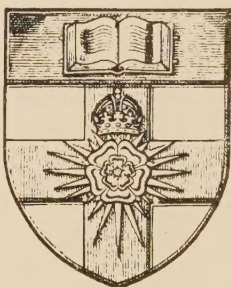


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THE ALL ENGLAND LAW REPORTS

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1916-1917

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1916-1917

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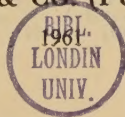
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THE ALL ENGLAND LAW REPORTS REPRINT

BOWMAN AND OTHERS *v.* SECULAR SOCIETY, LTD.

[HOUSE OF LORDS (Lord Finlay, L.C., Lord Dunedin, Lord Parker of Waddington, Lord Sumner and Lord Buckmaster), January 30, February 1, 2, 5, 8, May 14, 1917]

[Reported [1917] A.C. 406; 86 L.J.Ch. 568; 117 L.T. 161; 33 T.L.R. 376; 61 Sol. Jo. 478]

Religion—Christianity—Doctrine hostile to Christian faith—Gift for furtherance—Legality.

Christianity is not part of the common law of England, and the common law does not render criminal the propagation of doctrines hostile to the Christian faith, provided that such propagation is put forward decently, reverently, seriously, soberly, and temperately, and without any vilification, violence or ridicule which might lead to a disturbance of the peace. Nor are acts within those limits done to further such propagation illegal in the sense that they are of such a nature (e.g., against public policy) that no legal right to receive money for their furtherance can be established.

So **held** by LORD DUNEDIN, LORD PARKER OF WADDINGTON, LORD SUMNER and LORD BUCKMASTER; LORD FINLAY, L.C., dissenting.

Company—Illegal objects—Gift for furtherance—Legality—Cancellation of registration—Certiorari—Incorporation—Certificate not conclusive of legality of objects—Director—Misfeasance—Application of money for illegal object—Registrar of companies—Quasi-judicial function—Refusal to register company with illegal objects.

The granting of a certificate of the incorporation of a company, while constituting conclusive evidence that all the requirements of the Companies Acts in respect of registration have been complied with and that the company is duly registered under the Acts [see now Companies Act, 1948, s. 15], is not conclusive of the legality of the objects set out in the memorandum of the company. If a company with illegal objects obtained registration and the

matter came to the notice of the court, the Attorney-General on behalf of the Crown could institute proceedings by way of certiorari to cancel the registration which had been improperly or erroneously allowed.

Even if the objects of a company were illegal it would not follow that, while the certificate of incorporation remained unrevoked, the company would be incompetent to receive money for the furtherance of those objects, for in such a case the law takes no notice of the donor's motive in making the gift or the legality or otherwise of the purposes for which he intends the property to be applied by the donee and a company is not a trustee of money which it receives as an absolute gift. Where a gift to a company is in the form of a legacy the executor administering the testator's estate cannot be heard to discuss the probable uses to which the company would put the money any more than if the legacy had been to an individual. If, however, the directors of the company applied the money for an illegal object, they would be guilty of misfeasance and liable to replace the money, even if the object for which the money was applied was expressly authorised by the memorandum.

Per LORD PARKER OF WADDINGTON: The registrar of companies fulfils a quasi-judicial function, and his duty is to determine whether an association applying for registration as a company is authorised to be registered under the Companies Acts. Only by misconduct or great carelessness on the part of the registrar could a company with objects wholly illegal obtain registration.

Criminal Law—Blasphemy—Need to prove vilification or irreverence.

Per LORD PARKER OF WADDINGTON: To constitute blasphemy at common law there must be such an element of vilification, ridicule, or irreverence as would be likely to exasperate the feelings of others and so lead to a breach of the peace.

By his will a testator gave the residue of his estate upon trust for a company limited by guarantee and registered under the Companies Acts, 1862 to 1893. The main object with which the company was formed was to promote the principle "that human conduct should be based upon natural knowledge and not upon supernatural belief, and that human welfare in this world is the proper end of all thought and action," together with ancillary objects hostile to or critical of the Christian religion.

Held: the bequest was valid.

Briggs v. Hartley (1) (1850), 19 L.J.Ch. 416, and *Cowan v. Milbourn* (2) (1867), L.R. 2 Exch. 230, overruled.

R. v. Ramsay and Foote (3) (1883), 15 Cox, C.C. 231, applied.

Decision of Court of Appeal, [1915] 2 Ch. 447, affirmed.

Notes. Applied: *Re Ogden, Brydon v. Samuel*, [1933] All E.R. Rep. 720. Considered: *Tribune Press Lahore (Trustees) v. Income Tax Comr., Punjab, Lahore*, [1939] 3 All E.R. 469; *I.R. Comrs. v. National Anti-Vivisection Society*, [1947] 2 All E.R. 217. Applied: *Tennant Plays, Ltd. v. I.R. Comrs.*, [1948] 1 All E.R. 506. Considered: *Re Coats Trusts, Coats v. Gilmour*, [1948] 1 All E.R. 521. Applied: *Re Hopkinson, Lloyds Bank v. Baker*, [1949] 1 All E.R. 346. Considered: *Re Shaw, Public Trustee v. Day*, [1957] 1 All E.R. 745; *Leahy v. A.-G. of N.S.W.*, [1959] 2 All E.R. 300. Referred to: *Bourne v. Keene*, [1918-19] All E.R. Rep. 167; *Cotman v. Brougham*, [1918-19] All E.R. Rep. 265; *Re Tetley, National Provincial and Union Bank of England v. Tetley*, [1923] 1 Ch. 258; *Re Prevost, Lloyds Bank v. Barclays Bank*, [1930] 2 Ch. 383; *Gottliffe v. Edelston*, [1930] 2 K.B. 378; *R. v. Registrar of Joint Stock Companies, Ex parte More*, [1931] 2 K.B. 197; *Re Diplock, Wintle v. Diplock*, [1941] 1 All E.R. 193; *Chichester Diocesan Fund and Board of Finance (Incorporated) v. Simpson*, [1944] 2 All E.R. 60; *Re Bland-Sutton's Will Trusts, National Provincial Bank, Ltd. v. Middlesex Hospital Medical School Council*, [1950] 2 All E.R. 466; *Re Astor's Settlement Trusts, Astor v. Scholfield*, [1952] 1 All E.R. 1067; *Re Rumball*,

A *Sherlock v. Allan*, [1955] 3 All E.R. 71; *Royal College of Nursing v. St. Marylebone Corpn.*, [1958] 1 All E.R. 129.

As to gifts illegal or against public policy see 4 HALSBURY'S LAWS (3rd Edn.) 240, 241, and *ibid.*, vol. 18, pp. 395, 396. As to registration of companies see *ibid.*, vol. 6, pp. 108-116, 794, 795. For cases see 8 DIGEST (Repl.) 359, 360, 9 DIGEST (Repl.) 78-80, 10 DIGEST (Repl.) 1174-1179.

B Cases referred to :

(1) *Briggs v. Hartley* (1850), 19 L.J.Ch. 416; 15 L.T.O.S. 273; 14 Jur. 683; 8 Digest (Repl.) 359, 377.

(2) *Cowan v. Milbourn* (1867), L.R. 2 Exch. 230; 36 L.J.Ex. 124; 16 L.T. 290; 31 J.P. 423; 15 W.R. 750; 15 Digest (Repl.) 879, 8473.

C (3) *R. v. Ramsay* (1883), Cab. & El. 126; sub nom. *R. v. Ramsay and Foote*, 48 L.T. 733; 15 Cox, C.C. 231; 15 Digest (Repl.) 880, 8486.

(4) *Re National Debenture and Assets Corpn.*, [1891] 2 Ch. 505; 60 L.J.Ch. 533; 64 L.T. 512; 39 W.R. 707; 7 T.L.R. 485, C.A.; 9 Digest (Repl.) 81, 338.

(5) *R. v. Taylor* (1676), 1 Vent. 293; 3 Keb. 607, 621; 86 E.R. 189; 15 Digest (Repl.) 878, 8455.

D (6) *R. v. Woolston* (1729), 1 Barn. K.B. 162; Fitz.-G. 64; 2 Stra. 834; 94 E.R. 112; 15 Digest (Repl.) 880, 8481.

(7) *R. v. Williams* (1797), 26 State Tr. 653; 15 Digest (Repl.) 879, 8462.

(8) *R. v. Carlile* (1819), 3 B. & Ald. 167; 106 E.R. 624; 15 Digest (Repl.) 896, 8646.

(9) *R. v. Eaton* (1812), 31 State Tr. 927; 15 Digest (Repl.) 879, 8463.

E (10) *R. v. Waddington* (1822), 1 B. & C. 26; 1 State Tr. N.S. 1339; 1 L.J.O.S.K.B. 37; 107 E.R. 11; 15 Digest (Repl.) 879, 8458.

(11) *R. v. Hetherington* (1841), 4 State Tr. N.S. 563; 5 J.P. 496; 5 Jur. 529; 15 Digest (Repl.) 879, 8468.

(12) *R. v. Boulter* (1908), 72 J.P. 188; 15 Digest (Repl.) 880, 8487.

F (13) *De Costa v. De Pas* (1754), Amb. 228; Dick. 258; 3 Hare, 194, n.; 27 E.R. 150; sub nom. *De Costa v. De Paz*, 2 Swan. 487, n., L.C.; 8 Digest (Repl.) 461, 1615.

(14) *Re Bedford Charity (Masters, etc.)* (1819), 2 Swan. 470; 36 E.R. 696, L.C.; 19 Digest 546, 4052.

(15) *Lawrence v. Smith* (1822), Jac. 471; 37 E.R. 928; 13 Digest (Repl.) 57, 71.

G (16) *Murray v. Benbow* (1822), Jac. 474, n.; 4 State Tr. N.S. 1409; 37 E.R. 929, L.C.; 13 Digest (Repl.) 57, 70.

(17) *Thompson v. Thompson* (1844), 1 Coll. 381; 8 Jur. 839; 63 E.R. 464; 8 Digest (Repl.) 330, 119.

(18) *Pare v. Clegg* (1861), 29 Beav. 589; 30 L.J.Ch. 742; 4 L.T. 669; 26 J.P. 53; 7 Jur. N.S. 1136; 9 W.R. 795; 54 E.R. 756; 25 Digest 317, 202.

H (19) *A.-G. v. Shore* (1833), 7 Sim. 309, n.; affirmed sub nom. *Shore v. Wilson* (1842), 9 Cl. & Fin. 355; 4 State Tr. N.S. App. 1370; 5 Scott, N.R. 958; 8 E.R. 450, H.L.; 15 Digest (Repl.) 879, 8470.

(20) *Ashbury Railway Carriage and Iron Co. v. Riche* (1875), L.R. 7 H.L. 653; 44 L.J.Ex. 185; 33 L.T. 450; 24 W.R. 794, H.L.; 9 Digest (Repl.) 648, 4309.

I (21) *Cunnack v. Edwards*, [1896] 2 Ch. 679; 65 L.J.Ch. 801; 75 L.T. 122; 61 J.P. 36; 45 W.R. 99; 12 T.L.R. 614, C.A.; 8 Digest (Repl.) 355, 344.

(22) *A.-G. v. Haberdashers' Co.* (1834), 1 My. & K. 420; 39 E.R. 741, L.C.; 8 Digest (Repl.) 357, 357.

(23) *Morice v. Bishop of Durham* (1805), 10 Ves. 522; 32 E.R. 947, L.C.; 8 Digest (Repl.) 390, 336.

(24) *James v. Allen* (1817), 3 Mer. 17; 36 E.R. 7; 8 Digest (Repl.) 391, 839.

(25) *Re Jarman's Estate, Leavers v. Clayton* (1878), 8 Ch.D. 584; 47 L.J.Ch. 675; 39 L.T. 89; 42 J.P. 662; 26 W.R. 907; 8 Digest (Repl.) 395, 872.

- (26) *Thornton v. Howe* (1862), 31 Beav. 14; 31 L.J.Ch. 767; 6 L.T. 525; 26 J.P. 774; 8 Jur. N.S. 663; 10 W.R. 642; 54 E.R. 1042; 8 Digest (Repl.) 335, 159. A
- (27) *De Themmines v. De Bonneval* (1828), 5 Russ. 288; 7 L.J.O.S. Ch. 35; 38 E.R. 1035; 8 Digest (Repl.) 359, 376.
- (28) *Isaac v. Gompertz* (1786), cited in 7 Ves. 61; 32 E.R. 23, L.C.; 8 Digest (Repl.) 339, 212. B
- (29) *R. v. Carlile* (1819), 3 B. & Ald. 161; 1 State Tr. 1387; 106 E.R. 621; 15 Digest (Repl.) 878, 8457.
- (30) *A.-G. v. Pearson* (1817), 3 Mer. 353; 36 E.R. 135, L.C.; 8 Digest (Repl.) 425, 1146.
- (31) *Bohom v. Broughton* (undated), Y.B. 34 Hen. 6, fo. 40.
- (32) *Lilburne's Case* (1649), 4 State Tr. 1270; 14 Digest (Repl.) 277, 2455. C
- (33) *Calvin's Case* (1608), 7 Co. Rep. 1a; 2 State Tr. 559; Moore, K.B. 790; Jenk. 306; 77 E.R. 377; 2 Digest (Repl.) 212, 262.
- (34) *Omychund v. Barker* (1744), 1 Atk. 21; Willes, 538; 2 Eq. Cas. Abr. 397, pl. 15; Ridg. temp. H. 285; 1 Wils. 84; 26 E.R. 15; 2 Digest (Repl.) 212, 264.
- (35) *Sydlyes' Case* (1663), 1 Keb. 620; 83 E.R. 1146; sub nom. *R. v. Sidney*, 1 Sid. 168; sub nom. *Sedley's Case*, 17 State Tr. 155; Fortes Rep. 98; 15 Digest (Repl.) 892, 8596. D
- (36) *Adwood's Case* (1617), 2 Roll. Abr. 78.
- (37) *Traske's Case* (1617), Hob. 236; 80 E.R. 382; 15 Digest (Repl.) 879, 8459.
- (38) *R. v. Curl* (1727), 2 Stra. 788; 1 Barn. K.B. 29; 17 State Tr. 153; 93 E.R. 849; 15 Digest (Repl.) 895, 8624. E
- (39) *R. v. Davison* (1821), 4 B. & Ald. 329; 1 State Tr. N.S. App. 1366; 106 E.R. 958; 16 Digest 10, 27.
- (40) *R. v. Gathercole* (1838), 2 Lew. C.C. 237; 15 Digest (Repl.) 880, 8480.
- (41) *R. v. Moxon* (1841), 4 State Tr. N.S. 693; 2 Town. St. Tr. 356; 15 Digest (Repl.) 879, 8469.
- (42) *Bird v. Holbrook* (1828), 4 Bing. 628; 1 Moo. & P. 607; 2 Man. & Ry. M.C. 198; 6 L.J.O.S.C.P. 146; 130 E.R. 911; 36 Digest (Repl.) 153, 808. F
- (43) *Harrison v. Evans* (1767), 3 Bro. Parl. Cas. 465; 1 E.R. 1437; sub nom. *Evans v. Chamberlain of London*, 2 Burn's Eccl. Law, 9th Edn. 207, H.L.; 19 Digest 529, 3904.
- (44) *West v. Shuttleworth* (1835), 2 My. & K. 684; 4 L.J.Ch. 115; 39 E.R. 1106; 8 Digest (Repl.) 336, 182. G
- (45) *Shrewsbury v. Hornby* (1846), 5 Hare, 406; 67 E.R. 971; 8 Digest (Repl.) 339, 209.

Also referred to in argument:

- Re Barnett* (1860), 29 L.J.Ch. 871; 8 Digest (Repl.) 339, 210. H
- Cary v. Abbott* (1802), 7 Ves. 490; 32 E.R. 198; 8 Digest (Repl.) 338, 203.
- Smart v. Prujean* (1801), 6 Ves. 560; 31 E.R. 1195, L.C.; 8 Digest (Repl.) 338, 196.
- Cocks v. Manners* (1871), L.R. 12 Eq. 574; 40 L.J.Ch. 640; 24 L.T. 869; 36 J.P. 244; 19 W.R. 1055; 8 Digest (Repl.) 338, 198.
- Re Dutton, Ex parte Peake* (1878), 4 Ex.D. 54; 48 L.J.Q.B. 350; 40 L.T. 430; 27 W.R. 398; sub nom. *Re Dutton, Ex parte Tunstall Athenæum Trustees*, 43 J.P. 6; 8 Digest (Repl.) 437, 1281. I
- Moosa Goolam Ariff v. Ebrahim Goolam Ariff* (1912), 28 T.L.R. 505; L.R. 39 Ind. App. 237; 9 Digest (Repl.) 80, *118.
- British Association of Glass-Bottle Manufacturers, Ltd. v. Nettlefold* (1911), 27 T.L.R. 527; 9 Digest (Repl.) 75, 298.
- Evanturel v. Evanturel* (1874), L.R. 6 P.C. 1; 43 L.J.P.C. 58; 31 L.T. 105; 23 W.R. 32, P.C.; 12 Digest (Repl.) 270, 2073.

- A** *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535; 63 L.J.Ch. 908; 71 L.T. 489; 10 T.L.R. 686; 11 R. 1, H.L.; 12 Digest (Repl.) 270, 2074.
- Re Michel's Trust* (1860), 28 Beav. 39; 29 L.J.Ch. 547; 2 L.T. 46; 24 J.P. 581; 6 Jur. N.S. 573; 8 W.R. 299; 54 E.R. 280; 8 Digest (Repl.) 339, 214.
- Daimler, Ltd. v. Continental Tyre and Rubber Co. (Great Britain), Ltd.*, post, p. 191; [1916] 2 A.C. 307; 85 L.J.K.B. 1333; 114 L.T. 1049; 32 T.L.R. 624; 60 Sol. Jo. 602; 22 Com. Cas. 32, H.L.; 9 Digest (Repl.) 573, 3780.

Appeal from an order of the Court of Appeal, reported [1915] 2 Ch. 447, affirming a judgment of JOYCE, J., upon an originating summons taken out by the Secular Society, Ltd., the present respondents, to obtain the payment to them of the residue of the estate of the late Charles Bowman.

- C** *Talbot, K.C.*, and *J. A. Price* for the appellants.
Tomlinson, K.C., and *Macnaghten* for the respondents.
 The House took time for consideration.
 May 14, 1917. The following opinions were read.

LORD FINLAY, L.C.—The question in this case is as to the validity of a bequest of residue to the respondents, the Secular Society, Ltd. The right of the respondents to payment was attacked by the appellants, the next of kin of the testator, upon the ground that the objects of the respondents' society were such that the bequest was not enforceable. The respondents took out an originating summons, dated Nov. 25, 1914, for the payment of the residue to them. JOYCE, J., decided in their favour, and his decision was upheld by the Court of Appeal.

E The decision of the case must turn upon the proper construction of the memorandum of association of the respondents' society; and the view to be taken of the law of England with regard to bequests for such purposes as are therein enumerated. The memorandum of association, so far as material, is as follows:

F “(3) The objects for which the company is formed are: (a) To promote in such ways as may from time to time be determined the principle that human conduct should be based upon natural knowledge and not upon supernatural belief, and that human welfare in this world is the proper end of all thought and action. (b) To promote the utmost freedom of inquiry and the publication of its discoveries. (c) To promote the secularisation of the State, so that religious tests and observances may be banished from the legislature, the executive, and the judiciary. (d) To promote the abolition of all support, patronage, or favour by the State of any particular form or forms of religion. (e) To promote universal secular education, without any religious teaching in public schools maintained in any way by municipal rates or imperial taxation. (f) To promote an alteration in the laws concerning religion, so that all forms of opinion may have the same legal rights of propaganda and endowment. (g) To promote the recognition by the State of marriage as a purely civil contract, leaving its religious sanctions to the judgment and determination of individual citizens. (h) To promote the recognition of Sunday by the State as a purely civil institution for the benefit of the people and the repeal of all Sabbatarian laws devised and operating in the interest of religious sects, religious observances, or religious ideas.”

I In my opinion, the governing object of the society is that which is stated in para. 3 (a) of the memorandum of association, and the other objects stated in the memorandum under heads (b) to (g) of the third paragraph are subsidiary. I agree with what has been said by the founder of the respondent society in an article from the “Freethinker,” June 19, 1898, which is in evidence: “Clause (a) is of the highest importance and governs everything else.” It was argued on behalf of the respondents that some, at all events, of the objects of the society are not affected by any taint of illegality—e.g., that 3 (d) and (e), which state disestablishment and universal secular education as objects to be promoted, are in themselves

harmless. It is, of course, the fact that either of these two objects may be advocated from motives which are entirely friendly to religion. But if (a) is the governing object, then these and all the other clauses in the memorandum must be read by its light; in other words all the other clauses in the third paragraph are so many ways of carrying into practical application the principle enunciated in the first paragraph of cl. 3. That clause, in my opinion, lays down quite clearly that human conduct should not be based upon supernatural belief. This amounts to a negation of all religion, including, of course, the Christian religion, as governing human conduct. If the influence of supernatural motives is to be eliminated, the Christian religion is discarded in common with all forms of religion in the ordinary sense of the term. I think, therefore, that the memorandum shows that the object of the society was to promote in various ways the principle that human conduct should be based upon natural knowledge only, and that human welfare in this world is the proper end of all thought and action. Is a legacy in favour of a society which exists for such a purpose enforceable by English law?

Two preliminary points were taken on behalf of the respondents. They contended, first, that the certificate of incorporation is conclusive to show that the objects of the society are not unlawful, and, secondly, that some of the objects were not unlawful and it cannot be presumed that the legacy in question would be applied to any but lawful objects. We were informed that these points were argued on behalf of the respondents in the Court of Appeal. No notice is taken of either of them in any of the judgments, and the court must have considered that they had been disposed of in the course of the argument. In my opinion, neither is tenable. The society was registered on May 27, 1898, as a company limited by guarantee under the Companies Acts. The statute then in force was the Companies Act, 1862. Section 18 deals with the effect of registration and enacts that the certificate of incorporation shall be conclusive evidence that all the requirements of the Act in respect of registration have been complied with, and s. 192 repeats this provision and adds that the certificate is to be conclusive evidence that the company is authorised to be registered under the Acts. The Companies Act, 1900, enacts by s. 1 that the certificate shall be conclusive evidence that all the requisitions of the Companies Acts in respect of registration and in matters precedent and incidental thereto have been complied with, and that the association is a company authorised to be registered and duly registered under the Companies Acts. This provision appears to have been introduced into the Act of 1900 to get rid of some doubts which had been raised by what was said in *Re National Debenture and Assets Corpn.* (4) to the effect that if, in fact, only six persons had subscribed the memorandum, incorporation would not have been validly effected, and it is repeated in s. 17 of the Companies (Consolidation) Act, 1908 [see now s. 15 of the Companies Act, 1948]. It was argued before us that the society could not have been properly incorporated if its objects were illegal, and that as the certificate is conclusive to show that the company is one authorised to be registered and duly registered, it follows that it cannot for any purpose be contended that the objects are illegal. In my opinion, this argument is an attempt to extend the effect of these enactments beyond their fair meaning and manifest object. What the legislature was dealing with was the validity of the incorporation and it is for the purpose of incorporation, and for this purpose only, that the certificate is made conclusive. This first preliminary point, in my opinion, fails. The second point also fails on the true construction of the memorandum with which I have dealt above. Taken in themselves, some of the objects, as stated in the memorandum, may be harmless, but they cannot be taken by themselves. They are mere applications of the governing principle stated in 3 (a), and we are driven back upon the question whether that object is legal.

Counsel for the appellants contended that it was illegal on two grounds. First, that it is criminal to attack the Christian religion, however decent and temperate may be the form of attack. Second, that a court of law will not assist in the

A promotion of such objects as that for which this society is formed, whether they are criminal or not.

In support of the first of these propositions, it was contended that to attack the Christian religion is blasphemy by the common law of England, and that the view put forward upon this subject by LORD COLERIDGE, C.J., is erroneous. LORD COLERIDGE laid it down in *R. v. Ramsay and Foote* (3) (15 Cox, C.C. at p. 238),

B that

"if the decencies of controversy are observed, even the fundamentals of religion may be attacked without the writer being guilty of blasphemy."

This view was controverted by SIR JAMES FITZJAMES STEPHEN, who, in his HISTORY OF THE CRIMINAL LAW, vol. 2, pp. 449-476, on a review of the authorities, maintained that blasphemy consisted in the character of the matter published and not in the manner in which it is stated, and that any attack on the Christian religion, in whatever language expressed, constituted the offence of blasphemy at common law. A reply to the arguments of SIR J. F. STEPHEN was made by MR. ASPLAND of the Middle Temple, barrister-at-law, in a pamphlet entitled THE LAW OF BLASPHEMY, published in 1884, in which the authorities up to date are collected and examined. If SIR J. F. STEPHEN'S view be right, any pamphlet or speech in promotion of the governing object of the respondent society would be criminal and in every sense illegal. In my opinion, the appellants have failed to establish that all attacks upon religion are at common law punishable as blasphemous. There are no doubt to be found in the cases many expressions to the effect that Christianity is part of the law of England, but no decision has been brought to our notice in which a conviction took place for the advocacy of principles at variance with Christianity, apart from circumstances of scurrility or intemperance of language.

The earliest prosecution for blasphemy in the common law courts was in the reign of Charles II; in earlier times probably such cases were dealt with by the ecclesiastical courts. The main cases on this subject prior to *R. v. Ramsay and Foote* (3) are: (i) *R. v. Taylor* (5); (ii) *R. v. Woolston* (6); (iii) *R. v. Williams* (7) (in connection with which *R. v. Carlile* (8), and *R. v. Eaton* (9) should be referred to); (iv) *R. v. Waddington* (10); (v) *R. v. Hetherington* (11). In the cases numbered (i), (iii), (iv) and (v), it is apparent on the face of the reports that the language used was scurrilous and offensive. This is less apparent in the reports of *R. v. Woolston* (6). But examination of the libels in respect of which informations in that case were filed, namely, Mr. Woolston's first, second, third, and fourth discourses of the miracles of our Saviour, shows that the sacred subjects treated by him were handled with a great deal of irreverence, and in many passages language was used by him that was blasphemous in every sense of the term. It is apparently with reference to this element that in a passage in the report in 1 BARNARDISTON, p. 163, the court in dealing with the second point made on behalf of Mr. Woolston observed: "That as the Christian religion was part of the law of the land whatever derided that derided the law." The true view of the law of blasphemy appears to me to be that expressed by LORD DENMAN in *R. v. Hetherington* (11), which is substantially in accordance with that taken by LORD COLERIDGE in *R. v. Ramsay and Foote* (3), and followed by PHILLIMORE, J., in *R. v. Boulter* (12). We have been referred by LORD DUNEDIN to the law of Scotland on this subject, as stated in HUME'S CRIMINAL LAW (vol. 1, p. 568), and it appears to be the case that in Scotland scurrility or indecency is an essential element of the crime of blasphemy at common law. Certain Scottish statutes which made it a crime to contravene certain doctrines have been repealed. The consequences of the view put forward on behalf of the appellants would be somewhat startling, and in the absence of any actual decision to the contrary I think we must hold that the law of England on this point is the same as that of Scotland,

and that the crime of blasphemy is not constituted by a temperate attack on religion in which the decencies of controversy are maintained. A

The appellants, however, contended that whether criminal or not, the objects for which the society was formed were such that the law would give no help for the recovery of funds to be applied in their promotion. The principle on which this part of the appellants' case rested was very clearly stated by BRAMWELL, B., in *Cowan v. Milbourne* (2). In the course of the argument, BRAMWELL, B., said (L.R. 2 Exch. at p. 233): B

"An act may be illegal in the sense that it will not be recognised by the law as capable of being the foundation of any legal right, or that it may even deprive what it accompanies of that capacity although it is followed by no penalty."

In the course of his judgment (*ibid.* at p. 236) he expressed himself to the same effect. The principle is very familiar, and has been applied in innumerable cases. The question whether the present case falls within it demands a careful examination of the authorities. In arriving at the conclusion that the object of the respondent society was not unlawful in the sense that the court will not aid the plaintiff to get the legacy, the Court of Appeal found it necessary to overrule two cases. The first of these cases is *Briggs v. Hartley* (1). In this case a legacy had been left for the best original essay on C

"The subject of natural theology, treating it as a science and demonstrating the truth, harmony, and infallibility of the evidence on which it is founded, and the perfect accordance of such evidence with reason, also demonstrating the adequacy and sufficiency of natural theology when so treated and taught as a science to constitute a true, perfect, and philosophical system of universal religion (analogous to other universal systems of science such as astronomy, &c.) founded on immutable facts and the works of creation and beautifully adapted to man's reason and nature, and tending, as other sciences do, but in a higher degree, to remove and elevate his nature and to render him a wise, happy, and exalted being." D

SHADWELL, V.-C., gave judgment in these terms: E

"I cannot conceive that the bequest in the testator's will is at all consistent with Christianity, and, therefore, it must fail." F

This is a direct decision by a judge of great eminence upon the point, and, in my opinion, the Court of Appeal had no sufficient ground for overruling it. G

The second of these cases is *Cowan v. Milbourn* (2). In that case the plaintiff had hired of the defendant some rooms at Liverpool for the purpose of having lectures delivered there. Placards were issued giving as some of the subjects of the lectures "the character and teachings of Christ, the former defective, the latter misleading," and "The Bible shown to be no more inspired than any other book, with a refutation of modern theories thereon." The use of the rooms was refused by the defendant, and he justified his refusal by the character of the lectures proposed to be delivered. In an action in the Court of Passage, Liverpool, for breach of contract to let, the learned judge ruled that the lectures announced were blasphemous and illegal, and a verdict was entered for the defendants, with leave to the plaintiff to move to enter a verdict for him on each of these counts. Motion was made accordingly in the Court of Exchequer before KELLY C.B., MARTIN, B., and BRAMWELL, B. The court refused to grant a rule, the Chief Baron expressing himself as follows (L.R. 2 Exch. at p. 234): H

"It would be a violation of duty to allow the question raised to remain in any doubt. That question is whether one who has contracted to let rooms for a purpose stated in general terms, and who afterwards discovers that they are to be used for the delivery of lectures in support of a proposition which states, I

A with respect to our Saviour and His teaching, that the first is defective and
the second misleading, is nevertheless bound to permit his rooms to be used for
that purpose in pursuance of that general contract. There is abundant
authority for saying that Christianity is part and parcel of the law of the land,
and that therefore to support and maintain publicly the proposition I have
above mentioned is a violation of the first principles of the law and cannot be
B done without blasphemy. I therefore do not hesitate to say that the defendant
was not only entitled, but was called on and bound by the law, to refuse his
sanction to this use of his rooms."

MARTIN, B., concurred. BRAMWELL, B., said (ibid. at p. 235):

C "I am of the same opinion, and I will state my grounds. I think that the
plaintiff was about to use the rooms for an unlawful purpose, because he was
about to use them for the purpose of, 'by teaching or advised speaking,'
'denying the Christian religion to be true or the Holy Scriptures of the Old
and New Testament to be of Divine authority.' That he intended to use the
rooms for the purposes declared by the statute to be unlawful is perfectly
D clear, for he proposed to show that the character of Christ was defective and
His teaching misleading, and that the Bible was no more inspired than any
other book. That being so, his purpose was unlawful, and if the defendant
had known his purpose at the time of the refusal he clearly would not have
been bound to let the plaintiff occupy them, for if he would, he would then
have been compelled to do a thing in pursuance of an illegal purpose. . . .
Now, it appears that the plaintiff here was going to use the rooms for an
E unlawful purpose; he therefore could not enforce the contract for that purpose,
and therefore the defendant was not bound, though he did not know the fact.
It is strange there should be so much difficulty in making it understood that
a thing may be unlawful in the sense that the law will not aid it and yet that
the law will not immediately punish it. If that only were unlawful to which a
penalty is attached the consequence would be that inasmuch as no penalty is
F provided by the law for prostitution a contract having prostitution for its
object would be valid in a court of law. The rule must be refused, and I do
not regret the result, and on this ground, that this placard must have given
great pain to many of those who read it."

The authority of these two decisions has never, so far as I am aware, been
questioned in any later case, and no satisfactory reason is given in the Court of
G Appeal for disregarding them. The Master of the Rolls says ([1915] 2 Ch. at p.
463):

"It seems to me that the undoubted relaxation of the views as to common
law blasphemy must extend to matters outside the criminal law."

H He goes on to say that in his view the decision in *Briggs v. Hartley* (1) ought not
to be followed, and with regard to *Cowan v. Milbourn* (2) he says (ibid. at p. 464):

"So far as I am aware, this case, which was decided in 1867, has never been
followed, and notwithstanding my profound respect for the learned judges who
decided it, I am bound to say that I think it ought not to be followed. If
Cowan v. Milbourn (2) is still good law, the plaintiffs cannot claim the legacy,
but as I do not consider it is good law I think JOYCE, J., was right in the
I view which he took."

PICKFORD, L.J., says (ibid. at p. 466):

"A much more difficult question is whether this object, though not illegal
in the sense of being punishable, is illegal in the sense that the law will
not recognise it as being the foundation of legal right, and will do nothing
to aid it. The denial of religion is not in terms the object of the company
as set out in (a), but I think that it is involved in it, and that it is not
possible to promote the principle that human conduct should be based upon

natural knowledge and that human welfare is the proper end of all thought and action, without, at any rate inferentially, denying the Divine government of the world and the principles of religion. I think there is no doubt that in former times such an object would have been held to be contrary to public policy, but the question is whether it is right to hold so now. I think that the doctrine of public policy cannot be considered as being always the same, and that many things would be and have been held contrary to public policy which are not so held now."

The learned lord justice goes on to refer to *Briggs v. Hartley* (1) and *Cowan v. Milbourn* (2), and says (*ibid.* at p. 467) :

"Whatever may have been the doctrine as to public policy prevailing in 1850, when the former case was decided, I do not think that it ought now to be followed. If the latter decision means that no consideration will support a contract which involves any questioning of the truth of religion, I also think that should not be followed, but the court may have inferred from the title to which I referred that the lectures attacked religion in a reviling and contumelious manner, and if that were the case the decision was, I think, right."

WARRINGTON, L.J., does not specifically refer to *Briggs v. Hartley* (1), and with regard to the judgments of KELLY, C.B., and BRAMWELL, B., in *Cowan v. Milbourn* (2), he says (*ibid.* at p. 478) :

"Neither of the judges really dealt with the question whether the lectures, if not infringing a positive ordinance of law, would have rendered the contract incapable of being enforced. It is quite true that BRAMWELL, B., laid it down that a thing may be unlawful in the sense that the law will not aid it and yet that the law will not immediately punish it, but accepting this as correct, as I think it clearly is, it still remains to consider whether the particular thing in question is unlawful in the wider sense or not. In my opinion there is no authority binding us to hold that the promotion in a proper manner of the objects of the company is contrary to public policy, and we ought not to hold it to be so."

It may be that there has been a considerable change of public opinion with regard to the discussion of religion, but the question is whether anything has taken place to justify any court in holding that the principle of law on this matter may be treated as obsolete. From time to time the standard as to what is decent discussion of religious subjects may vary, and in one age a jury would find that a particular publication was blasphemous in the strict sense of the term which would not be so considered in another. With regard to questions of public policy such as those arising in connection with restraint of trade, circumstances with regard to facility of communication and of travel may so alter that the principle invalidating such contracts would apply to a particular state of circumstances in one age but not in another. But it is difficult to see how a change in the spirit of the time could justify a change in a principle of law by judicial decision. Such changes in public opinion may lead to legislative interference and substantive alteration of the law, but cannot justify a departure by any court from legal principle, however they may affect its application in particular cases. The decisions in *Briggs v. Hartley* (2) and *Cowan v. Milbourn* (2) are in conformity with a considerable body of authority on this subject. It has been repeatedly laid down by the courts that Christianity is part of the law of the land, and it is the fact that our civil polity is to a large extent based upon the Christian religion. This is notably so with regard to the law of marriage and the law affecting the family. The statement that Christianity is part of the law of the land has been often given as a reason for punishing criminally contumelious attacks upon Christianity. It is true that expressions have in some cases been used which would seem to imply that any attack upon Christianity, however decently conducted, would be criminal. For the reasons I have already given, I do not think that this view can be accepted

A as having represented the common law of England at any time. But the fact that Christianity is recognised by the law as the basis to a great extent of our civil polity is quite sufficient reason for holding that the law will not help endeavours to undermine it.

B These two cases do not stand alone. In 1754 *De Costa v. De Paz* (13) came before LORD HARDWICKE, the question arising upon a will which directed the investment of £1,200 and that the revenue arising therefrom should be applied forever in the maintenance of a Jesiba or assembly for daily reading the Jewish law and for advancing and propagating their holy religion. A bill was brought to have the money laid out according to the will, and, as stated in the report (2 Swan. at p. 488, n.):

C "The Lord Chancellor, upon the opening, asked if there had ever been a case where such a charity as this had been established, for it being against the Christian religion, which is part of the law of the land, he thought he could not decree it."

D After argument, LORD HARDWICKE said that the first question was "whether the legacy in question is good and such as this court can or ought to establish." He pointed out that the case would be different where the legacy was for the support of poor persons of the Jewish religion, and then proceeds as follows (*ibid.* at p. 490, n.):

E "But this is a bequest for the propagation of the Jewish religion, and though it is said that this is a part of our religion, yet the intent of this bequest must be taken to be in contradiction to the Christian religion, which is a part of the law of the land, which is so laid down by LORD HALE and LORD RAYMOND; and it undoubtedly is so, for the constitution and policy of this nation is founded thereon. As to the Act of Toleration, no new right is given by that, but only an exemption from the penal laws. The Toleration Act recites the penal laws, and then not only exempts from those penal laws, but puts the religion of the dissenters under certain regulations and tests. This renders those religions legal, which is not the case of the Jewish religion, that is not taken notice of by any law, but is barely connived at by the legislature."

G Accordingly, LORD HARDWICKE declared that he was of opinion that the legacy was not good in law, and ought not to be decreed or established by the court. In 1819, in *In Re Bedford Charity* (14), LORD ELDON referred (2 Swan. at p. 522) to *De Costa v. De Paz* (13) as establishing that no one can found by charitable donation an institution for the purpose of teaching the Jewish religion, and made the following observations (*ibid.* at p. 527):

H "I apprehend that it is the duty of every judge presiding in an English court of justice, when he is told that there is no difference between worshipping the Supreme Being in chapel, church, or synagogue, to recollect that Christianity is part of the law of England."

I It will be observed that *De Costa v. De Paz* (13) is a decision given by LORD HARDWICKE in 1744 and approved by LORD ELDON in 1819, to the effect that a legacy for the promotion of the Jewish religion was not enforceable, as being for the promotion of a faith contrary to Christianity. Secularism, as explained in the respondents' memorandum, is much more contrary to Christianity than is the Jewish religion. The Jews have been relieved by the Jewish Relief Act, 1846, s. 2, but there is no statute in similar terms with regard to those holding the views expressed by the memorandum of the respondent society.

In *Lawrence v. Smith* (15) a bill was filed to restrain the piracy of some lectures delivered at the College of Surgeons. An *ex parte* injunction was granted and a motion was made by the defendant to dissolve the injunction on the ground that the work could not be the subject of copyright, and passages were referred to which, it was contended, were hostile to natural and revealed religion and denied

the immortality of the soul. The Lord Chancellor said, in giving judgment (Jac. at p. 473):

"Looking at the general tenour of the work, and at many particular parts of it, recollecting that the immortality of the soul is one of the doctrines of the Scriptures, considering that the law does not give protection to those who contradict the Scriptures, and entertaining a doubt, I think a rational doubt, whether this book does not violate that law, I cannot continue the injunction. The plaintiff may bring an action, and when that is decided he may apply again."

In a note (*ibid.* at p. 474) it is stated that in *Murray v. Benbow* (16) (Feb., 1822) Mr. Shadwell, on the part of the plaintiff, moved for an injunction to restrain the defendant from publishing a pirated edition of LORD BYRON's poem, "Cain," and that the Lord Chancellor, after reading the work, refused the motion on grounds similar to those stated in *Lawrence v. Smith* (15). A note of LORD ELDON's judgment on that application is given in the preface to "Cain" in the large octavo edition of BYRON's works, published in 1846 by John Murray, p. 317. In *Thompson v. Thompson* (17) a question having arisen (*vide* 1 Coll. at p. 392) as to a bequest for literary purposes with reference to the doctrines maintained in the testator's writings, the Vice-Chancellor (SIR J. L. KNIGHT-BRUCE) said (*ibid.* at p. 397):

"Understanding it to be admitted that the testator's writings, published and unpublished, contained nothing irreligious, illegal, or immoral, I have no doubt that this is a legal disposition, according to the law of England."

He held the bequest good, "supposing neither atheism, sedition, nor any other crime or immorality to be inculcated by the works." Here, again, SIR J. L. KNIGHT-BRUCE recognised the doctrine that a bequest for irreligious purposes could not be enforced. In 1850 *Briggs v. Hartley* (1) was decided.

In *Pare v. Clegg* (18) it was contended that the claim of the plaintiff as creditor of a society called the National Communities Society (which afterwards took the name of the Rational Society) must fail on the ground that the society was founded for an immoral and illegal purpose. LORD ROMILLY, M.R., in delivering judgment, dealt with this contention as follows (29 Beav. at p. 601):

"The charges against [the society] are that it was founded, first, for the purpose of propagating natural religion, to the injury of revealed religion; secondly, in order to put an end to all moral restraint on the actions of mankind; and thirdly, to destroy the institution of private property generally. I have perused the rules of the society for the purpose of considering the force of this objection, and although I am of opinion that the society is based upon irrational principles, and seeks to realise a visionary and unattainable object, it is not, I think, to be considered as founded for the purpose of propagating irreligious and immoral doctrines in the ordinary and proper sense of those words. It is not such a society as that a person dealing with it could not acquire the right to enforce a contract entered into with him by the society."

This implies that if the result of the examination of the rules had been to show that the society was formed for irreligious purposes the decision might have been the other way. These authorities, beginning with *De Costa v. De Paz* (13) in 1754 and ending with *Pare v. Clegg* (18) in 1861, appear to me to establish that the courts will not help in the promotion of objects contrary to the Christian religion, apart altogether from any criminal liability, and to show that *Briggs v. Hartley* (1) and *Cowan v. Milbourn* (2) were well decided, and that if the law of England is to be altered upon the point, the change must be effected not by judicial decision but by the Act of the legislature.

It is foreign to the subject of the present inquiry to consider whether the welfare of the individual and the greatness of the nation would be best promoted by

- A proceeding on the lines of the Secular Society, involving the ignoring of the supernatural as influencing human conduct, and holding out the promotion of happiness in this world as the chief end of man, or upon the lines indicated in the striking passage with which LORD BACON concludes his *ESSAY ON ATHEISM*, and the still more striking quotation from CICERO which he there makes. Such considerations bear upon public policy and may have had some influence in moulding the English law upon the subject. But we have to deal, not with a rule of public policy which might fluctuate with the opinions of the age, but with a definite rule of law to the effect that any purpose hostile to Christianity is illegal. The opinion of the age may influence the application of this rule, but cannot affect the rule itself. It can never be the duty of a court of law to begin by inquiring what is the spirit of the age and in supposed conformity with it to decide what the law is. Very nice and difficult questions may arise whether in any particular case the purpose is hostile to the Christian religion. No such difficulty arises in the present case, as by the memorandum of association the axe is laid to the root of the tree of all religion. The legacy was given and would be taken for the purposes of the society, as stated in the memorandum, and if these purposes are illegal the illegality is not mended by the certificate of incorporation. In my opinion, they are illegal in the sense that the law will not aid in their promotion and this appeal ought to be allowed.
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LORD DUNEDIN.—Before I had committed my views in this case to writing, I had the advantage of seeing not only the judgment just delivered by the Lord Chancellor, but also those about to be delivered by my noble and learned friends,

- E **LORD PARKER** and **LORD BUCKMASTER**. In these there is contained so much that not only has my adhesion, but is expressed better than I could hope to do, that I shall refer to them for several of the propositions on which my judgment rests, and shall only state succinctly the reasons which have led me, though not without hesitation, to the conclusion that this appeal should be dismissed. I have said that I have formed my opinion not without hesitation; but that hesitation is due
- F to one fact only. Had there been no authorities to deal with, and I were to approach the matter from the point of view of legal principle alone, I do not think I should have felt much difficulty. What has troubled me is that I think it is impossible to decide the case as I think it should be decided without going counter to what has been said by judges of great authority in past generations. It is always, I feel, no light matter to overrule such pronouncements.

- G I shall first deal with two points which must be resolved before the case can be further considered, but on which, for the reason already mentioned, I shall adopt the opinion of others as my own. I agree with what I understand is the unanimous opinion of your Lordships, that as to what is necessary to constitute the crime of blasphemy at common law, the dicta of *ERSKINE, J.*, *LORD DENMAN, C.J.*, and *LORD COLERIDGE, C.J.*, in *Shore v. Wilson* (19), *R. v. Hetherington* (11), and *R. v. Ramsay and Foote* (3) respectively are correct; and I adopt the reasoning of the Lord Chancellor and **LORD BUCKMASTER**. Further, I agree with the Lord Chancellor that on a fair construction para. 3a of the memorandum of association of the respondent company expresses the dominating purpose of the company; and that the other matters are mentioned not as independent, but only as subsidiary aims. I agree with him in thinking that teaching in accordance with 3a is inconsistent with and to that extent subversive of the Christian religion—by which expression, without attempting definition, I mean all such forms of religion as have for a common basis belief in the Godhead of the Lord Jesus Christ.
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It is said for the appellants that the court will not lend its assistance for the furtherance of an illegal object, and that money given to the society must needs be illegally applied, because it certainly can only be used for objects in terms of the memorandum, and such objects are illegal, because the Christian religion is part of the law of the land. Now if money was laid out in either procuring

publications or lectures in terms of the objects of the memorandum, such publications or lectures need not be couched in scurrilous language, and so need not be such as would constitute the crime of blasphemy at common law. Nor need they be criminal under the Blasphemy Act, 1697, for here I agree with LORD BUCKMASTER that the Act is so framed as to make its penalties only apply when there has been what may be termed apostasy. It would not, I think, be safe to found any argument on the fact—but it is a fact sufficiently curious to be mentioned—that the Scottish Parliament two years before the Blasphemy Act passed an Act in similar terms, but omitting the words “having been educated in or at any time having made profession of the Christian religion, &c.” In the repealing Act, 53 Geo. 3, c. 160 [relating to Doctrine of the Trinity], this and another older Scottish Act are repealed in toto, while the Blasphemy Act was allowed to stand. How innocuous it was on a true construction may be surmised from the fact that there seem to have been no prosecutions under it. Criminal liability being negatived, no one has suggested any statute in terms of which it—by which I mean the supposed use of the money—is directly prohibited. There is no question of offences against what may be termed the natural moral sense. Neither has it been held, I think, as being against public policy, as that phrase is applied in the cases that have been decided on that head. Now if this is so, I confess I cannot bring myself to believe that there is still a *terra media* of things illegal, which are not criminal, not directly prohibited, not *contra bonos mores*, and not against public policy. Yet that, I think, is the result of holding that anything inconsistent with Christianity as part of the law of England cannot in any way be assisted by the action of the courts.

The Lord Chancellor has reviewed the authorities which he holds to be contrary to this opinion. Undoubtedly there are dicta; but so far as concerns actual judgments, they might, I think, all be supported on grounds not inconsistent with this opinion, except *Briggs v. Hartley* (1) and *Cowan v. Milbourn* (2). On the other hand, the opinions of the consulting judges in *Shore v. Wilson* (19) (including those of PARKE, B., and TINDALL, C.J.) are, in my view, clearly inconsistent with the decision in *Briggs v. Hartley* (1) and in favour of the view I am holding. For it is, I think, impossible to hold that the terms of 53 Geo. 3, c. 160, effected anything more than relief from statutory penalties and disqualifications, and equally impossible to say that Unitarian doctrine is, in the words used by SHADWELL, V.-C., in *Briggs' Case* (1), “consistent with Christianity.” I do not say more about the cases because they are to be reviewed with great minuteness by LORD BUCKMASTER, in whose views I entirely concur.

It is not, however, on this point alone that I desire to rest my judgment. So far, I have dealt with the matter as if the question were one of contract or of trust. That there is no trust here is, I think, clear beyond doubt. The trust to be constituted must either be found in some expression of the donor—here the testator—relative to the gift; or in the fact that the donee—here the society—is a trustee, and that the gift is only given to him in that capacity. But the testator has clogged his gift with no conditions. He has made an absolute gift to a legal entity which is entitled to receive money. The certificate of incorporation in terms of the section quoted of the Companies Act, 1900, prevents anyone alleging that the company does not exist. Then the law of *Ashbury Railway Carriage and Iron Co. v. Riche* (20) is based upon the consideration of what is and what is not *intra vires* of a statutory corporation, but I have never heard it suggested that it made a company a trustee for the purposes of its memorandum. I do not say more, for here I wish respectfully to concur with what is said on this subject by LORD PARKER. Trust being out of the reckoning, there can be no doubt that there is here no question of contract. What remains? Nothing but an ordinary action for a legacy at the instance of a legal person that has a right to sue. It is here that I feel disposed to quarrel with the phrase “the assistance of the courts.” I do not see that the company is seeking the assistance of the courts to carry out

A the objects of the memorandum. It is seeking their assistance only to compel the executor to do his duty, so that it may receive what is legally due to it. If the legacy were due to an individual, the executor would not be heard to discuss the probable uses to which the legatee would put the money. I do not think he can do so in the case of the society. For after all—and treating the memorandum, in spite of the opinion I have expressed already, as indicating purposes entirely
B illegal such as in contract would not serve as foundation for an action—there is no reason why the society should not employ the money in paying its office rent. For these reasons, and those to be more fully stated by my noble and learned friends who are to follow me, I am of opinion that this appeal should be dismissed.

LORD PARKER OF WADDINGTON (read by LORD SHAW).—In considering
C the questions which arise for decision on this appeal, it is, I think, well to bear in mind certain general and perhaps somewhat elementary principles.

At common law the conditions essential to the validity of a gift are reasonably clear. The subject-matter must be certain; the donor must have the necessary disposing power over, and must employ the means recognised by common law as sufficient for the transfer of, the subject-matter; and, finally, the donee must be
D capable of acquiring the subject-matter. If these conditions be fulfilled, the property in the subject-matter of the gift passes to the donee, and he becomes the absolute owner thereof and can deal with the same as he thinks fit. The common law takes no notice whatever of the donor's motive in making the gift or of the purposes for which he intends the property to be applied by the donee, or of any condition or direction purporting to affect its free disposition in the hands
E of the donee. It is immaterial that the gift is intended to be applied for a purpose actually illegal—as, for example in trade with the King's enemies—or in a manner contrary to the policy of the law—as, for example in paying the fines of persons convicted of poaching. In either case, the essential conditions being fulfilled, the gift is complete, the property has passed, and there is an end of the matter. A gift at common law is never executory in the sense that it requires the intervention
F of the courts to enforce it. With regard to the conditions essential to the validity of a gift, equity follows the common law. On the one hand, if the subject-matter be property transferable at common law, equity will not as a rule aid a gift which does not fulfil the essential conditions. On the other hand, when the property is transferable in equity only, equity also requires that the subject-matter must be certain, that the donor must have the necessary disposing power, and must employ
G the means which equity recognises as sufficient for a transfer of the subject-matter, and that the donee must be capable of acquiring the subject-matter. If a donee sues in equity to recover the subject-matter, he sues by virtue of an equitable estate already vested in him and not to enforce the gift. Under certain circumstances, however, the donee does not in equity, even if all the requisite conditions be fulfilled, obtain an absolute interest. The gift may have been obtained by
H duress or undue influence, in which case it will be set aside in equity, and if the donee has obtained any legal property he will be compelled to restore it to the donor or those claiming under him. Again, the circumstances of the gift or the directions given or objects expressed by the donor may be such as to impose on the donee the character of a trustee. In such a case equity will enforce the trust so far as
I may be, and if for any reason the trust fails will imply a resulting trust in favour of the donor or those claiming under him. But except so far as they may be relevant on the points above mentioned, equity does not any more than the common law pay any attention to the donor's motives in making the gift or to the purposes for which he intends the property to be applied by the donee, or to any condition or direction affecting its free disposition in the hands of the donee. The question whether a trust be legal or illegal or be in accordance with or contrary to the policy of the law only arises when it has been determined that a trust has been created, and is then only part of the larger question whether the trust is enforceable. For, as

will presently appear, trusts may be unenforceable, and, therefore, void, not only because they are illegal or contrary to the policy of the law, but for other reasons. A

It may be well to illustrate what I have said by one or two examples. Thus, if a testator gives £500 to A., saying that he knows A. will expend it in procuring masses to be said for testator's soul, the question arises whether A. is a trustee for the purpose indicated. If he be not a trustee, he will in equity take the legacy beneficially, the fact that the trust, if there be a trust, would be unlawful, being quite immaterial. [But see *Bourne v. Keane*, [1918-19] All E.R. Rep. 167.] If, however, it be held that A. is a trustee, then, as the trust is unlawful, equity will not allow the trustee to retain the legacy. Again, in the case of a simple legacy of £500 to A., where conversations had taken place between A. and the testator as to the purposes for which the legacy should be applied, the question would arise whether these conversations rendered it unconscionable for A. to take the legacy for his own use. If so, equity would treat him as a trustee. If not, it would allow him to retain the legacy, although the purpose for which the legacy was intended by the testator was unlawful, or otherwise unenforceable. Again, it is well settled that a gift to A. to help him in his business is an absolute gift to A., and it is, therefore, immaterial whether A.'s business is that of a corn merchant or a receiver of stolen goods. If, however, A. were a trustee the character of the business would be material in considering whether the trust was one which equity would carry into execution. C

In the present case you will find that the testator has given his residuary estate through the medium of trustees for sale and conversion to the Secular Society, Ltd., and the question is as to the validity of this gift. There is no doubt as to the certainty of the subject-matter, or as to the testator's disposing power, or as to the validity of his will. So far as the conditions essential to the validity of the gift are concerned, the only doubt is as to the capacity of the donee. The Secular Society, Ltd., was incorporated as a company limited, by guarantee under the Companies Acts, 1862 to 1893, and a company so incorporated is by s. 17 of the Act of 1862 capable of exercising all the functions of an incorporated company. Primâ facie, therefore, the society is a corporate body created by virtue of a statute of the realm, with statutory power to acquire property by gift, whether inter vivos or by will. The appellants endeavour to displace this primâ facie effect of the Companies Acts in the following manner. If, they say, you look at the objects for which the society was incorporated, as expressed in its memorandum of association, you will find that they are actually illegal or, at any rate, in conflict with the policy of the law. This being so, the society was not an association capable of incorporation under the Acts. It was and is an illegal association, and as such incapable of acquiring property by gift. I do not think this argument is open to the appellants, even if their major premise be correct. By the first section of the Companies Acts, 1900, the society's certificate of registration is made conclusive evidence that the society was an association authorised to be registered—that is, an association of not less than seven persons associated together for a lawful purpose. The section does not mean that all or any of the objects specified in the memorandum, if otherwise illegal, would be rendered legal by the certificate. On the contrary, if the directors of the society applied its funds for an illegal object, they would be guilty of misfeasance and liable to replace the money, even if the object for which the money had been applied were expressly authorised by the memorandum. In like manner, a contract entered into by the company for an unlawful object, whether authorised by the memorandum or otherwise, could not be enforced either in law or in equity. The section does, however, preclude all His Majesty's lieges from going behind the certificate or from alleging that the society is not a corporate body with the status and capacity conferred by the Acts. Even if all the objects specified in the memorandum were illegal, it does not follow that the company cannot on that account apply its funds or enter into a contract for a lawful purpose. Every company has power to wind-up voluntarily, and E
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A moneys paid or contracts entered into with that object are in every respect lawfully paid or entered into. Further, the disposition provided by the company's memorandum for its surplus assets in case of a winding-up may be lawful, though all the objects as a going concern are unlawful. If there be no lawful manner of applying such surplus assets, they would on the dissolution of the company belong to the Crown as *bona vacantia*: *Cunnack v. Edwards* (21). Some stress was laid on the public danger, or at any rate the anomaly of the courts recognising the corporate existence of a company all of whose objects, as specified in its memorandum of association, are transparently illegal. Such a case is not likely to occur, for the registrar fulfils a quasi-judicial function, and his duty is to determine whether an association applying for registration is authorised to be registered under the Acts. Only by misconduct or great carelessness on the part of the registrar could a company with objects wholly illegal obtain registration. If such a case did occur it would be open to the court to stay its hand until an opportunity has been given for taking the appropriate steps for the cancellation of the certificate of registration. It should be observed that neither s. 1 of the Companies Act, 1900, nor the corresponding section of the Companies (Consolidation) Act, 1908, is so expressed as to bind the Crown, and the Attorney-General, on behalf of the Crown, could institute proceedings by way of certiorari to cancel a registration which the registrar in affected discharge of his quasi-judicial duties had improperly or erroneously allowed. But, as will appear later, I do not think that the present is a case requiring such action on the part of your Lordships' House.

It follows from what I have already said that the capacity of the Secular Society, Ltd., to acquire property by gift must be taken as established, and all the conditions essential to the validity of the gift being thus fulfilled, the donee is entitled to receive and dispose of the subject-matter thereof, unless either (i) the gift was obtained by duress or undue influence, or (ii) there is something which in a court of equity imposes on the donee the character of a trustee. Admittedly there is no question of duress or undue influence, and, in my opinion, it is impossible to hold that the donee was intended to take or in fact takes the subject-matter as trustee or in any other character than that of absolute owner. It should be observed that the testator says nothing as to how he desires his residuary estate to be applied in the hands of the society, nor is there any evidence that he made any communication to anyone on behalf of the society with regard to such application. The only possible argument in favour of the testator's intention to create a trust rests upon this. The society is a body corporate, to which the principle of your Lordships' decision in *Ashbury Railway Carriage and Iron Co. v. Riche* (20) is applicable. Its funds can only be applied for purposes contemplated by the memorandum and articles as originally framed or altered under its statutory powers. A gift to it must, it may be said, be considered as a gift for those purposes, and, therefore, the society is a trustee for those purposes of the subject-matter of the gift. This argument is, in my opinion, quite fallacious. The fact that a donor has certain objects in view in making a gift does not, whether he gives them expression or otherwise, make the donee a trustee for those objects. If I give property to a limited company to be applied at its discretion for any of the purposes authorised by its memorandum and articles, the company takes the gift as absolutely as would a natural person to whom I gave a gift to be applied by him at his discretion for any lawful purpose. *A.-G. v. Haberdashers' Co.* (22) is an express authority on this point. A gift of a fund on trust to pay the income thereof in perpetuity to a society, whether corporate or otherwise, might possibly, if the objects of the society were charitable, be established as a charitable gift, exempt from objection, on the ground that it created a perpetuity. But it is one thing to establish a gift (which would otherwise fail) on the ground that it is charitable, and quite another thing to avoid a gift which would otherwise be good on the ground that it creates an unenforceable trust. If a gift to a corporation expressed to be made for its corporate purposes is nevertheless an absolute

gift to the corporation, it would be quite illogical to hold that any implication as to the donor's objects in making a gift to a corporation could create a trust. The argument, in fact, involves the proposition that no limited company can take a gift otherwise than as trustee. I am of opinion, therefore, that the society, being capable of acquiring property by gift, takes what has been given to it in the present case, and takes it as absolute beneficial owner and not as trustee.

The above considerations appear to me to be alone sufficient to dispose of this appeal. Nevertheless, I will proceed to consider the matter on a footing that the society takes in the character of trustee. On that footing it seems to me that the trust is clearly void, and that the appellants ought to succeed, whatever opinion your Lordships hold on the questions which were argued before the House. A trust to be valid must be for the benefit of individuals, which this is certainly not, or must be in that class of gifts for the benefit of the public which the courts in this country recognise as charitable in the legal as opposed to the popular sense of that term. Moreover, if a trustee is given a discretion to apply trust property for purposes some of which are and some are not charitable, the trust is void for uncertainty. A simple instance of this is a gift for charitable or benevolent purposes. Such a gift is void, for benevolent purposes are, as is well settled, not necessarily charitable: *Morice v. Bishop of Durham* (23); *James v. Allen* (24); *Jarman's Estate* (25). If your Lordships will refer for a moment to the society's memorandum of association, you will find that none of its objects, except, possibly, the first, is charitable. The abolition of religious tests, the disestablishment of the Church, the secularisation of education, the alteration of the law touching religion or marriage, or the observation of the Sabbath, are purely political objects. Equity has always refused to recognise such objects as charitable. It is true that a gift to an association formed for their attainment may, if the association be unincorporated, be upheld as an absolute gift to its members, or if the association be incorporated as an absolute gift to the corporate body; but a trust for the attainment of political objects has always been held invalid, not because it is illegal, for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because the court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and, therefore, cannot say that a gift to secure the change is a charitable gift. The same considerations apply when there is a trust for the publication of a book. The court will examine the book, and if its objects be charitable in the legal sense, it will give effect to the trust as a good charity: *Thornton v. Howe* (26); but if its object be political it will refuse to enforce the trust: *De Themmines v. De Bonneval* (27). If, therefore, there be a trust in the present case it is clearly invalid. The fact, if it be the fact, that one or other of the objects specified in the society's memorandum is charitable would make no difference. There would be no means of discriminating what portion of the gift was intended for a charitable and what portion for a political purpose, and the uncertainty in this respect would be fatal.

The only way of meeting this difficulty would be to argue in favour of a general charitable intention on the part of the testator. The rule of equity in this respect is well known, and, however admirable in the interest of the public, has, I think, gone further than any other rule or canon of construction in defeating the real intention of testators. Perhaps the most striking instance of the application of the rule is *De Costa v. De Paz* (13), to which I shall have to return presently. There the trust was for the purpose of establishing an assembly for reading the Jewish law and instructing the people in the Jewish religion. The Jewish Relief Act had not yet been passed, and, therefore, the gift could not be applied as directed by the testator. Nevertheless, LORD HARDWICKE held that, the gift being for a religious purpose, the testator had manifested a general charitable intent, and accordingly the fund was applied for paying a preacher to instruct children in the Christian instead of the Jewish religion. Any argument in favour of the testator's general charitable intention in the present case would have to proceed on the footing that

A the society's first and paramount object was charitable, and that its subsequent objects, though not charitable in themselves, were entirely subsidiary to the first object. It would be an argument depending for its validity on the true construction of the memorandum, and precisely analogous to that urged by the appellants in support of their contention that because the society's first object was illegal, all its other objects were also illegal, or, as they put it, tinged with illegality. I

B will consider the two arguments together.

The only object specified in the company's memorandum of association which can of itself be said to be either charitable or illegal is the first. All the other specified objects are in themselves clearly non-charitable, and admittedly legal. The suggestion must be that the charitable or illegal character of the first object so clearly manifests a charitable or illegal intention on the part of the testator

C that all the subsequent objects (being non-charitable) must, on the hypothesis that the first is charitable, be ignored altogether, or being legal, must on the hypothesis that the first is illegal, be themselves treated as illegal. Such suggestion, when analysed, appears to rest entirely on the assumption that the object first specified in the memorandum must be the paramount object, and that all the other specified objects must be subsidiary or subordinate. Such an assumption

D introduces a new, and, in my opinion, a very dangerous, canon of construction. Moreover, in the present case it appears to be inconsistent with the terms of the memorandum itself. The first object is to promote the principle therein referred to, not in such manner as thereafter mentioned, but in such ways as may from time to time be determined. This can only point to the subsequent objects being distinct or independent objects. Moreover, one of those objects, that lettered

E (1), is

"to assist by votes of money or otherwise other societies or associated persons or individuals who are specially promoting, not the first object, but any of the objects thereinbefore mentioned."

F How can it be argued that the society is precluded from giving assistance to societies or individuals who, while repudiating the society's first object, advocate the secularisation of education or the disestablishment of the Church on political or even on religious grounds? It is impossible to limit the societies or individuals to whom assistance may be granted to such as uphold the principle referred to in the society's first object. It is equally impossible to treat an act expressly authorised by the memorandum as ultra vires the company because of the motive by which

G the agents of the company may be inspired. The whole frame of the memorandum points to the company having distinct and separate objects, and not to the first object being paramount and the others subsidiary. Any argument in favour of a general charitable or a general illegal intention must therefore fail. Just as the objects of the society which the testator had in view in making the gift cannot be said to be illegal merely because the first object specified in the memorandum

H is illegal, so also if the society takes as trustee it cannot be said that the testator had a general charitable intention sufficient to support the trust merely because the first object specified in the memorandum is charitable. It follows that the trust, if a trust has been created, is wholly invalid, whether the first object is, on the one hand, charitable, or, on the other hand, illegal.

I I will next proceed to consider whether a trust for the first object specified in the memorandum would be a valid trust. The society's first object is "to promote the principle that human conduct shall be based upon natural knowledge and not upon supernatural belief, and that human welfare in this world is the proper end of all thought and action." A trust to promote or advocate this principle would certainly not be a trust for the benefit of individuals. But could it be established as a charitable trust? It is certainly not within the preamble of the statute 43 Eliz., c. 5. This is not conclusive, though the courts have taken that preamble as their guide in determining what is or is not charitable. It is not a religious trust,

for it relegates religion to a region in which it is to have no influence on human conduct. The principle may have its attractions for certain types of mind, but on analysis it appears to be extremely vague and ambiguous. The first branch does not prescribe the end to which human conduct is to be directed. It merely says that whatever aim a man has in view he is to base his conduct on natural knowledge rather than on supernatural belief. This may merely mean that if, for example, we desire to defeat our enemies we should avail ourselves of all known scientific means, and not rest idle in the belief that there is a special providence looking after our interests. The meaning intended must necessarily be obscure until the terms "natural knowledge" and "supernatural belief" are more narrowly defined. Passing to the second branch of the principle, it is, I think, equally obscure. It lays down dogmatically what ought to be the end of all human thought and action, "so think and act as to secure human welfare in this world." No hint is given as to what constitutes human welfare, a point on which there is the widest difference of opinion, or as to why anyone should act on the precept unless it be assumed that altruism is merely enlightened egoism. It would, in my opinion, be quite impossible to hold that a trust to promote a principle so vague and indefinite was a good charitable trust. Even if the principle to be promoted were as definite as KANT'S categorical imperative I doubt whether a trust for its promotion would be charitable.

It remains to consider the question (which formed the chief topic of argument at your Lordships' Bar), whether the promotion of the principle specified as the society's first object is either illegal or against the policy of the law. A trust for the promotion of the principle being unenforceable on other grounds, this question could only arise on a criminal prosecution for blasphemy or in an action to enforce a contract entered into for the purpose of promoting the principle. In discussing it I shall assume that the principle involves a denial of or an attack upon some of the fundamental doctrines of the Christian religion. On the subject of blasphemy I have had the advantage of reading and I entirely agree with the conclusions arrived at by my noble and learned friends, the Lord Chancellor and Lord BUCKMASTER. In my opinion, to constitute blasphemy at common law there must be such an element of vilification, ridicule, or irreverence as would be likely to exasperate the feelings of others and so lead to a breach of the peace. I cannot find that the common law has ever concerned itself with opinion as such, or with expression of opinion, so far as such expression is compatible with the maintenance of public order. Indeed there is express authority that heresy as such is outside the cognisance of a criminal court unless the heretic by setting up conventicles or otherwise endangers the peace: see *HAWKINS' PLEAS OF THE CROWN*, vol. 1, p. 354. The contrary view appears to be based on various dicta (I do not think they are more than dicta), to the effect that Christianity is part of the law of the land, the suggested inference being that to attack or deny any of its fundamental doctrines must, therefore, be unlawful. The inference, of course, depends on some implied major premise. If the implied major premise be that it is an offence to speak with contumely or even to express disapproval of existing law, it is clearly erroneous. If, on the other hand, the implied major premise is that it is an offence to induce people to disobey the law, the premise may be accepted, but to avoid a non sequitur it would be necessary to modify the minor premise by asserting that it is part of the law of the land that all must believe in the fundamental doctrines of Christianity, and this again is inadmissible. Christianity is clearly not part of the law of the land in the sense that every offence against Christianity is cognisable in the courts. A good deal of stress was laid in this connection upon the Blasphemy Act, 1697, and its provisions undoubtedly give rise to certain difficulties. I think, however, for reasons which will appear later that this Act should be construed as imposing, in the case of persons educated in or who have at any time professed the Christian religion, certain additional penalties for the common law offence rather than as creating a new statutory offence. The fact that there

A has, so far as can be discovered, never been a prosecution for an offence under the Act points to this view, having been generally accepted.

B On the question whether the promotion of the principle in question is against public policy as opposed to being illegal in the criminal sense the appellants relied principally on two authorities, namely, *Cowan v. Milbourn* (2) and *Briggs v. Hartley* (1). In the former case the court, consisting of KELLY, C.B., MARTIN, B., and
C BRAMWELL, B., refused to enforce a contract for the hire of rooms, the purpose of the hirer being to use the rooms for certain lectures, one of which, as advertised, was to be on "The character and teaching of Christ: the former defective, the latter misleading," and another on "The Bible shown to be no more inspired than any other book." KELLY, C.B., was of opinion that the first of these lectures could not be delivered without blasphemy. He referred especially to the fact
D that Christianity was part of the law of the land. MARTIN, B., agreed. BRAMWELL, B., quoted the Blasphemy Act, and said that the rooms were clearly intended to be used for a purpose declared by the statute to be unlawful. It appears, therefore, that all three judges considered that the purpose was unlawful in the strict sense, though BRAMWELL, B., referred to the distinction between things actually unlawful in the sense of being punishable and things unlawful in the sense of being contrary
E to the policy of the law. This, however, appears to have been unnecessary for the decision. The court refused to enforce the contract. In *Briggs v. Hartley* (1) the testator had created a trust to provide a prize for the best essay on natural theology, treated as a science, and sufficient when so treated to constitute a true, perfect, and philosophical system of universal religion. SHADWELL, V.-C., held the trust void as inconsistent with Christianity. In my opinion, the first of these cases
F might possibly be supported on the footing that the lectures intended to be given would involve vilification, ridicule, or irreverence likely to lead to a breach of the peace. In so far as it decided that any denial of or attack upon the fundamental doctrines of Christianity was in itself blasphemous either at common law or under the statute, I think it was wrong.

F The second case, however, appears to be a direct authority on the point at issue, for the trust was clearly a good charity unless it could be held contrary to the policy of the law. I desire to call the attention of the House to certain general considerations and to certain authorities which have led me to the conclusion that
G *Briggs v. Hartley* (1) was wrongly decided and that there is nothing contrary to the policy of the law in an attack on or a denial of the truth of Christianity or any of its fundamental doctrines provided such attack or denial is unaccompanied by
H such an element of vilification, ridicule, or irreverence as is necessary for the common law offence of blasphemy. In the first place I desire to say something as to the history of religious trusts. Trusts for the purposes of religion have always been recognised in equity as good charitable trusts, but so far as I am aware there is no express authority dealing with the question what constitutes religion for the purpose of this rule. Prior to the Reformation that form of Christianity now called
I Roman Catholic was undoubtedly within the rule, but the same cannot be said with equal certainty of other forms of Christianity or of the Jewish religion, which has little in common with Christianity except its monotheism and its belief in the inspiration of the Old Testament. After the Reformation Anglican Christianity was undoubtedly within the rule, but this cannot be said with equal certainty of Roman Catholicism or of any form of Protestant dissent or of the religion of the Jews. The question is complicated by the fact that the Reformation was followed by a number of penal statutes enforcing conformity with the Established Church and imposing penalties on the exercise of any other form of religion whether Christian or otherwise. As long as these statutes remained in force no trust for the purposes of any other religion than the Christian religion or of any form of Christianity other than the Anglican were enforceable because it was clearly against public policy to promote a religion or form of religion the exercise of which was penalised by statute. The fact that no such trust was enforceable does not show

that it was not a trust for the purposes of religion within the meaning of the rule. The Revolution of 1688 was followed by the Toleration Act of that year, which exempted Protestant dissenters from the penalties imposed by the earlier Acts, but provided that nothing therein contained should afford any protection to Roman Catholics or persons denying the Trinity. From the date of this Act all trusts for the religious purposes of any nonconformist body entitled to the benefit of its provisions have been held good charitable trusts, and, inasmuch as the provisions of the Act do not deal with the validity of trusts, but merely give exemption from penalties, I think we are safe in assuming that in the equitable rule as to trusts for the purposes of religion being charitable religion includes all forms of religion which accept, as the exempted nonconformists may be said to have done, the fundamental doctrines of the Christian faith.

But subsequent decisions enable us to go a step further. The Unitarian Relief Act, 1812, repeals so much of the Toleration Act, 1688, as enacts that nothing therein contained should extend to give any ease or benefit to persons denying the Trinity, and also so much of the Blasphemy Act as relates to persons denying the Trinity. As from the passing of this Act trusts for the religious purposes of Unitarians have always been held good charitable trusts. The repeal of the Blasphemy Act, which did not itself affect the common law, could not alter the common law. These decisions proceed, therefore, on the footing that a mere denial of the Trinity is not criminal. The Unitarian Relief Act, containing no provisions as to trusts, they also proceed on the footing that but for the statutory penalties to which, prior to the Act, persons who denied the Trinity had been subject, a trust for a religion which rejects the doctrine of the Trinity would have been a good charitable trust. A denial of or attack on the doctrine of the Trinity can never, therefore, have been either actually illegal or contrary to the policy of the law. Further, whatever may have been the case with the Unitarians of 1812, it is quite certain that in more recent years many Unitarians have not only denied the Trinity, but have disputed the "Divine authority" of the Old and New Testament in the sense in which that expression is ordinarily used by persons professing the Christian faith. If there is any doctrine vital to Protestant Christianity it would appear to be that of the Divine authority of the Scriptures, and yet in the case of trusts for the religion of Unitarians no distinction has been drawn between those who do and who do not hold this doctrine. It would seem to follow that a trust for the purpose of any kind of monotheistic theism would be a good charitable trust, and that it is not illegal or contrary to public policy to deny the authority of the Old or New Testament. The Roman Catholic Relief Act, 1832, and the Jewish Relief Act, 1846, expressly validate trusts for the purposes of the Roman Catholic and Jewish religions.

No inference can, therefore, be drawn from any decision since they were placed on the statute book. But *De Costa v. De Paz* (13), to which I have already referred, is important in this connection. It was decided before the Jewish Relief Act, and LORD HARDWICKE held that a trust for the purpose of the Jewish religion was bad, on the ground that it was against Christianity, and Christianity was the law of the land. It would have been enough to say it could not be enforced on the ground that the practice of the Jewish religion was subject to statutory penalties. On further consideration, however, LORD HARDWICKE upheld the gift on the ground that it was for a charitable purpose, and that the testator's general charitable intention ought not to be defeated because the fund could not be applied in the way the testator desired. He left it to the Crown to direct a *cy-près* application. As I have already said, the Crown applied it for the purposes of the Christian religion. This case seems to show that the Jewish religion is within the equitable rule, and that, apart from the statutory penalties, there was never anything inconsistent with public policy in enforcing a trust for the benefit of the Jewish religion. *De Costa v. De Paz* (13) was followed in *Isaac v. Gompertz* (28). LORD THURLOW there held that a trust for the maintenance of a Jewish synagogue was charitable

A and directed an application to the Crown with a view to its cy-près application. Apart from the question of religious trusts there is one authority directly in point. In *Pare v. Clegg* (18) the plaintiff sued the trustees of a friendly society, known as the Rational Society, for moneys lent to the society. The trustees objected that the society had illegal objects, and that the money could not be recovered on that account. The object of the society included the promotion of

B the following propositions:

C “(i) That all facts yet known to man indicate that there is an external or internal cause of all existences by the fact of their existence; that this all-pervading cause of motion or change in the universe is the power which the nations of the world have called God, Jehovah, Lord, &c., but that the facts are yet unknown to man which define what that power is. (ii) That all ceremonial worship by man of this cause whose qualities are yet so little known proceeds from ignorance of his own nature, and can be of no real utility in practice; and that it is impossible to train men to become rational in their feelings, thoughts, or actions until all such forms shall cease.”

D These propositions are clearly anti-Christian. If they point to religion at all, it is a kind of negative deism, if I may use that expression, and not a theistic religion. Nevertheless, it was held by ROMILLY, M.R., that they contained nothing “irreligious or immoral” and that, therefore, the defence failed. It follows that he cannot have thought that there was anything against public policy in advocating deism or (à fortiori) any form of monotheism. This conclusion is further borne out by *Thompson v. Thompson* (17). There the trust was to pay a stipend to

E some literary man who had not been successful in his career and who would assist in extending the knowledge of the doctrines to which the testator had devoted his attention and pen. This was held to be a charitable gift, provided the testator’s writings, published or unpublished, contained nothing “irreligious, illegal, or immoral.”

F In my opinion, the authorities I have mentioned are sufficient to establish that the first object of the society’s memorandum is not open to objection as contrary to the policy of the law. It is not illegal for it does not involve blasphemy. It is not irreligious, for it is at any rate consistent with that negative deism which was held not to be irreligious in *Pare v. Clegg* (18). It is not immoral or seditious. It is, no doubt, anti-Christian, but, to adopt the words of COLERIDGE, J., in *Shore v. Wilson* (19) (9 Cl. & Fin. at p. 539):

G “There is nothing unlawful at common law in reverently doubting or denying doctrines parcel of Christianity, however fundamental. It would be difficult to draw a line in such matters according to perfect orthodoxy or to define how far one might depart from it in believing or teaching without offending the law. The only safe and, as it seems to me, practical rule is that which I have pointed out and which depends on the sobriety and reverence and seriousness with which the teaching or believing, however erroneous, are maintained.”

H I am glad to be able to come to this conclusion. It would be a serious matter for your Lordships’ House, unless clearly compelled by authority, to lay down a principle which would not only lead to the anomalies pointed out by LORD BUCKMASTER, but would preclude the courts of this country from giving effect to trusts for the purposes of religions which, however sacred they may be to millions of His Majesty’s subjects, either deny the truth of Christianity or, at any rate, do not accept some of its fundamental doctrines. On all these grounds I think the appeal fails.

I **LORD SUMNER** (read by LORD DUNEDIN).—The question is whether an anti-Christian society is incapable of claiming a legacy duly bequeathed to it merely because it is anti-Christian. The certificate proves that the incorporation is that of the statutory number of persons in accordance with the formalities of the Act,

that "all the requirements of the Act in respect of registration have been complied with": Companies Act, 1862, s. 18; and that the respondent society is a complete person in law. It does not prove that all the memorandum powers are lawfully exercisable.

What then are the society's character and powers? For them we must look at the memorandum, and then the question will be: Does the law permit their exercise? Paragraph 3 (a) gives its principle. The first part is stated both as a positive proposition, namely, that human conduct should be based upon natural knowledge, and as a negative proposition, namely, that it should not be based on supernatural belief. The second part is expressed only positively, namely, that human welfare in this world is the proper end of all thought and action, but equally the negative of this proposition is implied. Since "human welfare in this world is the proper end of all thought and action," any object save the welfare of mankind in this world (for example, the glory of God) cannot be a proper end for any thought or action at all. The powers taken in the subsequent paragraphs are ancillary to the first and some are so expressed. It is true that object (k) is "to publish books," and object (l) "to assist by votes of money other societies or individuals who are specially promoting any of the above objects," but are we to say that this company has among its memorandum powers the publication of Bibles and Prayer Books, the subvention of Bible societies, and the doing of all lawful things conducive to the attainment of such objects, such as building a mission hall for reading the Bibles and offering the prayers? If the memorandum is to be so construed it is decisive of the case, for I agree that this gift is not an imperfect gift nor impressed with any trust in the donee's hands, and a donee, who sometimes acts legally and sometimes illegally, cannot be deprived of his legacy for fear he might follow the evil and eschew the good. It is not a question of hoping for the best, as was argued; the law must presume that what is legal will be done, if anything legal can be done under the memorandum. Thus one just man may save the city. To my mind, if the memorandum be construed as it is by my noble and learned friend who has immediately preceded me, any consideration of blasphemy or Christianity or their legal position is irrelevant, for the appeal succeeds without it, and before we come to it. I think we should look at the substance and that all the paragraphs should be construed as if they concluded with the words, "for the purposes and on the principle stated in para. (a)." Surely a society incorporated on such a principle cannot be supposed, as a matter of construction, to exercise ancillary powers on other principles or for independent purposes. Of course, it must be assumed that the powers taken are to be used, if possible, for lawful ends; for example, to subsidise a blaspheming lecturer would be an ultra vires act, and those who so disbursed the company's money would be personally liable to refund it, apart from aiding and abetting; but as I take the memorandum to be that of a society deliberately and entirely anti-Christian, in which opinion I believe the shareholders themselves would agree, I am constrained to deal with the question: What if all the company's objects are illegal per se? for I should be loth to dispose of this case on the narrow ground that, even if all its other objects are illegal, the company in law can always wind-up and so dispose of its funds.

If the respondents are an anti-Christian society, is the maxim that Christianity is part of the law of England true, and, if so, in what sense? If Christianity is of the substance of our law, and if a court of law must, nevertheless, adjudge possession of its property to a company whose every action seeks to subvert Christianity and bring that law to naught, then by such judgment it stultifies the law. So it was argued, and if the premise is right, I think the conclusion follows. It is not enough to say with LORD COLERIDGE, C.J., in *Ramsay's Case* (3) (48 L.T. at p. 735) that this maxim has long been abolished, or with my noble and learned friend, the Master of the Rolls, in the court below that "the older view," based on this maxim, "must now be regarded as obsolete." If that maxim expresses a positive rule of law once established, though long ago, time cannot

A abolish it nor disfavour make it obsolete. The decisions which refer to such a maxim are numerous and old, and although none of them is a decision of this House, if they are in agreement and if such is their effect, I apprehend they would not now be overruled, however little reason might incline your Lordships to concur in them.

In what sense, then, was it ever a rule of law that Christianity is part of the law? The legal material is fourfold: (i) statute law; (ii) the criminal law of blasphemy; (iii) general civil cases; (iv) cases relating to charitable trusts. From statute law little is to be gleaned. During the sixteenth century many Acts were passed to repress objectionable doctrines, but plainly statutes were not needed if the common law possessed an armoury for the defence of Christianity as part and parcel of itself. Indeed, who but the King in Parliament could then say whether the Christianity, which for the time being formed part of the common law, was the Christianity of Rome or of Geneva or of Wittenberg? Certainly the courts could not. After the Revolution of 1688 there were passed the Toleration Act "to give some ease to scrupulous consciences in the exercise of religion," which, upon conditions, relieved certain dissenters (Papists and those who denied the Trinity excepted) from the operation of various existing statutes, and the Blasphemy Act, which recites that "many persons have avowed blasphemous doctrines contrary to the doctrines and principles of the Christian religion and may prove destructive to the peace and welfare of this kingdom." That the Blasphemy Act simply added new penalties for the common law offence of blasphemy, when committed under certain conditions, was held by LORD HARDWICKE in *De Costa v. De Paz* (18), and by the Court of King's Bench in *R. v. Carlile* (29), and LORD ELDON in *A.-G. v. Pearson* (30) said that the Toleration Act left the common law as it was and only exempted certain persons from the operation of certain statutes. Such, indeed, is the clear language of the statute, nor can the fact that persons are singled out for special punishments, who deny the Godhead of the Three Persons of the Trinity, the truth of the Christian religion, and the Divine authority of the Holy Scriptures, or who maintain that there be more Gods than one, be accepted as showing that the common law offence of blasphemy consists in such denials and assertions and in nothing else. Later Acts have relieved various religious confessions from the burthen of the Blasphemy Act and other statutes, but, except in so far as they deal with charitable trusts for the purposes of such confessions, on which I do not now dwell, they seem to carry the present matter no further.

G The common law as to blasphemous libels was first laid down after the Restoration, and here the statement that Christianity is part of the law is first found as one of the grounds of judgment. Earlier opinions of the same kind are curiously general in character. In *Bohom v. Broughton* (31), on a *quare impedit*, it is said:

H "A tielx leis que ils de Saint Eglise ont en ancien Scripture covient a nous doner credence; car cœo common ley sur quel tous man's leis sont fondees."

I Again, in the DOCTOR AND STUDENT (Dialogue I, chs. 5, 6, and 7) three successive chapters state the grounds of the law of England—the first, the law of reason; the second, the law of God; and the third, the usage and custom of the realm. When Lilburne was on his trial in 1649 (*Lilburne's Case* (32)), he complained that he was not allowed counsel and appealed to the judges "to do as they would be done by." LORD KEEBLE said (4 State Tr. at p. 1307): "You say well. The law of God is the law of England." But all the same, Lilburne had to do the best he could for himself. A passage from LORD COKE may also be quoted. BROOK, J., had once observed casually (Y.B. Hen. 8, fo. 4) that a pagan could not have or maintain any action, and LORD COKE in *Calvin's Case* (33) (7 Co. Rep. at 17a), founding himself on this and on St. Paul's Second Epistle to the Corinthians (ch. vi, v. 15), stated that infidels are perpetui inimici, and "a perpetual enemy cannot maintain

any action or get anything within the realm." Of this WILLES, C.J., in *Omychund v. Barker* (34) observes (Willes, at p. 542):

"Even the devils themselves, whose subjects, [LORD COKE] says, the heathens are, cannot have worse principles; and besides the irreligion of it, it is a most impolitic notion and would at once destroy all that trade and commerce from which all this nation reaps such good benefits."

Evidently in this interval the spirit of the law had passed from the Middle Ages to modern times. So far it seems to me that the law of the Church, the Holy Scriptures, and the law of God are merely prayed in aid of the general system or to give respectability to propositions for which no authority in point could be found.

At the beginning of the seventeenth century a considerable change of procedure took place in reference to religion. Legate was burnt at Smithfield in 1612 upon a writ de haeretico comburendo, and another heretic, named Wightman, at Lichfield about the same time, but they were the last persons to go to the stake in this country pro salute animae. No doubt this process was moribund. Before the Restoration the Court of Star Chamber and the Court of High Commission had been suppressed, and at length, by the statute 29 Car. 2, c. 9, the writ de haeretico comburendo itself was abolished, with all process and proceedings thereupon and all punishment of death in pursuance of any ecclesiastical censures. It is to be noted that the Act, in saving the jurisdiction of the ecclesiastical courts over "atheism, blasphemy, heresy, and schism," distinguishes blasphemy from the profession of false doctrines, whether atheistical or heretical. The time of Charles II was one of notorious laxity both in faith and morals, and for a time it seemed as if the old safeguards were in abeyance or had been swept away. Immorality and irreligion were cognisable in the ecclesiastical courts, but spiritual censures had lost their sting, and the civil courts were extinct which had specially dealt with such matters viewed as offences against civil order. The Court of King's Bench stepped in to fill the gap. In 1663 Sir Charles Sedley was indicted for indecency and blasphemy (*Sedley's Case* (35)). The indecency was so gross that little stress was laid on the blasphemy, which was probably both tipsy and incoherent. The court told the prisoner that they would have him know that, although there was no longer any Star Chamber, they acted as *custos morum* for all the King's subjects, and it was high time to punish such profane actions, contrary alike to modesty and to Christianity. Then follows *Taylor's Case* (5) in 1675, when the indictment was for words only, though ribald and profane enough. This is the earliest trial for blasphemy. *Adwood's Case* (36) in 1617 is not an instance. It is like *Traske's Case* (37), where the matter in hand was the making of conventicles as tending to sedition.

The indictment in *Taylor's Case* (5) is given in TREMAINE'S PLACITA, p. 226, and shows that the charge was not confined to the fact that Taylor's language was contrary to true religion, but that it was considered dangerous to civil order, for it concludes:

"Ad grave scandalum professionis verae Christianae religionis in destructionem Christianae gubernationis et societatis . . . ac contra pacem dicti domini regis."

Taylor's Case (5) is the foundation stone of this branch of the law, and for a century or so there is no sign of carrying the law beyond it. The case repays scrutiny. The objection that the offence was an ecclesiastical one lay on the very face of the words charged, and in directing the jury HALE, C.J., found it necessary to show why it was also a civil offence. He said that such kind of wicked, blasphemous words, though of ecclesiastical cognisance, were not only an offence to God and religion, but a crime against the laws, State, and government, and "therefore punishable in this court, for to say religion is a cheat is to dissolve all those obligations whereby the civil societies are preserved." It is true that he added that Christianity was parcel of the laws of England, "and therefore to

A reproach the Christian religion is to speak in subversion of the law," but this does not really enlarge the previous statement. Speaking in subversion of the law, without more, in the sense of saying that particular laws are bad and should be mended, has never been a criminal offence, and agitating against them has often led on to fortune. *Woolston's Case* (6), in 1728, supplies the completion of the doctrine. Upon a motion in arrest of judgment, the court followed *Taylor's Case* (5) as settled law. The argument was that Woolston's crime, if any, was of ecclesiastical cognisance (he was a clergyman who joked about the miracles), and that "mere difference of opinion is tolerated by law." LORD RAYMOND's answer was:

C "I would have it taken notice of that we do not meddle with any differences in opinion and that we interpose only where the very root of Christianity is spoken of. . . . To say that an attempt to subvert the established religion is not punishable by those laws upon which it is established is an absurdity." True it is that the last words somewhat invert LORD HALE's reasoning, for they seem to treat an attempt to subvert the established form of Christianity (not any other) as an offence, because it attacks the creature of the law, not because that form is the basis of the law itself and the bond of civilised society. At any rate the case leaves untouched mere differences of opinion, not tending to subvert the laws and organisation of the realm.

D *Curl's Case* (38), heard about the same time, was a case for publishing an obscene libel, but is of some incidental importance. The courts were chary of enlarging their jurisdiction in this regard, and in Queen Anne's time judgment had been arrested in such a case for supposed want of precedent, and the offence was treated as one for ecclesiastical cognisance only. On a motion for arrest of the judgment on *Curl* it was argued that the libel, being only contra bonos mores, was for the spiritual courts. The motion was refused, the Chief Justice saying:

E "If it reflects on religion, virtue or morality, if it tends to disturb the civil order of society, I think it is a temporal offence." He said, too, "religion is part of the common law," but PROBYN, J., clears this up, adding:

F "It is punishable at common law as an offence against the peace in tending to weaken the bonds of civil society." At the end of the eighteenth and beginning of the nineteenth centuries various publishers of PAINE'S AGE OF REASON were prosecuted. The words indicted were chosen for their scoffing character, and indeed are often really blasphemous, but the idea throughout is that the book was the badge of revolution and tended to jeopardise the State. Thus during the trial of Williams (*R. v. Williams* (7)) G ASHURST, J., said (26 State Tr. at p. 715) of it that "it was an offence against law and government, from its direct tendency to dissolve all bonds and obligations of civil society," and again, in passing sentence on him in the Court of King's Bench, H he states the ground of this offence thus:

"All offences of this kind are not only offences to God, but crimes against the law of the land, and are punishable as such, inasmuch as they tend to destroy those obligations whereby civil society is bound together, and it is upon this ground that the Christian religion constitutes part of the law of England."

I If later cases seem to dwell more on religion and less on considerations of State, I think, when examined, they prove to be of small authority. In *Waddington's Case* (10) there seems to have been little argument, and no decisions were cited. *R. v. Davison* (39) decides in effect that contempt of God in court may be also contempt of court. In 1838 ALDERSON, B., told a York jury (*R. v. Gathercole* (40), 2 Lew. C.C. at p. 254) that

"a person may, without being liable to prosecution for it, attack Judaism and Mahomedanism, or even any sect of the Christian religion (save the estab-

lished religion of the country), and the only reason why the latter is in a different situation from the others is because it is the form established by law and is therefore part of the constitution of the country. In like manner and for the same reason any general attack on Christianity is the subject of criminal prosecution, because Christianity is the established religion of the country."

The defendant, in fact, had not made any general attack on Christianity, but, being a Protestant clergyman, had foully aspersed a Roman Catholic nunnery. Whether this strange dictum was material or not, and whether it is right or not (and ALDERSON, B.'s, is a great name), it only shows that the gist of the offence of blasphemy is a supposed tendency in fact to shake the fabric of society generally. Its tendency to provoke an immediate breach of the peace is not the essential, but only an occasional feature. After all, to insult a Jew's religion is not less likely to provoke a fight than to insult an episcopalian's; and, on the other hand, the publication of a dull volume of blasphemies may well provoke nothing worse than throwing it into the fire. *Hetherington's Case* (11) was a motion in arrest of judgment. Even here, alongside of the propositions that the Old Testament contains the law of God, and that "it is certain that the Christian religion is part of the law of the land" (per PATTERSON, J.), we find LORD DENMAN, C.J., saying (5 Jur. at p. 530):

"As to the argument that the relaxation of oaths is a reason for departing from old law, we could not accede to it without saying that there is no mode by which religion holds society together but by the administration of oaths, but that is not so, for religion contains the most powerful sanction for good conduct."

R. v. Moxon (41) is of small authority. Later prosecutions add nothing until LORD COLERIDGE's direction to the jury in *R. v. Ramsay and Foote* (3). For thirty years this direction has been followed, nor was it argued by the appellants that the publication of anti-Christian opinions, without ribaldry or profanity, would now support a conviction for blasphemy.

It is no part of your Lordships' task on the present occasion to decide whether LORD COLERIDGE's ruling was or was not the last word on the crime of blasphemy, but the history of the cases and the conclusion at present reached go to show that what the law censures or resists is not the mere expression of anti-Christian opinion, whatever be the doctrines assailed or the arguments employed. It is common ground that there is no instance recorded of a conviction for a blasphemous libel, from which the fact, or, at any rate, the supposition of the fact, of contumely and ribaldry has been absent, but this was suggested to be of no real significance for these reasons. Such prosecutions, it was said, often seem to be persecutions, and are, therefore, unpopular, and so only the gross cases have been proceeded against. This explains the immunity of the numerous agnostic or atheistic writings so much relied on by secularists. All it really shows is that no one cares to prosecute such things till they become indecent, not that, decently put, they are not against the law. Personally, I doubt all this. Orthodox zeal has never been lacking in this country. The Society for Carrying into Effect His Majesty's Proclamations against Vice and Immorality, which prosecuted Williams in 1797, has had many counterparts both before and since, and as anti-Christian writings are all the more insidious and effective for being couched in decorous terms, I think the fact that their authors are not prosecuted, while ribald blasphemers are, really shows that lawyers in general hold such writings to be lawful because decent, not that they are tolerable for their decency though unlawful in themselves. In fact, most men have thought that such writings are better punished with indifference than with imprisonment.

I may now turn to decisions in civil cases other than cases of charitable trusts. They are at least inconclusive. In *Murray v. Benbow* (16) (4 State Tr. N.S. at

A p. 1410) BYRON'S "CAIN" was in question. LORD ELDON read it, and as it happened, was able to compare it with "PARADISE LOST." He says:

B "You have alluded to MILTON'S immortal work. It did happen in the course of last Long Vacation, amongst the sollicitae jucunda obliuia vitæ, I read that work from beginning to end. . . . Taking it altogether, it is clear that the object and effect were not to bring into disrepute but to promote the reverence of our religion."

So judging "CAIN" he doubted, and, as an injunction was matter of discretion and not of right, he refused an injunction till the plaintiff's right had been established at law. According to SMILES' JOHN MURRAY (i, 428) the necessary action was brought a jury upheld the copyright, and on a subsequent application C the injunction was granted. About the same time, however, in 1822, in *Lawrence v. Smith* (15) an injunction had been obtained ex parte to restrain the issue of a pirated edition of the plaintiff's "LECTURES ON PHYSIOLOGY." As the lectures seemed to him to question the immortality of the soul, LORD ELDON dissolved it as a matter of discretion and in the absence of any judgment deciding the right at law, and observed that "the law does not give protection to those who contradict the Scriptures," a dictum which, in its full width, imperils copyright in D most books on geology. In the present case the respondents do not appeal for protection to the court's discretion, but vindicate a right of property as clearly established as if there were a verdict. Again in *Pare v. Clegg* (18) LORD ROMILLY, M.R., gave judgment against the defendant, remarking that the society which E he represented, though based on irrational principles, was not formed "for the purpose of propagating immoral and irreligious doctrines," and so was liable. This is not authority for saying generally that a society formed for the purpose of propagating irreligious doctrines could not be made to pay its debts. At most they must be such irreligious doctrines as the law forbids, and that leaves open the whole question what it is that the law forbids. Whether or not it is an authority F directly in favour of the respondents I am not prepared to say. *Cowan v. Milbourn* (2) has long stood unchallenged. The judges meant to decide no new law, but to follow and apply the passages cited from STARKIE ON LIBEL. I cannot follow the observation of LORD COLERIDGE, C.J., in *Ramsay's Case* (3) that the judgments, or, at any rate, that of BRAMWELL, B., turn on the effect of the statute of William III. The rooms had been engaged for two purposes. One was for a tea party G and ball in memory of TOM PAINE, and the other was the delivery of the lectures in question. As to the first, the recorder left the case to the jury, who gave a farthing damages for the frustration of this dismal, but no doubt harmless, festivity. As to the other, some fear of a breach of the peace may have existed, for intervention by the chief constable is mentioned in the LAW REPORTS, but not in the LAW H JOURNAL, LAW TIMES, or WEEKLY REPORTER. The plea (16 L.T. 290) alleged a purpose "to use the said rooms for certain irreligious, blasphemous and illegal lectures," but they had not been delivered, and no indictable words could have been assigned. The recorder refused to leave the question of purpose to the jury with regard to the lectures. The argument in moving for the rule was that the case should have gone to the jury, for the placards per se did not prove an intention to insult or mislead, and temperate discussion of such subjects is lawful. Clearly I the recorder had ruled that under such titles no lecture could be delivered that would not be unlawful. It is upon such a presentation of the case, and, I suppose, on such a ruling at the trial, that KELLY, C.B., said: "Such a lecture cannot be delivered without blasphemy and impiety," and from this his colleagues did not dissent. I do not think that the court were finding in the placards and the chief constable a quia timet justification for the defendant's breach of contract. Their ground was that the hiring was and could only be for an illegal object, and therefore the contract could not be enforced. The distinction is well settled between things which are illegal and punishable and things which, though not punishable,

are illegal so as not to support a contract for good consideration. Prostitution is one of the common examples. BRAMWELL, B., evidently thought that secularism was another. But this reasoning postulates that, whatever lectures were actually delivered, they could not but be unlawful. Lectures, lawful because decently expressed, could, however, have been delivered under those titles, and, therefore, the hiring was not conclusively shown to have been for an unlawful purpose and void. The case should have gone to the jury. The alternative view of the case must be that the whole court held that any general denial or dispute of Christian faith is unlawful, which had not been held at law before. From this it would follow that a person, whose business it was to publish and sell anti-Christian books, need neither pay his printer's bill nor the poor rates for his shop, a proposition which is refuted by stating it, and from which at least two members of the court in *Cowan v. Milbourn* (2) would have recoiled. I think the decision was wrong.

As to *De Costa v. De Paz* (13), LORD HARDWICKE is reported as saying that

"there is a great difference between laying penalties on persons for the exercise of their religion and establishing them by the act of the court."

So here I think there is a great difference between laying civil disabilities on a man for the profession of his irreligion or on a company for the exercise of its memorandum powers, however contrary to Christianity, and establishing them by the act of the court. The appellants' claim is that the court should deny the respondent company's right to receive this money on the ground that it cannot make any lawful use of it, not that it should establish the money in the company's hands as a charitable trust for un-Christian objects. It is true that LORD HARDWICKE goes on to say that

"the intent of this bequest must be taken to be in contradiction to the Christian religion, which is part of the law of the land . . . for the constitution and policy of this realm is founded thereon,"

and there are a good many other cases of the same kind, especially *Briggs v. Hartley* (1), in which similar language is used, but charitable trusts form a particular and peculiar branch of the law, and I do not think that the reasoning and still less the remarks contained in those cases bear usefully on general principles. However right it may be to refuse the aid of the law in establishing a trust for secularist purposes, I cannot see why a secularist is not to receive a gift of money because he is a secularist and says so. I will not further pursue the cases cited on charitable trusts, nor could I presume to add to what has fallen from my noble and learned friend, LORD PARKER OF WADDINGTON.

With all respect for the great names of the lawyers who have used it, the phrase, "Christianity is part of the law of England," is really not law; it is rhetoric, as truly so as was Erskine's peroration when prosecuting Williams: "No man can be expected to be faithful to the authority of man who revolts against the government of God." One asks what part of our law may Christianity be, and what part of Christianity may it be that is part of our law? BEST, C.J., once said in *Bird v. Holbrook* (42) (4 Bing., at p. 641), a case of injury by setting a spring-gun:

"There is no act which Christianity forbids that the law will not reach; if it were otherwise Christianity would not be, as it has always been, held to be part of the law of England."

But this was rhetoric, too. Spring-guns, indeed, were got rid of, not by Christianity, but by Act of Parliament. "Thou shalt not steal" is part of our law. "Thou shalt not commit adultery" is part of our law, but another part. "Thou shalt love thy neighbour as thyself" is not part of our law at all. Christianity has tolerated chattel slavery; not so the present law of England. Ours is, and always

A has been, a Christian State. The English family is built on Christian ideas, and if the national religion is not Christian there is none. English law may well be called a Christian law, but we apply many of its rules and most of its principles, with equal justice and equally good government, in heathen communities, and its sanctions, even in courts of conscience, are material and not spiritual.

B Frequently as the proposition in question appears in one form or another, it is always as something taken for granted and handed down from the past rather than as a deliberate and reasoned proposition. It constantly has been used in charging juries as to 'unmistakably scurrilous words, where there was neither opportunity nor occasion for defining the limits of legitimate religious and irreligious opinion. I question if the foundations of the criminal law of blasphemous libel were ever fully investigated in any court before *Ramsay's Case* (3). Even then LORD C

C COLERIDGE passed over numerous decisions. To be sure his omissions were faithfully dealt with soon afterwards by STEPHEN, J., one of his own puisnes, in a popular periodical, and this paper your Lordships allowed counsel for the appellants to read as part of his argument, to which, nevertheless, it added nothing either in learning or in cogency. Such observations, too, have often been employed by judges of first instance in cases relating to charitable trusts, where there was

D equally little need for any analysis of the proposition or for discussion, either historical or juridical, of its implications. It is fairly clear, too, that men of the utmost eminence have thought and said advisedly that mere denials of sundry essentials of the Christian faith are indictable as such. HAWKINS, in his PLEAS OF THE CROWN (Bk. 1, ch. 5, ss. 1 and 2), says that "all blasphemies against God in denying His being . . . as well as all profane scoffing at the Holy Scriptures" are punishable offences, and adds as the reason for punishing the latter that offences of this nature "tend to subvert all religion or morality, which are the foundation of government." BLACKSTONE COMMENTARIES (Bk. 4, ch. 4) describes a class of crimes consisting in "offences more immediately against the Almighty, by denying His being or providence or by contumelious reproaches of our Saviour Christ" and "all profane scoffing at the Holy Scriptures." Probably few great

E judges have been willing to go further in questions of religious liberty than LORD MANSFIELD in his eloquent address to this House in *Evans v. Chamberlain of London* (43). Yet there he says (2 Burn's Eccl. Law, 9th Edn. at p. 218):

F

G "The eternal principles of natural religion are part of the common law; the essential principles of revealed religion are part of the common law, so that any person reviling, subverting or ridiculing them may be prosecuted at common law."

Again, the very careful Commissioners on the Criminal Law, of whom SERJEANT STARKIE was one and SIR WILLIAM WIGHTMAN another, observe in their Sixth Report, p. 85:

H "Although the law forbids all denial of the being and providence of God or the Christian religion, it is only when irreligion assumes the form of an insult to God and men that the interference of the criminal law has taken place."

I Nevertheless, it seems too clear to need citation of authorities (the opinions of the majority of the judges in your Lordships' House in *Shore v. Wilson* (19) having been fully discussed) in order to show that a temperate and respectful denial, even of the existence of God, is not an offence against our law, however great an offence it may be against the Almighty Himself, and, except for *Cowan v. Milbourn* (2), it has never been decided outside of the region of charitable trusts that such a denial affects civil rights. I cannot bring myself to think that it does so.

What, after all, is really the gist of the offence of blasphemy, or of its nature as a cause of civil disability? Ribaldry has been treated as the gist, which must be a temporal matter; as between creature and Creator, how can the bad taste or

the provocative character of such a denial come into question? The denial itself, not the mode of it, must be what merits the Divine anger; but that is an offence against God. Our courts of law, in the exercise of their own jurisdiction, do not, and never did that I can find, punish irreligious words as offences against God. As to them they held that *deorum injuriæ dis curæ*. They dealt with such words for their manner, their violence, or ribaldry, or, more fully stated, for their tendency to endanger the peace then and there, to deprave public morality generally, to shake the fabric of society and to be a cause of civil strife. The words, as well as the acts, which tend to endanger society differ from time to time in proportion as society is stable or insecure in fact, or is believed by its reasonable members to be open to assault. In the present day, meetings or processions are held lawful which a hundred and fifty years ago would have been deemed seditious, and this is not because the law is weaker or has changed, but because, the times having changed, society is stronger than before. In the present day reasonable men do not apprehend the dissolution or the downfall of society because religion is publicly assailed by methods not scandalous. Whether it is possible that in the future irreligious attacks, designed to undermine fundamental institutions of our society, may come to be criminal in themselves, as constituting a public danger, is a matter that does not arise. The fact that opinion grounded on experience has moved one way does not in law preclude the possibility of its moving on fresh experience in the other; nor does it bind succeeding generations, when conditions have again changed. After all, the question whether a given opinion is a danger to society is a question of the times and is a question of fact. I desire to say nothing that would limit the right of society to protect itself by process of law from the dangers of the moment, whatever that right may be, but only to say that, experience having proved dangers once thought real to be now negligible, and dangers once very possibly imminent to have now passed away, there is nothing in the general rules as to blasphemy and irreligion, as known to the law, which prevents us from varying their application to the particular circumstances of our time in accordance with that experience. If these considerations are right, and the attitude of the law both civil and criminal towards all religions depends fundamentally on the safety of the State and not on the doctrines or metaphysics of those who profess them, it is not necessary to consider whether or why any given body was relieved by the law at one time or frowned on at another, or to analyse creeds and tenets, Christian and other, in which I can profess no competence. Accordingly, I am of opinion that acts merely done in furtherance of para. 3 (a) and other paragraphs of the respondents' memorandum are not now contrary to the law, and that the appeal should be dismissed.

LORD BUCKMASTER.—The terms of the will of the testator and the circumstances leading up to this appeal have been fully stated and repetition is, therefore, unnecessary. In truth, according to the appellants' argument, the whole question to be decided depends upon the meaning of the third article of the memorandum of association of the respondent company, and upon the determination of whether this article, properly construed, renders the real object of the respondent company either criminal or illegal as contrary to the common law. The point of construction must be decided by considering the fair meaning of the language used and without resort to external means. Neither the documents preliminary to the incorporation of a company registered with a memorandum of association, nor the action of directors after a company has been formed, can properly be received in evidence for the purpose of determining what the objects of the company may be.

Clause 3 (a) of the memorandum defines the main object of the company in these words:

"To promote, in such a way as may from time to time be determined, the principle that human conduct should be based upon natural knowledge, and not

A upon super-natural belief; and that human welfare in this world is the proper end of all thought and action."

Upon this follows a series of objects which in themselves it is not suggested are obnoxious to the law, while the last sub-head of the clause is in general terms and gives power "to do all such other lawful things as are conducive or incidental to all or any of the above-named objects." Without this last provision the true construction of the memorandum would involve the view that if the defined objects could be attained, either by lawful or by unlawful means, it was only those that were lawful that were permitted. But the latter provision makes the meaning quite plain. This conclusion, however, does not affect the appellants' case, which depends upon the assertion that there are no lawful ways by which the objects of the society can be carried out. It is said that the true meaning of the memorandum is to encourage the propagation of doctrines directly contrary to the Christian faith—doctrines that are inimical to the central principle of Christianity and incapable of reconciliation with any essential portion of its creeds. WARRINGTON, L.J., indeed, thought that to promote such objects would be to promote atheism, and as this may be a material matter it is necessary to state the reasons why I am unable to accept this view.

D Natural law may, as it seems to me, be properly regarded as part of the Divine purpose, revealed through the instrument of reason, and if natural knowledge be accepted, as on this assumption it must, as equivalent to the truth, then, to take that as the basis of human conduct, as the first part of the clause directs, does not, to my mind, necessarily mean that a belief in God is thereby excluded. The latter part of the clause, which says that human welfare in this world is "the proper end of all thought and action" is more difficult. That human welfare is a proper end of thought and action few would dispute—it is the end on which the noblest minds have concentrated their highest effort; even if it be regarded as the sole object, I can conceive it being steadfastly pursued by people who possessed a firm belief in a supreme invisible Power using the instrument of man's agency to accomplish the Divine will. That this clause of the memorandum defines an object contrary to the generally accepted conception of the Christian faith is, I think, assented to by all who have heard this case, and from this view I am not prepared to dissent. It is not necessary, and if unnecessary it is certainly not desirable, to attempt a definition of what the law would regard as the essential features of that faith. It is sufficient to say that the respondent company has as its main object the propagation of doctrines hostile to the Christian religion, and the question to be determined is whether it is in consequence an illegal association—incapable of receiving or holding property. The contention that that is so is urged by counsel for the appellants by saying that such doctrine offends, in the first case, against the common law, which prohibits blasphemy. He regards the essence of legal blasphemy as the publication of matter denying or hostile to the Christian faith, and he rejects the interpretation put upon it by *ERSKINE, J.*, in *Shore v. Wilson* (19) (9 Cl. & Fin. at p. 355), by *LORD DENMAN, C.J.*, in *R. v. Hetherington* (11) (4 State Tr. N.S. at p. 590), and by *LORD COLERIDGE, C.J.*, in *R. v. Ramsay and Foote* (3), each of whom state the law so as to limit the offence to the act of denial associated with ribald, contumelious or scurrilous language or conduct. I am unable to accept the appellants' contention as correct. To do so would involve the conclusion that all adverse critical examination of the doctrines of Christianity—even though it was conducted with the utmost reverence—was a blasphemous publication which rendered the writer liable to criminal proceedings. It would, indeed, be hard to find a worse service that could be done to the Christian faith than to prevent people from explaining and inviting an answer to the reasoned convictions that led them to question its truth. The common law which forbids blasphemy is to be gathered from usage and custom, and it is a striking fact that, with one possible exception—*R. v. Woolston* (6)—every reported case upon the matter, beginning with *R. v. Taylor* (5), and continuing

down to *R. v. Ramsay and Foote* (3), and *R. v. Boulter* (12), is a case where the offence alleged was associated with, and I think constituted by, violent, offensive, or indecent words.

That it was considered necessary to report the earlier cases as precedents affords, to my mind, a strong presumption that it was the character of the attack which constituted the crime, for if the law was well recognised as forbidding any adverse criticism, the cases where such criticism was coarse and disgraceful would be too plain to merit preservation. In my opinion, therefore, the common law of England does not render criminal the mere propagation of doctrines hostile to the Christian faith. The crime consists in the manner in which the doctrines are advocated, and whether in each case this is a crime is a question for the jury, who should be directed, in the words of *ERSKINE, J.*, in *Shore v. Wilson* (19) (9 Cl. & Fin. at pp. 524, 525), quoted by the Master of the Rolls in his judgment in the present case.

It is then said that, even if this be conceded, the object of the society is illegal, not in the sense that acts done to further its objects would be criminal, but that they are of such a nature as to be incapable of establishing a legal right to receive money for their furtherance. I find it difficult to appreciate this distinction, but I understand the contention to be that Christianity is part of the common law of England, and it must, therefore, be illegal, even if it were not criminal, for any body of people to promote doctrines that are hostile to its creed. If this argument be carried to its full extent, it will really show that Unitarians, Positivists, Comtists, and other similar religious and ethical bodies, unless relieved by statute, are illegal associations, for the Christianity known to the common law is certainly not Unitarian Christianity, nor is it reconcilable with the doctrines of COMTE or HEGEL. Again, it would result that editors and publishers would be able to deny payment to contributors and authors whom they had expressly employed to write philosophical and scientific articles or books if it could be decided that the work was anti-Christian, while no one could be compelled to pay for any such books when purchased. Indeed, the doctrine, as it seems to me, would apply to a great deal of classical and scientific literature, and the conditions which would condemn these works might vary from year to year as different views from time to time prevailed. It is quite right to point out that, if the law be as the appellants contend, these considerations afford an argument for its alteration, but do not prove that it does not exist. If, on the other hand, the law is not clear it is certainly in accordance with the best precedents so to express it that it may stand in agreement with the judgment of reasonable men.

Apart from the criminal cases already mentioned certain authorities are referred to, which, if correctly decided, do appear to afford support for the appellants' arguments. *De Costa v. De Paz* (13)—a decision of LORD HARDWICKE'S—is one of these authorities; and *Re Bedford Charity* (14), is a decision of LORD ELDON'S, containing statements to the same effect, and so also is *Briggs v. Hartley* (1). The first of these was a gift for the purpose of providing a fund to be applied for ever for the reading of the Jewish law and for advancing and propagating the Jewish faith. It was certainly open to argument that this was not a charitable bequest and was consequently void as a perpetuity. But it was not upon this ground that the decision was based; it was held that it was a charity (see the report in *AMBLER*, p. 228), but that the mode of disposition was such that it could not take effect. It is true that in the report in 2 *SWANSTON* the reason why the gift to the specific object of the charity was held inoperative was because it was contrary to the Christian religion, but in *AMBLER* it is stated that the objects were contrary to the "established" religion, and as at that date the statutory disabilities under which the adherents of the Jewish faith suffered had not been removed, this might have been sufficient for the purpose of the case; indeed on any other view it is hard to understand why it was supported as a charity at all. I do not, however, propose further to pursue this question, as I have had the advantage of reading LORD

A PARKER's opinion, and with it I am in entire agreement. The second case was merely a question whether Jews might enjoy the benefits of a particular charity, and it was held they might not. The last was a legacy for the best essay on natural theology treated as a science, and sufficient when so treated and taught to constitute a true, perfect, and philosophical system of universal religion; and it was held bad for no further reason than that it was not consistent with Christianity, but

B the law was in no way examined or criticised. In two earlier cases it was stated that Christianity is part of the law of the land, and the authorities quoted in support of the proposition are *R. v. Taylor* (5) and *R. v. Woolston* (6); but the pronouncements of LORD HALE and LORD RAYMOND in these cases must be taken in reference to the subject-matter of the case, which, in one instance certainly, and in the other possibly, was a prosecution for scurrilous blasphemy.

C If the reasons for the decision in *De Costa v. De Paz* (13) were those urged by the appellants I should not regard them as correct. If a gift to endow any body that propagates doctrines hostile to the generally accepted view of the Christian religion was at any time contrary to the common law, it is, in my opinion, contrary at the present time, and gifts to Unitarians and similar religious bodies for the support and endowment of their religious faith are now void. It is urged

D in answer to this that the position with regard to Unitarians, as also with regard to Jews, is altered by two statutes—the one 53 Geo. 3, c. 160 [Doctrine of the Trinity], and the other the Religious Disabilities Act, 1846. I am unable to accept this view. The statutory position appears to me to be plain. By the Act of 1 Will. & Mary, c. 18 (generally known as the Toleration Act), it is provided that no penalties shall apply to any person dissenting from the Church of England that

E shall take the oaths that are specified in 1 Will. & Mary, c. 1, and in 30 Car. 2, st. 2, and accept the articles of religion, excepting arts. 34, 35, and 36, and certain words of the twentieth article. But Papists and those denying the doctrines of the Blessed Trinity as declared in the said articles of religion are omitted from the protection of this statute. The penalties from which this statute grants relief are statutory penalties and disabilities, and it left the common law exactly what

F it was. The Blasphemy Act, 1697, is really an Act directed against apostates from the Christian faith, and that Act again provides certain penalties, cumulative and severe on second conviction, for any person who, having been educated in, or at any time having made profession of, the Christian religion within this realm, shall by writing or advised speaking deny any one of the Persons of the Holy

G Trinity to be God, or who shall assert that there are more Gods than one, or shall deny the Christian religion to be true. This is a disabling statute still unrepealed, imposing penalties so severe that it is said no prosecution has ever been instituted under its provisions. Its terms, therefore, demand the narrowest and most jealous scrutiny. The fact that it has only incidentally been brought under judicial notice may explain the loose, and, as I think, erroneous, references

H made to its effect, as, for example, by LORD LYNTHURST in *Shore v. Wilson* (19), where he says that “those persons who by preaching denied the doctrine of the Trinity are subject to the penalties of the Act,” and again by BRAMWELL, B., in *Cowan v. Milbourn* (2). This is not accurate; only those persons who have been educated in, or had at any time made profession of, the Christian religion within the realm could incur the statutory penalties.

I The Act 53 Geo. 3, c. 160 [Doctrine of the Trinity], repeals so much of the Toleration Act as provides that the exemption of the statute shall not extend so as to give its advantage or benefit to persons denying the doctrines of the Blessed Trinity, and for the purposes of making this exemption effectual it repeals the Blasphemy Act so far as was necessary. The Religious Disabilities Act, 1846, provided that persons professing the Jewish religion shall, in respect of their schools, places of religious worship, educational, and charitable purposes, and property held by them, be subject to the same laws as His Majesty's Protestant subjects who dissent from the Church of England. This means that they are freed

from all disabilities imposed by statute and open to all existing at common law. This is the view expressly stated by LORD ELDON in *A.-G. v. Pearson* (30) (3 Mer. at p. 405), and is in agreement with the decisions in *R. v. Carlile* (29) and *R. v. Waddington* (10). So far as holding property is concerned, Jews are to be regarded as being in the same position as His Majesty's Protestant subjects who dissent from the Church of England. This must be taken to mean that they can hold property; for the common law—whatever its scope—did not specially safeguard what we now know as the established church, but the Christian faith. And there was never anything, apart from statutory disabilities, to prevent Protestant dissenters from holding property: *A.-G. v. Pearson* (30) (3 Mer. at pp. 309, 410). Of course, while any particular belief was made the subject of penalty by statute, a gift to further the purpose of that belief would be contrary to the statute law, but when once the statutory disability was removed, unless some disability could be found outside, there could be nothing to hinder the gift of money for the purpose of any such association.

It is this that explains the decision in *West v. Shuttleworth* (44) [overruled by the House of Lords in *Bourne v. Keane* [1918-19] All E.R. Rep. 167]; which was a decision on the statute in relief of Roman Catholics similar to that in relief of Jews—the Roman Catholic Charities Act, 1832. Now, the Roman Catholic religion—whatever views may be taken of the Reformation—was certainly never contrary to the common law, and, therefore, when once the statutory prohibitions were taken away, difficulties as to receipt of money for the general purpose of their faith was not forbidden. In *Shrewsbury v. Hornby* (45) a gift in support of Unitarian doctrine was held good, and it is suggested that this was because 53 Geo. 3, c. 160, repealed the common law so far as it affected Protestant ministers. I am unable to find that the statute effects this purpose. If by implication any part of the common law is repealed there would appear to be no particular reason why it should be repealed so as to allow a special class of Protestant dissenters—but not other people—to deny the doctrine of the Holy Trinity. It would, indeed, be strange if the publication of a book, or the delivery of a lecture, would be legal or illegal according to the religious opinion of the person who wrote it and not according to its contents. If any repeal at all had been effected by these Acts it would, in my opinion, have been the repeal of the whole doctrine had it ever existed; but the true view, in my judgment, is that it did not exist. The common law throughout remains unaffected, and I cannot find any case except *Briggs v. Hartley* (1) where as a necessary step in the decision it is enunciated in terms as wide as are necessary to support the appellants' case. For example, in *Thompson v. Thompson* (17) (1 Coll. at pp. 381, 397), where it was held that a gift will be supported for the encouragement of the general doctrines advocated in a testator's writings if neither atheism, sedition, nor any crime or immorality is to be inculcated. Again, in *Evans v. Chamberlain of London* (43) LORD MANSFIELD defined the common law in these terms (2 Burn's Eccl. Law, 9th Edn., at p. 218):

"There was never a single instance from Saxon times down to our own in which a man was ever punished for erroneous opinions concerning rites and modes of worship but upon some positive law. The common law of England, which is only common reason or usage, knows of no prosecution for mere opinions. For atheism, blasphemy, and reviling the Christian religion there have been persons prosecuted and punished upon the common law."

It is unnecessary to determine whether and under what circumstances the promulgation of atheism is illegal, for by "atheism" in this connection I understand as a disbelief in one eternal and invisible God, and I have already stated my views that the respondents' objects do not properly include the advocacy of such a doctrine. Blasphemy is constituted by violent and gross language, and the phrase, "reviling the Christian religion," shows that without vilification there is no offence.

A I am glad to think that this opinion is supported by the carefully considered and weighty utterances of many learned judges. *Shore v. Wilson* (19), in its actual result, depended upon a question of construction of deeds of trust and upon special facts, and, so regarded, the decision could have but little application to other disputes; but when the case was before this House the opinions of the judges were taken on certain questions, and the sixth question was this:

B "Whether such (i.e., Unitarian) ministers, preachers, widows and persons are in the present state of the law incapable of partaking of such charities or any and which of them."

ERSKINE, J. (9 Cl. & Fin. at p. 525), COLERIDGE, J. (ibid. at p. 539), MAULE, J. (ibid. at p. 509), WILLIAMS, J. (ibid. at p. 545), GURNEY, B. (ibid. at p. 554), PARKE, B. (ibid. at p. 565), and TINDAL, C.J. (ibid. at p. 578), all agreed in thinking that they were not. It is true that COLERIDGE, J., based his opinion upon the ground that Unitarians were Christians, but MAULE, J., stated that there was no authority to show that teaching Unitarian doctrine was contrary to the common law. And ERSKINE, J., stated that it was open to any man "without subjecting himself to any penal consequences soberly and reverently to examine and question the truth of those doctrines which have been assumed as essential to the Christian faith." There is, indeed, to be found in certain of these opinions indications of the view expressed in *R. v. Woolston* (6) that it is not illegal to deny any doctrine of the Christian faith, but that it is to deny them all collectively. I cannot accept this view of the law. The Christianity, offences against which are illegal at common law, is the Christianity known to the common law, and Unitarian Christianity is opposed to the central doctrine of this faith. There remains *Cowan v. Milbourn* (2), in which the distinction urged by the appellants is clearly stated by BRAMWELL, B.; but it is equally clear that he misconceived the meaning of the Blasphemy Act, for he based his judgment on the statement that the hirer "proposed to use the rooms for purposes declared by the statute to be unlawful," but, as I have already shown, the statute had no such comprehensive scope.

F I am unable to ascertain what is the real reason upon which the distinction is supported. It appears to me that offences against Christianity, so far as they are recognised by law, are either statutory offences, leading to statutory penalties, or they are criminal offences at common law, punishable by the criminal courts, and I am unable to see how such offences, if not so punishable, exist at all, or how in this connection an act can be illegal without being the subject of prosecution.

G for even if it be accepted that Christianity is part of the common law it does not follow that it is illegal to question its wisdom or its truth. The analogy of the cases with regard to restraint of trade and immorality of consideration does not appear to me to be sound. Restraint of trade, though contrary to the common law of England, never was a criminal offence; and, again, acts of immorality, though not criminal, cannot be made the consideration sufficient to support a contract, nor can a contract entered into to further such acts be enforced in the courts. The latter of these classes of case are those which offend against good morals—the former are those contrary to public policy. The alleged offence in this case is neither one nor the other. The common law of England, in the words of LORD MANSFIELD, "knows no prosecution for mere opinion," and if the holding of opinion be not contrary to the common law, I cannot see why its expression should be unlawful, provided such expression be kept within proper limits of order, reverence, and decency. If this be so, a society to propagate such opinions, if properly conducted, is not an illegal society.

I I have only to add that, apart altogether from these considerations, I think that the respondents are well founded in arguing that since the company is a legal entity, and as some at least of its objects are on the face of them lawful, there is no ground upon which it is possible to prevent them from receiving money which has been the subject of a bequest in their favour. I cannot accede to the

argument that the later purposes in the memorandum, which, taken alone, must be regarded as proper and lawful objects; become unlawful because they are associated with the first purpose of the memorandum. If an unequivocal act be lawful in itself the motive with which it is performed is immaterial; and, if it be said that all the later purposes are the instruments by which the first purpose may be effected, this, as it seems to me, may be an argument for showing that the first purpose is lawful, but it cannot establish that the later purposes are not. Even if all the objects of the company were illegal it would not follow that while the certificate of incorporation remained unrevoked the company would be unable to receive money. It is a mistake to treat the company as a trustee, for it has no beneficiaries and there is no difference between the capacity in which it receives a gift and that in which it obtains payment of a debt. In either case the money can only be used for the purposes of the company, and in neither case is the money held on trust. If, by oversight or mistake, a company were incorporated for wholly illegal objects, the right course to follow, where its capacity to receive money was questioned, in legal proceedings would be to direct an adjournment till proper steps had been taken to revoke the incorporation. This matter has been so fully dealt with by LORD PARKER, with whose views I entirely agree, that I do not desire to elaborate it further. For these reasons I am of opinion that this appeal should be dismissed.

Solicitors : *Calder, Woods & Pethick; Stoneham & Sons.*

[Reported by W. E. REID, Esq., Barrister-at-Law.]

R. v. BASKERVILLE

[COURT OF CRIMINAL APPEAL (Viscount Reading, C.J., Scrutton, Avory, Rowlatt and Atkin, JJ.), May 29, July 31, 1916]

[Reported [1916] 2 K.B. 658; 86 L.J.K.B. 28; 115 L.T. 453; 80 J.P. 446; 60 Sol. Jo. 696; 25 Cox, C.C. 524; 12 Cr. App. Rep. 81]

Criminal Law—Evidence—Corroboration—Accomplice—Essentials of corroboration—Independent evidence implicating accused—Warning to jury—Review of verdict by Court of Criminal Appeal.

It has long been a rule of practice at common law for the judge at the trial of a person for a criminal offence to warn the jury of the danger of convicting the prisoner on the uncorroborated evidence of an accomplice or accomplices, and, in his discretion, to advise them not to convict on such evidence. In the absence of such a warning the Court of Criminal Appeal will quash the conviction, but will not do so if, after a proper caution by the judge, the jury nevertheless convict the prisoner, unless it thinks that the verdict is "unreasonable" or "cannot be supported having regard to the evidence" within s. 4 (1) of the Criminal Appeal Act, 1907. In considering whether or not the conviction should stand the Court of Criminal Appeal will review all the facts of the case, and will bear in mind that the jury had the opportunity of hearing and seeing the witnesses when giving their testimony.

The corroboration required must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, i.e., which confirms in some material particular not only the evidence that the crime has been committed,

- A** but also that the prisoner committed it. The corroboration need not be direct evidence that he committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with it. Nor is it necessary that the accomplice should be confirmed in every detail of his evidence; if it were, his evidence would be merely confirmatory of the independent testimony and would not be essential to the case. The evidence given by one accomplice
- B** cannot be corroboration of the evidence of another accomplice, and where an accomplice gives evidence against two prisoners who are tried together corroboration of his evidence against one prisoner is not corroboration of his evidence against the other.

C **Notes.** Considered: *R. v. Evans* (1924), 88 J.P. 196. Applied: *R. v. Beebe* (1925), 133 L.T. 736. Considered: *Statham v. Statham*, [1928] All E.R. Rep. 219. Applied: *R. v. Charavanmuttu* (1930), 22 Cr. App. Rep. 1. Considered: *R. v. Davies* (1930), 22 Cr. App. Rep. 33; *R. v. Lewis*, [1937] 4 All E.R. 360; *Nkambule v. R.*, [1950] A.C. 379; *Davies v. D.P.P.*, [1954] 1 All E.R. 507. Referred to: *R. v. Wyman* (1918), 13 Cr. App. Rep. 163; *R. v. Feigenbaum*, [1918-19] All E.R. Rep. 489; *R. v. Smith* (1919), 14 Cr. App. Rep. 74; *R. v. Wakeley* (1919), 84 J.P. 31; *R. v. Warren* (1919), 14 Cr. App. Rep. 4; *R. v. Schiff* (1920), 15 Cr. App. Rep. 63; *R. v. Howard* (1921), 15 Cr. App. Rep. 177; *Thomas v. Jones*, [1920] All E.R. Rep. 462; *R. v. Crocker*, [1922] All E.R. Rep. 775; *R. v. Rudge* (1923), 17 Cr. App. Rep. 113; *R. v. Ross* (1924), 18 Cr. App. Rep. 141; *R. v. Harris*, [1927] All E.R. Rep. 473; *R. v. Manser* (1934), 25 Cr. App. Rep. 18; *Mahadeo v. R.*, [1936] 2 All E.R. 813; *R. v. Hervey*, *R. v. Goodwin* (1939), 27 Cr. App. Rep. 146; *R. v. Barnes*, *R. v. Richards*, [1940] 2 All E.R. 229; *R. v. Day*, [1940] 1 All E.R. 402; *R. v. Hartley*, [1941] 1 K.B. 5; *R. v. Cleal*, [1942] 1 All E.R. 203; *R. v. Moore* (1942), 28 Cr. App. Rep. 111; *R. v. Dent*, [1943] 2 All E.R. 596; *Fairman v. Fairman*, [1949] 1 All E.R. 938; *Bereng Griffith Leretholi v. R.*, [1950] A.C. 11.

F As to corroboration in criminal cases see 10 HALSBURY'S LAWS (3rd Edn.) 458-462, and for cases see 14 DIGEST (Repl.) 533 et seq.

Cases referred to:

- (1) *R. v. Atwood and Robbins* (1788), 1 Leach, 464; 14 Digest (Repl.) 534, 5182.
- G** (2) *R. v. Stubbs* (1855), Dears. C.C. 555; 25 L.J.M.C. 16; 26 L.T.O.S. 109; 19 J.P. 760; 1 Jur. N.S. 1115; 4 W.R. 85; 7 Cox, C.C. 48, C.C.R.; 14 Digest (Repl.) 535, 5191.
- (3) *R. v. Meunier*, [1894] 2 Q.B. 415; 63 L.J.M.C. 198; 71 L.T. 403; 42 W.R. 637; 18 Cox, C.C. 15; 10 R. 400, D.C.; 14 Digest (Repl.) 535, 5193.
- (4) *R. v. Tate*, [1908] 2 K.B. 680; 77 L.J.K.B. 1043; 99 L.T. 620; 72 J.P. 391; 52 Sol. Jo. 699; 21 Cox, C.C. 693; 1 Cr. App. Rep. 39, C.C.A.; 14 Digest (Repl.) 539, 5240.
- H** (5) *R. v. Mullins* (1848), 12 J.P. 776; 3 Cox, C.C. 526; 14 Digest (Repl.) 410, 3996.
- (6) *R. v. Noakes* (1832), 5 C. & P. 326; 14 Digest (Repl.) 536, 5199.
- (7) *R. v. Birkett and Brady* (1813), Russ. & Ry. 251, C.C.R.; 14 Digest (Repl.) 538, 5218.
- I** (8) *R. v. Jones* (1809), 2 Camp. 131; 31 State Tr. 251; 14 Digest (Repl.) 535, 5184.
- (9) *R. v. Hastings and Graves* (1835), 7 C. & P. 152; 3 Nev. & M.M.C. 396; 14 Digest (Repl.) 535, 5186.
- (10) *R. v. Avery* (1845), 4 L.T.O.S. 493; 1 Cox, C.C. 206; 14 Digest (Repl.) 535, 5188.
- (11) *R. v. Wilkes* (1836), 7 C. & P. 272; 14 Digest (Repl.) 538, 5224.
- (12) *R. v. Farler* (1837), 8 C. & P. 106; 14 Digest (Repl.) 538, 5225.
- (13) *R. v. Dyke* (1838), 8 C. & P. 261; 14 Digest (Repl.) 538, 5226.

- (14) *R. v. Birkett* (1839), 8 C. & P. 732; 14 Digest (Repl.) 538, 5228.
- (15) *R. v. Everest* (1909), 73 J.P. 269; 2 Cr. App. Rep. 116, 130, C.C.A.; 14 Digest (Repl.) 538, 5230.
- (16) *R. v. Wilson, Lewis and Havard* (1911), 6 Cr. App. Rep. 125, C.C.A.; 14 Digest (Repl.) 539, 5234.
- (17) *R. v. Blatherwick* (1911), 6 Cr. App. Rep. 281, C.C.A.; 14 Digest (Repl.) 533, 5179.
- (18) *Bradshaw v. Waterlow & Sons, Ltd.*, [1915] 3 K.B. 527; 85 L.J.K.B. 318; 113 L.T. 1101; 31 T.L.R. 556, C.A.; 14 Digest (Repl.) 536, 5213.
- (19) *R. v. Brown* (1911), 6 Cr. App. Rep. 147, C.C.A.; 14 Digest (Repl.) 535, 5194.
- (20) *R. v. Crane* (1912), 76 J.P. 261; 7 Cr. App. Rep. 113, C.C.A.; 15 Digest (Repl.) 1146, 11,535.
- (21) *R. v. Cohen* (1914), 111 L.T. 77; 24 Cox, C.C. 216; 10 Cr. App. Rep. 91, C.C.A.; 14 Digest (Repl.) 516, 4999.
- (22) *R. v. Willis*, [1916] 1 K.B. 933; 85 L.J.K.B. 1129; 114 L.T. 1047; 80 J.P. 279; 32 T.L.R. 452; 60 Sol. Jo. 514; 25 Cox, C.C. 397; 12 Cr. App. Rep. 44, C.C.A.; 14 Digest (Repl.) 540, 5246.
- (23) *R. v. Cooper* (1914), 10 Cr. App. Rep. 195, C.C.A.; 14 Digest (Repl.) 525, 5103.
- (24) *R. v. Jenkins* (1845), 1 Cox, C.C. 177; 14 Digest (Repl.) 542, 5255.

Also referred to in argument:

- R. v. Watson* (1913), 109 L.T. 335; 29 T.L.R. 450; 23 Cox, C.C. 543; 8 Cr. App. Rep. 249, C.C.A.; 14 Digest (Repl.) 511, 4942.
- R. v. Andrews and Payne* (1845), 5 L.T.O.S. 23; 1 Cox, C.C. 183; 14 Digest (Repl.) 535, 5190.
- R. v. Warren* (1909), 73 J.P. 359; 25 T.L.R. 633; 2 Cr. App. Rep. 194, C.C.A.; 14 Digest (Repl.) 539, 5231.
- R. v. Kams* (1910), 4 Cr. App. Rep. 8, C.C.A.; 14 Digest (Repl.) 533, 5177.
- R. v. Mason* (1910), 5 Cr. App. Rep. 171, C.C.A.; 14 Digest (Repl.) 543, 5266.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court before the Recorder of London of gross indecency with male persons, contrary to s. 11 of the Criminal Law Amendment Act, 1885 (now s. 13 of the Sexual Offences Act, 1956: 36 HALSBURY'S STATUTES (2nd Edn.) 223). The ground of the appeal was that he had been convicted on the evidence of accomplices which had not been corroborated.

Marshall-Hall, K.C., and *B. W. Ginsburg* for the appellant.

Bodkin and *E. C. P. Boyd* for the Crown.

July 31, 1916. The judgment of the court was read by

VISCOUNT READING, C.J.—The appellant was convicted of having committed offences under s. 11 of the Criminal Law Amendment Act, 1885. He appeals to this court on the ground that there was no such corroborative evidence as is required by law of the testimony of the three boys who were called for the prosecution at the trial and were accomplices in the crime. There is no statutory provision requiring corroboration applicable to these offences. At the close of the arguments we decided that there was abundant corroboration. In addition to the testimony of the accomplices, the following facts were given in evidence. A letter was proved to have been sent to one of the boys by the appellant in his handwriting, signed by him with his initial B., without any address on the letter, inclosing a note for 10s. to "Dear Harry," one of the boys, for himself and "Charlie," another of the boys, and making an appointment for them to meet the appellant "as arranged," without naming the place, and at a time stated. The prisoner had admitted to the police that the three boys had been at his flat, that he knew one as a pageboy at the Trocadero Restaurant, and that this boy had been to see him

A on several occasions with another boy, and the appellant suggested to the police that he belonged to a boys' club, and was entitled to invite any of the members to his place. The appellant was not a member of a boys' club. The appellant gave evidence at the trial and admitted that he had given money to two of the boys on various occasions, and that, on hearing a peculiar whistle outside his flat, he had gone downstairs to let the boys in. We entertained no doubt that this
B evidence afforded ample corroboration of the boys' testimony, even if we assumed that the corroboration required was corroboration "in some material particular implicating the accused." We were of opinion that in any event the direction given to the jury by the learned recorder regarding this matter gave no cause of complaint to the appellant. The warning by the recorder to the jury was sufficient, if indeed not more than sufficient. We, therefore, announced that the appeal
C would be dismissed.

Having regard, however, to the arguments addressed to the court and to the difficulty of reconciling all the opinions expressed in the cases cited, and to the general importance of reviewing and re-stating the law applicable to corroboration of the evidence of accomplices, we took time to consider our judgment. There is no doubt that the uncorroborated evidence of an accomplice is admissible in law :
D see *R. v. Atwood and Robbins* (1). But it has long been a rule of practice at common law for the judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices, and, in the discretion of the judge, to advise them not to convict upon such evidence; but the judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence: see *R. v. Stubbs* (2), and *Re Meunier* (3). This
E rule of practice has become virtually equivalent to a rule of law, and since the Criminal Appeal Act, 1907, came into operation this court has held that, in the absence of such a warning by the judge, the conviction must be quashed: see *R. v. Tate* (4). If after the proper caution by the judge the jury nevertheless convict the prisoner, this court will not quash the conviction merely upon the ground that the testimony of the accomplice was uncorroborated. It can but rarely happen
F that the jury would convict in such circumstances. In considering whether or not the conviction should stand, this court will review all the facts of the case, and will bear in mind that the jury had the opportunity of hearing and seeing the witnesses when giving their testimony. But this court, in the exercise of its powers, will quash a conviction, even when the judge has given to the jury the warning or advice above mentioned, if this court, after considering all the circum-
G stances of the case, thinks the verdict "unreasonable" or that it "cannot be supported having regard to the evidence": Criminal Appeal Act, 1907, s. 4 (1). This jurisdiction gives larger powers to interfere with verdicts than had heretofore existed in criminal cases.

In addition to the rule of practice above mentioned, there are, with regard to
H certain offences, statutory provisions

"that no person shall be convicted of an offence under this section upon the evidence of one witness only, unless such witness be corroborated in some material particular by evidence implicating the accused."

For example, the Criminal Law Amendment Act, 1885, s. 2, s. 3 [see now s. 2, s. 3, s. 22, s. 23 of Sexual Offences Act, 1956]. In these cases the law is that the judge,
I in the absence of such corroborative evidence, must stop the case at the close of the prosecution and direct the jury to acquit the accused. Where no such statutory provision is applicable to the offence charged, and the evidence for the prosecution consists of the uncorroborated testimony of an accomplice or accomplices, the law is that the judge should leave the case to the jury after giving them the caution already mentioned.

As the rule of practice at common law was founded originally upon the exercise of the discretion of the judge at the trial, and, moreover, as it is anomalous in its

nature, inasmuch as it requires confirmation of the testimony of a competent witness, it is not surprising that this rule should have led to differences of opinion as to the nature and extent of the corroboration required, although there are propositions of law applicable to corroboration which are beyond controversy. For example,

"Confirmation does not mean that there should be independent evidence of that which the accomplice relates, or his testimony would be unnecessary":

MAULE, J., in *R. v. Mullins* (5), 3 Cox, C.C. at p. 531.

Indeed, if it were required that the accomplice should be confirmed in every detail of the crime, his evidence would not be essential to the case; it would be merely confirmatory of other and independent testimony. Again, the corroboration must be by some evidence other than that of an accomplice, and, therefore, the evidence given by one accomplice is not corroboration of the testimony of another accomplice: *R. v. Noakes* (6). The difference of opinion has arisen mainly in reference to the question whether the corroborative evidence must connect the accused with the crime. The rule of practice as to corroborative evidence has arisen in consequence of the danger of convicting a person upon the unconfirmed testimony of one who is admittedly a criminal. What is required is some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it. If the only independent evidence relates to an incident in the commission of the crime which does not connect the accused with it, or if the only independent evidence relates to the identity of the accused without connecting him with the crime, is it corroborative evidence? There are some expressions in the books which imply that it may be, and in *R. v. Birkett and Brady* (7) the judges were of opinion that an accomplice did not require confirmation as to the person he charged, if he was confirmed as to the particulars of his story. The case is very imperfectly reported and the evidence is not stated. It was not argued by counsel, but was stated verbally to a meeting of the judges by the judge who tried the case. There are other cases where it has been held that a conviction on such evidence could not be quashed by the court, but the ratio decidendi is that as an accomplice is a competent witness and the jury thought him worthy of credit, the verdict was in accordance with law. *R. v. Atwood and Robbins* (1) and *R. v. Jones* (8) may be referred to. There are other cases where it has been held that on such evidence the case cannot be withdrawn from the jury: e.g., *R. v. Hastings and Graves* (9) and *R. v. Avery* (10).

After examining these and other authorities to the present date, we have come to the conclusion that the better opinion of the law upon this point is that stated in *R. v. Stubbs* (2) by PARKE, B., namely, that the evidence of an accomplice must be confirmed not only as to the circumstances of the crime, but also as to the identity of the prisoner. The learned baron does not mean that there must be confirmation of all the circumstances of the crime; as we have already stated, that is unnecessary. It is sufficient if there is confirmation as to a material circumstance of the crime and of the identity of the accused in relation to the crime. PARKE, B., gave this opinion as a result of twenty-five years' practice; it was accepted by the other judges and has been much relied upon in later cases. In *R. v. Wilkes* (11) ALDERSON, B., said (7 C. & P. at p. 273):

"The confirmation which I always advise juries to require is the confirmation of the accomplice in some fact which goes to fix the guilt on the particular person charged. You may legally convict on the evidence of an accomplice, if you can safely rely on his testimony, but I advise juries never to act on the evidence of any accomplice unless he is confirmed as to the particular person who is charged with the offence."

In *R. v. Farler* (12) LORD ABINGER, C.B., said (8 C. & P. at pp. 107, 108):

"It is a practice which deserves all the reverence of law, that judges have uniformly told juries that they ought not to pay any respect to the testimony

A of an accomplice, unless the accomplice is corroborated in some material circumstance. Now, in my opinion, that corroboration ought to consist in some circumstance that affects identity of the party accused. A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history, without identifying the persons, that is really no corroboration at all. . . . It would not
B at all tend to show that the party accused participated in it."

In *R. v. Dyke* (13) GURNEY, B., said:

"Although in some instances it has been so held, you will find that in the majority of recent cases it is laid down that the confirmation should be as to some matter which goes to connect the prisoner with the transaction."

C In *R. v. Birkett* (14) the prisoner was indicted for receiving stolen sheep. The evidence consisted of the statement of an accomplice, and, to confirm it, it was proved that a quantity of mutton corresponding in size with the sheep stolen was found in the house of the prisoner. PATTESON, J., said:

"If the confirmation had merely gone to the extent of confirming the accomplice as to matters connected with himself only, it would not have been sufficient
D . . . but here we have a good deal more; we have a quantity of mutton found in the house in which the prisoner resides, and that I think is such a confirmation of the evidence of the accomplice's evidence as I must leave to the jury."

These cases lead to the view expressed later by PARKE, B., in *R. v. Stubbs* (2), and show that in his time, although there had been doubt in the past, the law as formulated by him was accepted as the correct opinion, and continued to be the
E law to the time of the passing of the Criminal Appeal Act, 1907, and, in our judgment, to the present day.

We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him—that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offence for which corroboration is required by statute. The language of the statute "implicating the accused" compendiously incorporates the test applicable at common law in the rule of practice. The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in a high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true; not merely that the crime has been committed, but that it was committed by the accused. The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. A good instance of this indirect evidence is to be found in *R. v. Birkett* (14). Were the law otherwise, many crimes which are usually committed between accomplices in secret, such as incest, offences with females, or the present case, could never be brought to justice.

H The decisions of this court upon the nature of the corroboration required call for some examination, and it is because they do not always appear to be to the same effect that this court was specially constituted in order that we might lay down rules for future guidance. In *R. v. Everest* (15) the court said (2 Cr. App. Rep. at p. 132):

"The rule has long been established that the judge should tell the jury to acquit the prisoner if the only evidence against him is that of an accomplice, unless that evidence is corroborated in some particular which goes to implicate the accused."

We think "Tell the jury to acquit" should read "Warn the jury of the danger of convicting." There is no statement in the report of the exact warning given by the judge. In *R. v. Wilson, Lewis and Havard* (16) there was an abundant caution, and the court said (6 Cr. App. Rep. at p. 128):

"It must not be supposed that corroboration is required amounting to independent evidence implicating the accused."

If this means that the judge should not warn the jury to require independent corroboration of some part of the story which implicates or involves the accused, it goes too far. In *R. v. Blatherwick* (17) the court said: "*R. v. Everest* (15) goes too far. *R. v. Wilson* (16) is the correct statement of the law." We agree that *R. v. Everest* (15) goes too far in saying that the judge should direct the jury to acquit, but *R. v. Everest* (15) is the better statement of the law as regards the corroboration for which the jury should look. In *Bradshaw v. Waterlow & Sons, Ltd.* (18) ([1915] 3 K.B. at p. 534) PICKFORD, L.J., in the Court of Appeal was of opinion that the recent cases of *R. v. Wilson, Lewis and Havard* (16), *R. v. Brown* (19), *R. v. Blatherwick* (17), and *R. v. Crane* (20),

"show that it is not necessary to have corroboration directly implicating the accused if the corroboration which exists supports the truth of the story as a whole."

The learned lord justice was merely stating his view of these cases in regard to the case there before the court. He found, however, that in fact there was corroboration directly implicating the accused in the case then under appeal, and it was, therefore, unnecessary to consider further the cases cited. In *R. v. Cohen* (21) the court did not attempt to deal with the difference of opinion manifested by the decisions of *R. v. Everest* (15) and *R. v. Wilson, Lewis and Havard* (16), but, as explained in *R. v. Willis* (22), decided the case on the assumption that the view of the law more favourable to the appellant as laid down in *R. v. Everest* (15) was right. The court there said that it was the practice of this court to require corroboration before it could allow a conviction to stand. We did not intend to lay down such a rule of practice. It is too strongly expressed and is too general a statement. The correct view is that laid down earlier in the present judgment. The latest case is that of *R. v. Willis* (22). The court there stated ([1916] 1 K.B. at p. 937):

"There are certain statutes which provide that certain classes of evidence shall be insufficient to support a conviction unless corroborated by some other material evidence implicating the accused; but corroboration where required by the common law is not subject to any such qualification."

It follows from the law laid down in the present judgment that that is a correct view to the effect that the verdict of a jury properly warned would not be set aside merely because they had believed an accomplice without corroboration implicating the accused, but it must not be read as meaning that the corroboration need not be independent evidence implicating the accused. *R. v. Cooper* (23) was referred to during the course of the argument in the present case. That case turned upon special facts relating to the medical testimony. It did not alter the law. Now that we have stated the law to be applied in future cases, we trust that it will be unnecessary again to refer to the earlier decisions of this court.

The question was discussed on the hearing of this appeal whether the evidence of an accomplice against two prisoners, corroborated as to one prisoner's participation in the crime, but not as to the other, can be regarded as corroboration with regard to both prisoners. We think the law is correctly stated by ALDERSON, B., in *R. v. Jenkins* (24). The learned baron there said:

"Where there is one witness of bad character giving evidence against both prisoners, a confirmation of his testimony with regard to one is no confirmation of his testimony as to the other. If, therefore, you find there is a corroboration

A applicable to one prisoner, take it as against him, but, unless it exists with regard to both, it seems to me it would be unjust to give it a general effect."

B *R. v. Jones* (8) may appear at first sight to be in the contrary direction, but upon closer examination we do not think that LORD ELLENBOROUGH intended to decide more than that when two prisoners are tried and convicted upon the evidence of an accomplice corroborated as to the one but not as to the other, the conviction of the other must nevertheless be regarded as a conviction which was good in law. LORD ELLENBOROUGH was upholding the rule of law that a conviction founded upon the evidence of an accomplice only could not be treated as bad in law. His Lordship said (2 Camp. at pp. 132, 133) :

C "Judges in their discretion will advise a jury not to believe an accomplice unless he is confirmed, or only in as far as he is confirmed, but, if he is believed, his testimony is unquestionably sufficient to establish the facts to which he deposes. It is allowed that he is a competent witness, and the consequence is inevitable that if credit is given to his evidence it requires no confirmation from another witness."

D We see no reason in principle why a different rule as to corroboration should apply to a prisoner tried with another against whom there is corroborative evidence of the accomplice's story from that applicable if the first prisoner had been tried alone. In that case the uncorroborated evidence of the accomplice would be admissible against him, but it would be the duty of the judge to give the proper caution to the jury, and it would be equally incumbent upon the judge to give the warning to the jury when the prisoner is tried with another against whom there is corroboration of the story told by the accomplice. If the judge failed to give the warning, the court would be bound to set aside the conviction. If the judge gave the warning, this court would then have to consider all the circumstances of the case as already indicated. The appeal stands dismissed.

Appeal dismissed.

Solicitors: *F. Freke Palmer; Director of Public Prosecutions.*

[*Reported by R. F. BLAKISTON, Esq., Barrister-at-Law.*]

GLAMORGANSHIRE COAL CO., LTD. v. GLAMORGANSHIRE
STANDING JOINT COMMITTEE AND OTHERS
POWELL DUFFRYN STEAM COAL CO., LTD. v. SAME

[COURT OF APPEAL (Phillimore and Pickford, L.J.J., and Bray, J.), December 8, 9, 10, 13, 14, 1915, February 5, 1916]

[Reported [1916] 2 K.B. 206; 85 L.J.K.B. 1193; 114 L.T. 717; 80 J.P. 289; 32 T.L.R. 293; 14 L.G.R. 419]

Police—Emergency Officers from other forces called in—Expense of maintenance and lodging—Liability of standing joint committee and county council—Protection of public—Right of party to dispute—County Police Act, 1839 (2 & 3 Vict., c. 93), s. 18—Local Government Act, 1888 (51 & 52 Vict., c. 41), s. 9, s. 100—Police Act, 1890 (53 & 54 Vict., c. 45), s. 25.

Acting under s. 25 of the Police Act, 1890, during a time of special emergency the chief constable of G., with the authority of the standing joint committee, entered into agreements with other police authorities under which officers of those authorities came to assist the police force of G., these officers to be housed and maintained by the police authority of G. The need for assistance resulted from a strike of colliery workers at G. in which there had been rioting and an anticipation by the colliery owners of damage being done to their property. At the request of the chief constable members of the local police and also of the aiding forces were lodged on the colliery premises and maintained at the expense of the colliery owners. In an action by the colliery owners to recover the cost of such maintenance from the standing joint committee and/or the county council of G.,

Held: in view of the provisions of s. 9 and s. 100 of the Local Government Act, 1888, and s. 25 of the Police Act, 1890, the standing joint committee had power to enter into the contracts in question and to authorise the chief constable to enter into them on their behalf, and (PHILLIMORE, L.J., dissenting) were liable to be sued on contracts so entered into, but an order must be made against the county council, as the authority responsible for providing money for the maintenance of the police force, for payment of the sums claimed by the colliery owners.

Per CURIAM: Section 18 of the County Police Act, 1839, which provides that allowances shall be made to the chief constable of a county for extraordinary expenses necessarily incurred by him, does not limit the powers of the county authorities to give the chief constable authority to make contracts.

Per PICKFORD, L.J.: If one party to a dispute is threatened with violence by the other party he is entitled to protection from such violence whether his contention in the dispute be right or wrong, and to allow the police authorities to deny him protection from that violence unless he pays all the expense, in addition to the contribution which, with other ratepayers, he makes to the support of the police, is only one degree less dangerous than to allow that authority to decide which party is right in the dispute, and grant or withhold protection accordingly. There is a moral duty on each party to the dispute to do nothing to aggravate it and to take reasonable means of self-protection, but the discharge of this duty by them is not a condition precedent to the discharge by the police authority of their own duty.

Per BRAY, J.: It is not material to inquire whether the authority [by the standing joint committee to the chief constable] had been given antecedently or was ratified by conduct afterwards. The whole conduct of the standing joint committee is overwhelming to show one or the other, and the defendants' counsel were obliged to admit that, if it were the case of a private person instead of a public body, ratification could not be disputed. I know of no

A distinction between a private person and a public body in such a case, provided always that the public body has the power to contract and that power is not limited by provisions requiring that it shall be exercised in a particular way. No point has been raised in this case that the power had to be exercised in any particular way.

B Decision of *BANKES, J.* ([1915] 1 K.B. 471) affirmed on these points, but varied with regard to a further question of fact.

Notes. Considered: *Glasbrook Bros., Ltd. v. Glamorgan County Council*, [1924] All E.R. Rep. 579; *Rodwell v. Minister of Health*, [1947] 1 All E.R. 80.

C As to mutual aid between police forces, see 30 HALSBURY'S LAWS (3rd Edn.) 128, 129; and for cases see 37 DIGEST 185. For County Police Act, 1839, and Police Act, 1890, see 18 HALSBURY'S STATUTES (2nd Edn.) 42, 103, and for Local Government Act, 1888, see *ibid.*, vol. 14, p. 171.

Cases referred to :

(1) *The Feronia* (1868), L.R. 2 A. & E. 65; 37 L.J. Adm. 60; 17 L.T. 619; 16 W.R. 585; 3 Mar. L.C. 54; 41 Digest 938, 8289.

(2) *Dean and Chapter of Fernes Case* (1608), Dav. Ir. 42; 13 Digest (Repl.) 261, *123.

(3) *R. v. Inhabitants of Essex* (1792), 4 Term Rep. 591; Nolan, 56; 100 E.R. 1193; 33 Digest 110, 736.

(4) *Re Local Government Act, 1888, Ex parte Somerset County Council* (1889), 58 L.J.Q.B. 513; 61 L.T. 512; sub nom. *Re Somerset County Council*, 54 J.P. 182; 5 T.L.R. 712, D.C.; 33 Digest 376, 847.

E Also referred to in argument :

R. v. Glamorgan County Council, [1899] 2 Q.B. 536; 68 L.J.Q.B. 1047; 64 J.P. 115; 48 W.R. 112; 15 T.L.R. 536; sub nom. *R. v. Glamorganshire County Council, Ex parte Miller*, 81 L.T. 372, C.A.; 33 Digest 110, 743.

R. v. Pinney (1832), 3 B. & Ad. 947; 5 C. & P. 254; 3 State Tr. N.S. 11; 1 Nev. & M.M.C. 307; 110 E.R. 349; 33 Digest 306, 234.

F *Wolmershausen v. Gullick*, [1893] 2 Ch. 514; 62 L.J.Ch. 773; 68 L.T. 753; 9 T.L.R. 437; 3 R. 610; 26 Digest (Repl.) 150, 1115.

Owen v. Delamere (1872), L.R. 15 Eq. 134; 42 L.J.Ch. 232; 27 L.T. 647; 21 W.R. 218; 24 Digest (Repl.) 617, 6129.

Marsh v. Joseph, [1897] 1 Ch. 213; 66 L.J.Ch. 128; 75 L.T. 558; 45 W.R. 209; 13 T.L.R. 136; 41 Sol. Jo. 171, C.A.; 1 Digest 417, 1122.

G *Phosphate of Lime Co. v. Green* (1871), L.R. 7 C.P. 43; 25 L.T. 636; 9 Digest (Repl.) 440, 2872.

R. v. West Riding of Yorkshire County Council, [1895] 1 Q.B. 805; 64 L.J.M.C. 145; 72 L.T. 520; 59 J.P. 340; 43 W.R. 386; 11 T.L.R. 311; 18 Cox, C.C. 141; 14 R. 391, C.A.; 37 Digest 185, 78.

H *Metropolitan Police Comr. v. Hancock*, [1916] 1 K.B. 190; 85 L.J.K.B. 339; 114 L.T. 67; 80 J.P. 144; 32 T.L.R. 95; 14 L.G.R. 604, D.C.; 37 Digest 183, 60.

Salford Corpn. v. Lancashire County Council (1890), 25 Q.B.D. 384; 59 L.J.Q.B. 576; 63 L.T. 409; 55 J.P. 85; 38 W.R. 661; 6 T.L.R. 362, C.A.; 33 Digest 113, 759.

I *Bootle-cum-Linacre Corpn. v. Lancashire County Council* (1890), 60 L.J.Q.B. 323; 7 T.L.R. 179, C.A.; 33 Digest 94, 640.

Firth v. Staines, [1897] 2 Q.B. 70; 66 L.J.Q.B. 510; 76 L.T. 496; 61 J.P. 452; 45 W.R. 575; 13 T.L.R. 394; 41 Sol. Jo. 494; 1 Digest 403, 1033.

R. v. Chelmsford (Churchwardens) (1843), 5 Q.B. 66; 3 Gal. & Dav. 357; 12 L.J.M.C. 139; 1 L.T.O.S. 108, 385; 7 J.P. 432, 447; 7 Jur. 879; 114 E.R. 1172; 37 Digest 189, 104.

R. v. Leicester Justices (1827), 7 B. & C. 6; 9 Dow. & Ry. K.B. 772; 4 Dow. & Ry. M.C. 518; 5 L.J.O.S.M.C. 95; 108 E.R. 627; 37 Digest 183, 65.

R. v. Lewisham Union, [1897] 1 Q.B. 498; 66 L.J.Q.B. 403; 76 L.T. 324; 61 J.P. 151; 45 W.R. 346; 13 T.L.R. 154; 41 Sol. Jo. 210; 38 Digest (Repl.) 202, 259. A

Davies v. Gas Light and Coke Co., [1909] 1 Ch. 708; 78 L.J.Ch. 445; 100 L.T. 553; 25 T.L.R. 428; 53 Sol. Jo. 399; 16 Mans. 147, C.A.; 10 Digest (Repl.) 1217, 8524.

Smith v. Chorley Rural Council, [1897] 1 Q.B. 678; 66 L.J.Q.B. 427; 76 L.T. 637; 61 J.P. 340; 45 W.R. 417; 13 T.L.R. 327; 41 Sol. Jo. 422, C.A.; 26 Digest (Repl.) 550, 2209. B

Guaranty Trust Co. of New York v. Hannay & Co., [1915] 2 K.B. 536; 84 L.J.K.B. 1465; 113 L.T. 98; 21 Com. Cas. 67, C.A.; 30 Digest (Repl.) 174, 239.

Baxter v. London County Council (1890), 63 L.T. 767; 55 J.P. 391; 7 T.L.R. 142; 30 Digest (Repl.) 175, 242. C

Appeal by defendants (other than Captain Lionel Lindsay) from an order of BANKES, J. ([1915] 1 K.B. 471), upon the trial of preliminary questions of liability raised on the pleadings in two actions brought by the plaintiffs against the defendants in which the plaintiffs sought to recover sums of money expended by them at the request of the defendant, Captain Lindsay, acting as chief constable of the county of Glamorgan, with the authority of the other defendants, the Standing Joint Committee of Glamorganshire Quarter Sessions and County Council, on the housing and feeding of police who had been brought into the county of Glamorgan during 1910 and 1911 in consequence of unrest and disorders arising from disputes between the plaintiffs and their workmen. D

The facts are stated in the headnote and further referred to in their LORDSHIPS' judgments. E

Duke, K.C., and *C. Willoughby Williams* for the standing joint committee.

Holman Gregory, K.C., and *Vaughan Williams, K.C.*, for the county council.

Clavell Salter, K.C., and *J. R. Randolph, K.C.*, for the Glamorgan Coal Co.

Macmorran, K.C., and *M. M. Macnaghten* for the Powell Duffryn Steam Coal Co. F

Cur. adv. vult.

Feb. 5, 1916. The following judgments were read.

PHILLIMORE, L.J. [after stating the facts in detail].—The Act under which the aiding agreements were made is the Police Act, 1890, s. 25 of which provides : G

“(1) Where a police authority deem it expedient for any special emergency or under any exceptional circumstances to strengthen their police force (in this section referred to as the aided force) by constables belonging to another police force, such number of constables belonging to the latter force may be added to the aided force, and for such period as may be agreed on between the police authorities of the forces, and the constables so added, notwithstanding that they have not been sworn or taken any declaration as constables of the aided force, shall during that period be deemed, save as otherwise provided by the agreement, to be for all purposes constables of the aided force, and shall have the like powers, duties, and privileges. (2) The agreement may be made for a particular occasion or as a standing agreement, and with reference either to recurring or to unforeseen events, or otherwise, as may be thought expedient. (3) Any power conferred on a police authority by this section, or by any agreement made thereunder, may (subject to anything in the agreement to the contrary) be delegated by the authority to their chief officer of police by any general or special order and with or without any exceptions, restrictions, or conditions. (4) An agreement under this section may contain such terms as to the command of the constables added to the aided forces, and as to the expenses (including the pay and allowances of the constables so added and I

A provision for pensions, gratuities, and allowances in the event of those constables being killed or injured) and otherwise, as may seem expedient."

I shall have later to consider what authority, if any, there was for the chief constable to enter into these agreements with authorities other than those discussed in 1909, but before I part with the actual documents I may usefully make these remarks. The Police Act, 1890, defines "police authority" by s. 33 and the third schedule as follows—in a county "the standing joint committee of the quarter sessions and the county council," and in a borough the watch committee. The chief constables, therefore, have neither authority to let nor hire without the sanction of their standing joint committee in the case of counties, and the watch committee in the case of cities and boroughs.

C These being the facts, the two coal companies brought their actions, each in similar form. A writ was issued against "the standing joint committee of the quarter sessions and the county council of Glamorgan composed of"—and then all the names of the members were set out. Another writ was issued against the county council; and each pair of actions were afterwards consolidated. In the Glamorgan case there was a third writ against the standing joint committee (not expressing their names this time) and Captain Lindsay, which was also consolidated. This was unnecessary in the Powell Duffryn case, as he had been made a defendant along with the standing joint committee. The statements of claim and the pleadings generally need not be particularly referred to, except in respect of the prayer or claim. In each case a judgment was asked against the chief constable for the sum claimed. In the Glamorgan Coal Co. case a judgment was asked for the sum claimed against the defendant council, the standing joint committee, and Lindsay, jointly, severally, or in the alternative. In each case, as an alternative claim, damages were asked for against Captain Lindsay for breach of his warranty that he had authority to contract. In addition to these comparatively simple claims, there were alternatives and more unusual prayers which I need not set out, because towards the end of the trial the prayer for relief was amended substantially into the form in which judgment was ultimately given by the learned judge. At the conclusion of the trial judgment was given for Captain Lindsay with costs. There has been no appeal against this judgment, and he has not been brought before us.

F The trials came on before BANKES, J., under orders that the preliminary questions of liability be tried, reserving the question of damages, and the form of the judgment in either case was as follows: The judge

G "decided in favour of the plaintiffs against the defendants, the standing joint committee, on all questions of liability raised on the pleading, with costs, and directed judgment to be entered for the plaintiffs against the defendants for the amount of expenditure (when ascertained as hereinafter directed) incurred by the plaintiffs in respect of the police (other than the metropolitan police) referred to in the pleadings, and further declared that all the expenditure incurred by the plaintiffs and referred to in the pleadings, in respect of all the police referred to in the pleadings, including the metropolitan police, was extraordinary expenditure necessarily incurred by the defendant Lindsay; that the constables under his orders in the execution of his and their duty come within the meaning of the County Police Act, 1839; that the defendant Lindsay was entitled to payment thereof out of the county fund of the county of Glamorgan, subject to the examination and audit by the standing joint committee of his accounts relating thereto, as required by s. 18 of the last-mentioned Act; and that the defendant council were bound, subject to the said examination and audit, to pay the last-mentioned expenditure to the defendant Lindsay for the use and benefit of the plaintiffs."

I The learned judge further directed the defendant council to pay the last-mentioned expenditure when ascertained to the defendant Lindsay for the use



and benefit of the plaintiffs, and directed the defendant Lindsay to pay over the same to the plaintiffs.

Both the standing joint committee and the county council have appealed from these judgments, and it appears to me that there are five matters for our consideration, (i) (ii) and (iii), the authority of the chief constable to bind the county (using the phrase "county" as before in quite a general way) to pay for board and lodging or lodging of Glamorgan police, of generally aiding police, and of the metropolitan police; (iv) the liability of the standing joint committee and of the county council, either or both, to be sued upon a contract made by the chief constable within the scope of his authority; and (v) the form of the remedy or judgment.

First, as to the authority of the chief constable in respect of feeding or housing Glamorgan police. The evolution of the county police has been a gradual one. Under the Special Constables Act, 1831, new or additional powers were given to the justices to appoint and swear in special constables, and by s. 13 the justices for the division may, at a special session, order reasonable allowances to be paid to special constables for their trouble, loss of time, and expenses, and the county treasurer is to pay on such order. From this probably developed the establishment of paid constables, which was made pretty general by the County Police Act, 1839, and universal by the County and Borough Police Act, 1856. Under the Act of 1839 the justices were empowered to appoint a chief constable, who was to appoint petty constables, and were to provide for their pay and clothing, and in some instances for stations and lock-ups, drawing for this purpose upon the county rate. It seems to me that this statute gave them authority to contract, either by the chief constable or by some other agent whom they might select, for all things necessary for the maintenance of their force. Contracts would have to be made with tradesmen for uniforms, probably with builders, and with each policeman for his pay. If it seemed desirable to give a policeman less money and to provide him with lodging the necessary contracts would be made, and if his pay was given him on the footing that he lived with his wife and family, and then he was on special duty removed to a distant part of the county, his food would have to be given him, and the necessary contract could be made either with him or with an inn-keeper. The intermediary would be the chief constable, but his principals would be the justices. In the Act there is a s. 18 which has been ridden to death in this case. The defendants have said that, except in respect of pay and possibly uniform, it provides the only way by which the county can be bound, that for all other matters the chief constable must contract so as to bind himself, and then seek for repayment from the justices, who are to consider not what he has bound himself to pay, but what are his reasonable allowances. It seemed to be conceded that he need not actually make the disbursement before coming for repayment, as to which see *The Feronia* (1), but it was contended that the liability was his, and that there would be no primary contract between the tradesmen supplying and the county. On the other hand, the defendants use s. 18 as a warrant for the remarkable form of the latter part of the judgment, suggesting that in some way the court must determine what are just and proper allowances, or compel the county authorities to determine—and determine rightly—what are just and proper allowances to be made to the chief constable, and then that in some way the tradesmen should be subrogated to the chief constable and given in his name or through him a right of recovery, which he did not seek to exercise.

This section is, to my mind, a very simple and harmless one. It is as follows:

"In addition to the salary to be paid to the chief constable of the county, reasonable allowances shall be made to him for extraordinary expenses necessarily incurred by him, and by the constables under his orders, in the apprehension of offenders, and in the execution of his and their duty under

A this Act; which allowances shall be examined and audited by the justices of the county in quarter sessions assembled."

I think it means this. There are expenses which the chief constable, or, indeed, a petty constable, for the section applies to both, may have to incur on the spur of the moment. He may want to hire a vehicle to pursue an offender, or to carry him to the nearest lock-up, or before a justice. He may want, in order to lie in
B wait for or detect an offender, or to bring along a person to identify him, to incur small expenses for hiring a room or a disguise, or a vehicle. The chief constable may want to transport police and pay their railway fares. And as to some or all of these matters there may not be antecedent authority. The section provides that in such cases the justices may out of the county rate lawfully reimburse the constable. It means no more. It does not limit the powers which the county
C authorities have of giving an antecedent authority to make contracts. It does not give the person with whom the constable deals on his own credit any right as against the county. This being so, there is nothing in the section to prevent the county authorities from giving or being held by the mere virtue of his appointment to give to the chief constable authority to enter into necessary contracts for feeding and housing county police who are moved away from their stations or
D homes. Therefore, question No. (i) is answered, that the chief constable had authority to bind the county to pay the colliery companies, as the county has paid other tradesmen, for housing (if there was any housing) and feeding Glamorgan police.

Now question No. (ii) as to the general aiding police. The statute of 1890 makes
E such police, if they have been brought in under a lawful agreement, peace officers and police of the county. The question of the chief constable's power to provide by contract for the feeding and lodging of such police must arise. There can be no question that part of the remuneration of the aiding police must take the form of housing them and feeding them, unless the agreement gives them lodging and subsistence money. Therefore, as regards Somerset police, possibly as regards
F Bristol, possibly even as regards Swansea, Gloucester, and Cardiff, there is no difficulty. There remain the other counties and cities and boroughs. If there was authority to bring them in they stand on the same footing. The question therefore is: Was there authority? No doubt the statute states that the police authority is the chief constable empowered by his standing joint committee, by general or special order, and there is no recorded order. But the standing joint committee,
G though I suppose it must be considered so much an association that it must meet to pass resolutions as if its members were capitulariter congregati (see *Dean and Chapter of Fernes Case* (2)) and could not give assent through the separate adhesion of its several members, has yet no rules or none bearing upon this matter, does not meet except at stated and remote periods, has no provision for summoning special meetings, and must in such matters be taken to authorise either its chairman
H or its clerk or the chief constable to act in cases of emergency. The action of the sub-committee with regard to Bristol, the language of the chairman with regard apparently to Gloucester, Cardiff, and Swansea, show that formal agreements were not expected. I have noticed that, with the exception of London and Hertford, none of the agreements shows on its face that the chief constable of the aiding county had
I authority by order of his standing joint committee to make such an agreement, and the authority is quite as necessary for the aiding as for the aided chief constable. In no case does the aiding authority seem to have required any proof that the aided chief constable had authority. All these agreements spring from the Home Secretary's circular. All appear to be based, with some variations, upon the form of agreement which he suggests, which of itself does not deduce title in the chief constables to make agreements. It may well be that, since the circular, a standing joint committee which appoints a chief constable, without expressly forbidding him to contract or reserving to itself the power of contracting, must be taken.

by the mere fact of appointment, to authorise its chief constable not to make general agreements, not to make agreements lasting beyond the next meeting of the standing joint committee, but agreements binding in case of an emergency arising between two meetings. The conduct of the standing joint committee is good evidence of ratification if it could ratify. I see a difficulty about ratification because a lawfully introduced aiding policeman gets by the statute the privileges of a peace officer, and I do not understand how he could be without those privileges at the moment, say, of making an arrest, and get those privileges *ex post facto* to the detriment possibly of the person arrested, by reason of an unwarranted agreement being ratified. But the conduct of the standing joint committee in this case may be good evidence that it had delegated the power to its chief constable, and the fact that when these aiding agreements—other than those with the metropolitan police—were brought to its notice it passed no censure upon the chief constable for making them, and paid, though with a kind of internal protest, the smaller tradesmen's bills, and, what is strongest of all, has paid the various aiding authorities, seems to me strong evidence of some order, not, indeed, written or recorded in *totidem verbis*, giving authority to its chief constable to make these arrangements in case of emergency. This being so, the plaintiffs are entitled to recover for lodging and feeding the general aiding police.

The position as to the metropolitan police is different. They were not brought in under an aiding agreement, they were sent by the Home Secretary on his own motion; and the subsequent agreements made some days after their arrival are mere forms. The Home Secretary gave up the attempt to insist upon them. I have been prepared to go so far as to hold that the standing joint committee might have contemplated and by implication authorised the chief constable to enter into ordinary aiding agreements, but it would be wild to suppose that it ever contemplated an agreement for an introduction upon this scale of a body of substitutes for the military. As soon as ever it was known that there were agreements between the Chief Commissioner of Metropolitan Police and the chief constable, purporting to provide for the employment of the metropolitan police, the standing joint committee repudiated these agreements and any liability for the pay or maintenance of the metropolitan police. It is suggested that they were sworn in as special constables for the county. It may be doubted whether that was regularly done, but, assuming that it was, it would be almost fantastic to treat the application of the present plaintiffs as an enforcing of the right of special constables to have such compensation as is provided for them by the Act of 1831. There can be no direct remedy against the standing joint committee or the county council upon the contract supposed to be made to pay for the board and lodging of the metropolitan police, nor do I think that the judge thought there could be. The form of his judgment and his reasons seem to show this. The ingenious attempt was, however, made upon behalf of the plaintiffs to work s. 18 of the Act, 1839, by treating the chief constable as having made himself personally responsible to the colliery companies, giving him an indemnity and then vesting that indemnity in the plaintiffs by way of subrogation. This suggestion has commended itself to the learned judge, and results in his judgment in the form which it has taken. But it will not do. The chief constable did not bind himself. If he had, the judgment should have been given against him. He does not ask for any indemnity. He was a defendant and not a plaintiff, and never sought to be put in any other position.

Questions (iv) and (v) may be treated of together. The old county authority—the justices—could by common law make valid contracts. This is shown in *R. v. Inhabitants of Essex* (3). How they did it, in form and in what name, or through whom they could sue and be sued upon such contracts, has not been investigated during the arguments before us, and probably it is needless to inquire. So long ago as the County Rates Act, 1738, justices were given power by s. 1 to make one general rate to be raised, except in certain places, out of the poor rate, and paid

A to the county treasurer, who by s. 6 was to make payment thereout on the order of the justices. By s. 14 they could contract for re-building bridges and similar works, and provision was made for security for due performance being given by the contractor to the clerk of the peace, on behalf of the justices. By the County and Borough Police Act, 1856, s. 22, justices were given power to purchase station houses and strong rooms, and to use the Lands Clauses Act, but no provision was made, that I can trace, for nominating any particular person or officer to whom land could be conveyed. It is not unlikely, however, that the clerk of the peace had already been mentioned in some Acts of Parliament as a person with whom contracts could be legally made, or to whom lands could be conveyed.

B All this leads up to the statute which was in force till the Local Government Act, 1888, was enacted, and was in fact only repealed some years later by the Statute Law Revision Act, 1892. This statute (21 & 22 Viet., c. 92, relating to county property) provides by s. 1 that conveyances of land which the justices are authorised to purchase shall be made to the clerk of the peace upon trust for the public uses and purposes for which it is bought, and by s. 2 that, except where otherwise specially provided for by any Act of Parliament, contracts entered into by the justices shall be made on their behalf by the clerk of the peace, and may be sued upon by or against the clerk of the peace for the time being. In these circumstances the Local Government Act, 1888, by which the general government of the counties was transferred from the justices to the county council and the standing joint committee, was passed. The material sections are 9, 30, and 64. By s. 9:

E “(1) The powers, duties, and liabilities of quarter sessions and of justices out of session with respect to the county police shall, on and after the appointed day, vest in and attach to the quarter sessions and the county council jointly, and be exercised and discharged through the standing joint committee of the quarter sessions and county council appointed as hereinafter mentioned. . . . (3) Nothing in this Act shall affect the powers, duties, and liabilities of justices of the peace as conservators of the peace, or the obligation of the chief constable or other constables to obey their lawful orders given in that behalf.”

F By s. 30:

G “(1) For the purpose of the police, and the clerk of the peace, and of clerks of the justices, and joint officers, and of matters required to be determined jointly by the quarter sessions and the council of a county, there shall be a standing joint committee of the quarter sessions and the county council, consisting of such equal number of justices appointed by the quarter sessions and of members of the county council appointed by that council as may from time to time be arranged between the quarter sessions and the council, and in default of arrangement such number taken equally from the quarter sessions and the council as may be directed by a Secretary of State. . . . (3) Any matter arising under this Act with respect to the police . . . and any other matter requiring to be determined jointly by the quarter sessions and the county council shall be referred to and determined by the joint committee under this section; and all such expenditure as the said joint committee determine to be required for the purposes of the matters above mentioned shall be paid out of the county fund, and the council of the county shall provide for such payment accordingly.”

I By s. 64:

“(1) On and after the appointed day all property of the quarter sessions of a county, or held by the clerk of the peace, or any justice or justices of a county, or treasurer, or commissioners, or otherwise for any public uses and purposes of a county, or any division thereof, shall pass to and vest in and be held in trust for the council of the county, subject to all debts and liabilities affecting it, and shall be held by the county council for the same estate,

interest, and purposes, and subject to the same covenants, conditions, and restrictions, for and subject to which that property is or would have been held if this Act had not passed, so far as those purposes are not modified by this Act. (2) On and after the appointed day all debts and liabilities of the quarter sessions, or of the clerk of the peace, or any justice or justices, or treasurer, or commissioners, incurred for county purposes, shall become debts and liabilities of the county council, and shall, subject, to the provisions of this Act, be defrayed by them out of the like property and funds out of which they would have been defrayed if this Act had not been passed."

[See now amendment to these sections in Justices of the Peace Act, 1949.] It results that the county council can make contracts and can sue and be sued in respect, at any rate, of such matters as would not come within the cognisance of the standing joint committee; and that the standing joint committee can either itself enter into contracts, or direct the county council to enter into contracts for the standing joint committee. But as the standing joint committee is not a body corporate and has not a common seal it seems to me that all contracts requiring to be under seal and all conveyances by or to the county authorities must be made by or to the county council. I gather from the judgments of my colleagues that we are not quite in agreement on this point. They think that the contracts are the contracts of the standing joint committee. I think that the legislature intended, in the Act of 1888, to follow the principle of the Act 21 & 22 Vict., c. 92 [relating to county property], and that, as the unincorporated justices could make contracts through, and sue or be sued by, their clerk of the peace, so it was intended that the unincorporated standing joint committee should make contracts through, and sue or be sued by, their county council. I am somewhat assisted by the Police Act, 1890. This Act, enabling police authorities to make agreements, must have intended that these agreements should be enforceable, and, one would think, directly enforceable by ordinary process of law. Now the watch committee is the police authority in boroughs for the purposes of this Act, and the watch committee is a mere committee of the town council, a necessary committee where the borough has its own police, but not more necessary than the finance committee, the existence of which is also required by statute. Both are pieces of internal organisation, having no separate existence apart from the corporation, and no funds. The legislature never, I think, meant that disputing watch committees should sue or be sued in order to get a formal judgment, fruitless except as the basis of some ulterior procedure. I think it is intended in that statute that the corporation should be the parties to the action, and if, for instance, the police authority of Bristol had occasion to sue on its agreement, it would sue by the corporation of the city, and sue the county council of Glamorgan. It seems to me, therefore, that these actions were rightly brought against the county council.

I have more difficulty in understanding the joinder of the standing joint committee as a defendant or defendants. But, on the whole, I think it a convenient course that an action upon a contract made by the directing mind of the standing joint committee, even if through the county council as the actual contractor, should be decided in the presence of the standing joint committee. The standing joint committee has to determine, and its determination binds the county council. Though the form of writ is peculiar, enumerating, as it does, all the members of the standing joint committee by name, no relief is prayed against these members in their private capacity; and, after appearance and defence, it is not open to the standing joint committee or its members to contend that the standing joint committee is not a suable entity. The defence does not go far enough for this. My colleagues, I gather, think that the standing joint committee is the primary party to be sued, but that the action is also rightly brought against the county council. We all, therefore, agree that both are proper parties, and we agree to the form of the judgment. Why, as the two bodies agreed in resisting the

- A claim, it was thought necessary to defend separately, I do not see, nor, I think, do any of us. Upon the whole, I think that the actions succeed as regards the claim for housing and feeding all the police other than the metropolitan police, and fail as regards the metropolitan police. I think that the orders or judgments of the court below must be varied, and that the proper form of order for this court to make in either action is as follows: Allow the appeal; vary order of the court below; decide in favour of the plaintiffs against the defendants, the standing joint committee and the county council, on the questions of liability raised on the pleadings so far as these relate to police other than the metropolitan police, and against the plaintiffs and in favour of the defendants so far as these questions relate to the metropolitan police. Declare that the defendants, the standing joint committee, are liable for the expenditure incurred by the plaintiffs as in the pleadings mentioned in respect of police other than the metropolitan police, but not in respect of the metropolitan police. Refer the claim of the plaintiffs to an official referee, unless otherwise arranged, to ascertain the true amount thereof. Direct judgment to be entered in favour of the plaintiffs against the defendants for the amount when ascertained. Order that the costs in the court below be the plaintiffs' in any event, and that the costs of the reference abide the order of the official referee, and that there be no costs of the appeal. Order the defendant county council to pay the claim of the plaintiffs, when so ascertained, and all costs awarded to them.
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- PICKFORD, L.J.**, stated the facts and continued: I think the result of these facts is that the county authorities knew quite well that the plaintiffs had incurred and continued to incur this expense on the footing of being repaid by the county any part of it which ought fairly to be considered a police expense chargeable to the county. The standing joint committee held a meeting on Dec. 12, 1910, and appointed a sub-committee to deal with the claims in respect of the police. The sub-committee and the standing joint committee held other meetings after that time, and the result was that they repudiated the aiding agreements made by the chief constable in respect of the metropolitan police and all expense connected with them, and accepted responsibility for the other aiding agreements and the expenses of the aiding police, with the exception of the amount claimed by the colliery companies, which they refused to pay. Their reason for repudiating any liability in respect of the metropolitan police was that no one had asked for them, but the magistrates had asked for an assistance which they considered would have been more effective and would not have been chargeable to the county, and, if the Home Office sent something not asked for, which they considered less effective, the Home Office could not ask the county to pay for it. I do not consider that it is for me to express any opinion whether the action of the Home Office in sending metropolitan police instead of soldiers was judicious or not, but I think the position of the standing joint committee was sound—that, as they had not asked for them, they could not be held liable to pay for them. Eventually, most of the expense of these police was paid by the government, without admitting liability, with the exception of the amounts claimed by the colliery companies, which they declined to pay. I have no information as to why this distinction was made.
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- I The ground on which the standing joint committee refused to pay the plaintiffs' claim appears in a minute of June 25, 1911, and a letter from their clerk to the secretary of the Glamorgan Coal Co. of June 28, 1911. The minute is in these terms:

“The sub-committee directed the clerk to write repudiating any liability to pay any part of the above claims, and to inform them that, if they expect more than the ordinary protection that the police force of the county is able to give to their property, the committee expects them to do something on their part to protect their special property and interests.”

The letter was in these terms :

"With reference to the bills your company sent to the chief constable, amounting to £20,997 11s., for lodging and maintenance of police, which he laid before the committee, I am to remind you of the interview to which your chairman, Mr. D. A. Thomas, was invited on the 18th November last, and which was had at these offices between representatives of the Powell Duffryn company and your company, with your solicitors, and the chairman of the county council and standing joint committee and myself on the special subject of the responsibility for expenses of this nature, which the respective companies suggested that the county should agree to bear, but which the representatives of the county quite distinctly refused to consent to."

That last statement has been found to be wrong by the learned judge, and his finding has not been disputed.

"The committee direct me to say that they decline to pay any part of the above bill or bills that may be presented by the company. Regarding the intimation contained in your letter that the company cannot continue providing for the lodging and maintenance of the police especially engaged in protecting the colliery premises, I am directed to say that the committee considers that it is incumbent on the owners of property to take reasonable precautions for its protection at all times, but most especially when disturbance of the pits is anticipated as a result of ill-feeling that has arisen between such owners and a numerous body of the inhabitants of the district in connection with the contractual relations between them. In the event of damage being done by rioters to your company's machinery I am to draw your attention to the provisions of the Riot (Damages) Act, 1886, which require the tribunal which will decide upon any claim to have regard to the conduct of the claimants and the precautions taken. The committee has imposed upon the ratepayers of the county a burden of very large amount in providing men to guard the property of the company and the collieries connected with them, and they consider that the share of the exceptional expenses that have resulted from the dispute between the company and their allies and the workmen in their collieries, which the company has hitherto incurred in lodging and maintaining some of these men who are more particularly stationed for the garrison or defence of the collieries, is not more than a moderate discharge of the company's duty of protecting their property and interests, and a refusal to do at least this much will compel the committee to consider the provision they are now making."

The letter was not accurate if by police specially engaged in protecting the colliery premises they meant specially requisitioned for that purpose. Both plaintiffs had asked for the services of special police, and had paid for them, and nothing arises in this case as to them. The police in this case had not been sent to the plaintiffs' collieries as special police engaged by the plaintiffs, but as the result of a meeting attended by the officer commanding the troops, the chief constable, stipendiary magistrates, and representatives of the Home Office and the colliery companies, in which these places were pointed out as the most vital points in the collieries which needed protection.

The position taken by the standing joint committee seems to me entirely untenable, and was not insisted on before us. They are the police authority, and have to make proper police arrangements to maintain the peace. If one party to a dispute is threatened with violence by the other party he is entitled to protection from such violence whether his contention in the dispute be right or wrong, and to allow the police authority to deny him protection from that violence unless he pays all the expense, in addition to the contribution which, with other ratepayers, he makes to the support of the police, is only one degree less dangerous than to allow that authority to decide which party is right in the dispute, and grant or

A withhold protection accordingly. There is a moral duty on each party to the dispute to do nothing to aggravate it and to take reasonable means of self-protection, but the discharge of this duty by them is not a condition precedent to the discharge by the police authority of their own duty. The Glamorgan Coal Co. did take some steps to protect themselves, but I have no information as to their extent. As I have said, the ground for non-payment alleged by the standing joint committee

B was not insisted on; indeed, before BANKES, J., the chairman of the standing joint committee stated that they were willing to pay all expense except that voluntarily undertaken by the plaintiffs, and one main contention at the trial was that all the expense claimed in this action had been so voluntarily incurred. This was decided against the defendants by the learned judge, and his finding was not questioned before us, but the defendants still refused to pay, on the ground that they had no

C power legally to do so.

The defendants, on these facts, seem to me to have no defence on the merits, except as to the metropolitan police. With regard to the other aiding police, they have accepted the aiding agreements made by the chief constable, they knew perfectly well that those police were in the county at the invitation of the chief constable, and that, under these circumstances, the expense of housing and feeding

D them ought to fall on the county, and the request of the plaintiffs to house and feed them was made by the chief constable. If they cannot escape by virtue of some technicality arising from their statutory position, they clearly ought to pay. I do not think they are liable for the expense of the metropolitan police on the short ground that those police were not brought into the county by them or by anyone for whom they were responsible; they were sent by the Home Secretary,

E and the aiding agreements made by the chief constable were made by him without authority. He knew the provisions of the Act of Parliament under which such agreements were authorised, and believed that these police had not come into the county under those provisions. I have no doubt he acted for the best in the difficult position in which he was placed, but I think he acted without authority.

This leaves only the question of the aiding police and those belonging to the

F county of Glamorgan. If the chief constable had authority to bring the aiding police into the county and to make the aiding agreements these two forces are on the same footing, because, under s. 25 of the Police Act, 1890, the aiding force are to be deemed part of the aided force. I think he had such authority. By sub-s. (3) of that section the police authority can delegate their power of making an aiding agreement to the chief constable by general or special order, and such

G general or special order is not required to be in writing or in any particular form. I think there is evidence upon which it can rightly be found that the standing joint committee in this case had delegated that authority to Captain Lindsay in case of emergency arising between its meetings. The chairman was clearly of that opinion, although he founded his opinion upon a resolution of 1909, which does not seem to go so far as he thought. When these agreements came before the

H standing joint committee no suggestion was made that the chief constable had in any way exceeded his authority, and the standing joint committee acted upon them, and paid the other police authorities the sums due under them. I think this authority also extended to obtaining the food and lodging which was part of the obligation under the agreements, for in none of them was there any agreement that the sums mentioned therein should include food and lodging; in some they were expressly excluded, and under all of them the aiding force became part of the aided force, and had to be supported like them by the county of Glamorgan. It was not denied that there was ample evidence of ratification, if the standing joint committee could ratify, but I agree with PHILLMORE, L.J., that the chairman's evidence and the facts stated pointed to an antecedent authority having been conferred on the chief constable to bring aiding police into the county in an emergency, and to make the necessary arrangements for the fulfilment of the resulting obligations of the county.

I

This only leaves the question whether, under the statutes, the standing joint committee or the county council can be sued upon the agreements made by the chief constable. If, as I think, he had created an obligation upon the county to pay, the question whether it can be enforced by action or otherwise is purely technical, and would, I think, never have been raised but for the fact that the defendants were unwilling to pay, for the untenable reason which I have already mentioned. Still, if it is a good point, they are entitled to the benefit of it. The standing joint committee is a statutory body, and its duties and liabilities are in substitution for those of the justices before the Local Government Act, 1888. Before that Act, the justices under various statutes, chiefly the County Police Act, 1839, and the County and Borough Police Act, 1856, were the police authority, and were charged with the duty of supporting the police force. In order to discharge this duty they could, and did, make contracts for buildings, clothing, &c., for police purposes, and by s. 2 of 21 & 22 Vict., c. 92 [relating to county property], except where otherwise provided for, contracts were made on their behalf by the clerk of the peace, and he could sue or be sued upon them, payment being made out of the county fund. In 1888 the Local Government Act, s. 9, transferred these powers, duties, and liabilities to the quarter sessions and county council jointly, to be exercised by the standing joint committee. By s. 30 (3), any matter relating to the police shall be referred to, and determined by, them, and any expenditure which they determine to be required for the purposes of such matters shall be paid out of the county fund, and the council of the county shall provide for such payment accordingly. It seems to me that, if the duties and liabilities which required the making of contracts before are transferred to the standing joint committee, there must be implied a power of contracting, and this is consistent with s. 25 of the Police Act, 1890, which gives them the power of making a particular kind of contract. It cannot, I think, be a correct construction of this legislation that the standing joint committee had no power of contracting except in the one instance mentioned in that Act. It was necessary to give them that power expressly because it extended beyond the support of their own police.

A more difficult question is: Who is bound by a contract made by them? They are not an incorporated body, it could not have been intended that the members should be personally liable, and they have no seal under which they can contract when a seal is required. In ordinary cases no difficulty arises. The standing joint committee indent, so to speak, for what they want, and the necessary contract is made by the county council, who cannot object to the requirements of the standing joint committee, but there is no provision in the Acts that the county council shall be a party to all their contracts as the clerk of the peace was a party to those of the justices. I think that the agreements mentioned in s. 25 are intended to be contracts of the standing joint committee on their own behalf, and not as agents for the county council, and if that be so, I think that this section, considered in connection with the latter part of s. 30 of the Local Government Act, 1888, points to all contracts made by the standing joint committee being their contracts, payment for which is to be made by the county council. I think that, when the standing joint committee made a contract, by doing so they determined the proper expenditure under that contract, which must be ascertained, in case of dispute, by the ordinary tribunals to be necessary expenditure, and the county council must pay it, but that the contract remained that of the standing joint committee. The question is not, in my opinion, very important, as the same result is obtained in each case, and the only difference is that the form of recovery is by means of a declaration that the standing joint committee are liable for the amount, and an order on the county council to pay it, instead of by means of a direct judgment against the county council.

The result is that the plaintiffs are not, in my opinion, entitled to recover anything in respect of the metropolitan police, but they are entitled to recover such sums as may be found to be expenditure incurred in housing and feeding the

A Glamorgan police and the aiding police, other than the metropolitan, by reason of the request made by the chief constable. Some of the expenditure was said to be for meals supplied, not in consequence of that request, but generally and casually, and, if this be so, that should not be recovered. I have not discussed s. 18 of the County Police Act, 1839, upon which there was so much discussion before us, because I think it deals with matters quite different from those before us. It really only provides that the chief constable is not to be out of pocket by reason of having, either by himself or the constables under him, to make certain necessary expenditure for police duties, and has no relation to a case where expenditure has been incurred by reason of such a request as he has been found in this case to have made. I have also not considered what his position might be with regard to his request to house and feed the metropolitan police. Judgment has been given for him, and there is no appeal against the judgment. I think the plaintiffs were justified in joining the county council as defendants. If they decline to pay, it is necessary to get an order on them to pay, and I think it was convenient to have that question, as well as the liability of the standing joint committee, decided in one action, but I can see no reason for the two bodies being separately represented. The questions to be determined as against the two defendants are exactly the same, and could have been contested on behalf of both by the same solicitors and counsel. I agree with the terms of the order, and the terms as to costs mentioned by PHILLIMORE, L.J.

BRAY, J.—These two actions were brought to recover moneys expended by the two plaintiff colliery companies in housing and feeding police during the coal strike in Glamorganshire, which commenced in November, 1910, and lasted for many months. There were three defendants, the standing joint committee of the Glamorgan Quarter Sessions and the Glamorgan County Council, the county council, and Captain Lindsay, the chief constable of the county. There is, in my opinion, no distinction to be drawn between the two actions. In order to succeed against the first two defendants the plaintiffs had to establish the following propositions: (i) That Captain Lindsay requested the plaintiffs to expend these moneys under circumstances which created an implied promise to pay; (ii) that Captain Lindsay, in making this request, purported or intended to act as agent, and on behalf, of the standing joint committee; (iii) that the standing joint committee had power to authorise Captain Lindsay to make this contract on their behalf; (iv) that they did give him such authority, or, if they did not, they afterwards ratified his acts or are estopped from denying that he had such authority. If these propositions are proved, either the standing joint committee or the county council, or both, are, in my opinion, liable.

A broad distinction has to be drawn between the money expended in reference to the metropolitan police and the money expended in reference to the other police. I will deal first with the latter. As to point (i), the learned judge has found, in terms, for both plaintiffs. The defendants' counsel did not dispute these findings. With regard to point (ii), the learned judge found that the county were not mentioned as the authority who would pay in the conversation at which the requests were made, but with regard to the conversation with Mr. Hann, the manager of the Powell Duffryn company, on Nov. 5, the learned judge finds as follows:

I "So far as the conversation related to the police, I am satisfied that Captain Lindsay made the statement he did in his character as chief constable, and believing that he had, or would in due course get, the authority of the standing joint committee for any expenditure that was incurred, and I am also satisfied that, when he directed that any particular body of police (including the metropolitan police) should occupy the Aberaman House accommodation, he was also acting as chief constable, and under the same belief."

In dealing with the conversations between Captain Lindsay and Mr. Llewellyn, the manager of the Glamorgan Company, there is a similar finding of the learned

judge. In my opinion, these are findings that Captain Lindsay purported or intended to act as the agent of the standing joint committee, although there was no direct reference made in the conversations to the county. What was in Captain Lindsay's mind the finding clearly shows, and it was demonstrated by the fact that at this time Captain Lindsay was entering into written hiring agreements on behalf of the standing joint committee with other police authorities, binding his committee to pay. What was in the mind of the managers of the collieries is shown by the action they took in sending in accounts. Indeed, so far as the police, other than the metropolitan police, are concerned, there could be no other person or body on whose behalf Captain Lindsay could be acting. I think, therefore, the plaintiffs proved point (ii).

Point (iii) is a question of law, and it was the point mainly argued on behalf of the defendants. It was said that the standing joint committee were a body created by statute, and could have no powers other than those expressly given them by the statute, and s. 18 of the County Police Act, 1839, was referred to as confirming this view. It was said that they had no power to contract, but they might pay the chief constable the reasonable allowances for extraordinary expenses necessarily incurred. The standing joint committee was created by the Local Government Act, 1888, s. 30, and by s. 9 it was enacted that the powers, duties, and liabilities of quarter sessions and of justices out of session with respect to the county police should vest in and attach to the quarter sessions and the county council jointly and be exercised and discharged through the standing joint committee of the quarter sessions and county council, appointed as hereinafter mentioned. By the interpretation clause, s. 100, the expression "powers" includes "rights, jurisdiction, capacities, privileges, and immunities." The "capacities," therefore, of quarter sessions with respect to the county police have to be exercised through the standing joint committee. If, therefore, quarter sessions had the capacity to make contracts with respect to the police, it seems clear that that capacity vested in and attached to quarter sessions and the county council jointly, and had to be exercised through the standing joint committee. I again postpone the consideration of the question whether such contracts were to be in the name of the standing joint committee or in the name of the county council, or in the names of quarter sessions and the county council. In any event, it would seem that the standing joint committee would be the body to negotiate the contracts. Now, had quarter sessions at the time of the passing of the Act of 1888 the capacity to make contracts with reference to the police? They had power to appoint a chief constable (see s. 4 of the County Police Act, 1839); they had power to provide station houses and strong rooms (see s. 12 of the County Police Act, 1840); and by the County and Borough Police Act, 1856, they were empowered to purchase lands for that purpose. It was their duty to supply the police with uniforms, accoutrements, &c. It would have been impossible for them to exercise such powers and to perform such duties unless they had the power of making contracts. It does not seem open to doubt that quarter sessions could make contracts. It follows, therefore, that the standing joint committee could exercise the same power or capacity. Further, by s. 25 of the Act of 1890 express power was given to them to make aiding agreements. These agreements would, or might, involve making contracts for the housing and feeding of the aiding police. There is nothing in s. 18 of the Act of 1839 to negative or limit this power. It was obvious that extraordinary expenses might have to be incurred by the chief constable in carrying out his duties without the opportunity of obtaining instructions from quarter sessions, and the object of s. 18 was to enable quarter sessions to reimburse him for such expenses. In my opinion, the standing joint committee had the capacity to make and ratify the contract which Captain Lindsay purported or intended to make on their behalf.

The fourth and last point is whether the standing joint committee had not, in fact, given Captain Lindsay the authority to make the aiding agreements and to

A contract with the plaintiffs to house and feed the police. The learned judge, after setting out these facts, says :

B "It appears to me that the only possible inference to be drawn from those facts is that either all parties considered that power had been delegated to the chief constable to enter into these aiding agreements, or that the standing joint committee approved of his action, and so fully and so entirely treated it as a matter of course that he should enter into these agreements that no reference to them was necessary unless they were for some reason disapproved of."

C I entirely agree with this finding. Again, later on in his judgment, after dividing the police into three categories—(a) Glamorgan and county of Somerset police, (b) metropolitan police, (c) all other police—he says :

D "I am satisfied, with regard to all these classes, that the expenditure was incurred at the request of Captain Lindsay, and under circumstances from which a promise to pay must be implied. If the doctrine of ratification applies to the standing joint committee, I am satisfied that they did ratify the action of Captain Lindsay in employing all the police (other than the metropolitan police), and in employing them upon the terms that their expenses for board and lodging should be paid by the police authority."

Again, after dealing with the question of the power to ratify, he says :

E "As ratification relates back to the time when the act which is ratified was done, it follows that, in my opinion, the position is exactly the same with regard to all the police (other than the metropolitan) as if Captain Lindsay had received antecedent authority from the committee to enter into the aiding agreements. This authority, in my opinion, includes an authority to make the necessary arrangements for housing and feeding the police."

F I think it is not material to inquire whether the authority had been given antecedently, or was ratified by conduct afterwards. I think, perhaps, the evidence points rather more to an antecedent authority than to a ratification. The whole conduct of the standing joint committee is overwhelming to show one or the other, and the defendants' counsel were obliged to admit that, if it were the case of a private person instead of a public body, ratification could not be disputed. I know of no distinction between a private person and a public body in such a case, provided always that the public body has the power to contract and that power is not limited by provisions requiring that it shall be exercised in a particular way. I may observe that no point was raised in the pleadings or before us that the power had to be exercised in any particular way.

G As I thoroughly agree with these findings of fact of the learned judge and as I have no doubt as to the power of the standing joint committee to make the arrangements which Captain Lindsay made or purported to make on their behalf, and to ratify them if originally made without authority, it follows that the standing joint committee are liable (subject, of course, to an inquiry as to the amount in each case) to the following claims of the Glamorgan company—namely, £4,587, meals and other requisites supplied to the police who succeeded the metropolitan police in the occupation of the rink; £10,328 for meals and other requisites supplied to the police at the different collieries of the Glamorgan company at which they were housed and fed, or fed only, and for so much of the £3,750 for hire of rink as is referable to the police other than the metropolitan police. Counsel for the standing joint committee raised a separate question as to the £10,328, but this, I think, is clearly covered by the learned judge's findings of fact. On the same grounds, the standing joint committee are, in my opinion, liable to the claim of the Powell Duffryn company for £485 subject to an inquiry.

I now come to the much more difficult question of the plaintiffs' claim in respect to the metropolitan police. The learned judge has found that the defendants are

liable in respect of these, but on a different ground from that on which he held them liable for the other police. He has found that they were extraordinary expenses necessarily incurred by the chief constable within s. 18 of the County Police Act, 1839, and, although the chief constable has not paid them, nor been held liable for them in these actions, he held that the defendants could be ordered to pay them to the plaintiffs. Having all parties before him he was of opinion that the order could be made to avoid circuity of action. I cannot agree with this. The only cause of action that the plaintiffs can have against the defendants is in respect of money paid under an implied contract by the defendants to repay. Section 18 creates no privity between the plaintiffs and the defendants. In my opinion, the plaintiffs' claim can only succeed if they can show that the defendants are responsible for the request made to the plaintiffs by the chief constable. The plaintiffs have to prove the same four points that they had to prove in the case of the other police. I proceed, therefore, to consider how far they have proved them. [His LORDSHIP considered the evidence and said that the implied promises made by the chief constable covered the feeding and providing for the metropolitan police, and those promises were made by Captain Lindsay in his character of chief constable, and believing that he had, or would in due course get, the authority of the standing joint committee for any expenditure that was incurred, expressly including that of the metropolitan police; what he had already said on the point whether the standing joint committee had the capacity to contract, applied equally to the metropolitan police, for s. 25 of the Police Act, 1890, applied to all police forces, including the metropolitan, the police authority in that case being the Home Secretary; it could not be taken that the chief constable had any antecedent authority from the standing joint committee as regards the metropolitan police, but the plaintiffs had failed to prove that the standing joint committee knew, or ought to have known, the true facts, with the result that he could not find that the committee were estopped from denying that they had authorised or ratified the acts of the chief constable; accordingly, he thought that the appeal succeeded on the question of the liability of the standing joint committee in respect of the cost of the feeding and housing of the metropolitan police.] The last question is what should be the form of the judgments in favour of the plaintiffs as regards the claims in respect of police other than the metropolitan police, and whether it should be against the standing joint committee or against the county council, or both. This must depend partly on whether the promise made by the chief constable was a promise made on behalf of the standing joint committee or on behalf of the county council. The chief constable was not the servant or agent of the county council, and was not purporting to act as such. In my opinion, the promise was made on behalf of the standing joint committee, and it was their contract and not the contract of the county council. First, there is s. 9 of the Act of 1888, to which I have already referred. The powers given by that section are to vest in and attach to the quarter sessions and the county council jointly. They are to be exercised through the standing joint committee. If I am right in holding that "powers" includes the capacity to contract, I think the contract must be either the contract of the standing joint committee or the joint contract of quarter sessions and the county council. It seems impossible to suppose it was to be a joint contract. I think it was the standing joint committee who were to exercise the power of contracting, and the contract would be their contract. I think s. 30 (3), confirms this view. If the contract were to be a contract of the county council, the latter part of the section would be unnecessary and inapplicable. The meaning of this is, as CAVE, J., put it in *Re Local Government Act, 1888, Ex parte Somerset County Council* (4), that the county council have to pay the bills of the standing joint committee. The latter would have no bills if they could make no contracts. We were referred to s. 64. In my opinion, there is nothing in that section inconsistent with the view I have taken. All property and liabilities, which means existing property and liabilities, of the

- A quarter sessions are to vest in the county council, and none in the standing joint committee. That is right, because by s. 30 they are the people to pay; the county council are to levy the rates; the rates produce the funds out of which they are to pay. Then there is s. 81. By sub-s. (4) the joint committees are given, subject to the terms of their delegation, the same power as the council appointing them, and by sub-s. (8) the same section applies to the standing joint committees. I had a doubt whether the sub-section included the standing joint committees appointed under s. 30, or whether it referred only to those appointed under sub-s. (7). There seems no reason for so limiting sub-s. (8), and it would be absurd that the standing joint committee of two or more counties, or county boroughs, should have different powers from those of a single county. If this be so sub-s. (4) gives the standing joint committee the same power of contracting as the quarter sessions and the county council had. Lastly, there is s. 25 of the Police Act, 1890, which gives express power to the police authority (in this case the standing joint committee) to make agreements with other police authorities, and it is out of these very agreements that these claims arise. I do not see how it can be said, having regard to the words of the section, that these aiding agreements were to be made, not with the standing joint committee, but with the county council. Then if the aiding agreements provide, as many of them did here, for the housing and feeding by the aided authority, it necessitates the aided authority entering into contracts for such housing and feeding. Are the aiding agreements to be made with the standing joint committee and the other agreements with the county council? Surely that is impossible. It seems to me that if the legislature had intended that all agreements of whatever kind negotiated by the standing joint committee should be in the name of the county council, it would have been so provided in terms. Mr. Franklen, in his evidence, stated that it was the practice in Glamorganshire to make some agreements (but not agreements of this kind) in the name of the county council, but it does not seem to me that any such practice can be looked at for the purpose of construing the Act, and it is within my own knowledge that in other counties the practice is quite different.
- I think the judgment should declare that the standing joint committee are liable to pay all the claims of both plaintiffs in respect of all the police other than the metropolitan police (subject to the inquiry as to the items), and that they are not liable to pay the claims in respect of the metropolitan police. As regards the county council they were, in my opinion, proper parties to this action, for two reasons—one, because they, as the paymasters, are the persons really interested, and the other because I think that the plaintiffs are entitled to an order that the county council should pay to the plaintiffs the sums for which the standing joint committee are found to be liable. I do not feel pressed by the concluding words of s. 30 of the Act of 1888. If the standing joint committee enter into a contract they, by that very act, determine that their liabilities under that contract are an expenditure required for the purpose of the matters mentioned in the section. If there is any dispute between them and the other parties to the contract about the amount of liability that dispute has to be decided by the ordinary tribunal—namely, a court of law. If the standing joint committee incur debts or liabilities in relation to matters referred to them the county council must pay them. I am sorry that the standing joint committee and the county council should have severed in their defences and incurred the great cost of appearing by separate solicitors and separate counsel. The interest of the two bodies was precisely the same and the course they have taken is quite wrong, but I suppose the unfortunate ratepayers will have to pay these double costs. There is another point on which I should like to express an opinion. The real reason for the refusal of the county council to pay these claims seems to have been that they thought the colliery proprietors ought to pay for having the lives of their employees and their property protected. The colliery proprietors have to pay rates like other persons and have a right to have the same protection as other persons living and

owning property in the county. I agree with what has been said by PHILLIMORE, L.J., as to costs.

Order varied.

Solicitors: *Bell, Brodrick & Gray*, for *C. & W. Kenshole & Prosser*, Aberdare; *Smith, Rundell & Dods*, for *Morgan, Bruce & Nicholas*, Pontypridd.

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

HUNT v. RICHARDSON

[KING'S BENCH DIVISION (Darling, Bray, A. T. Lawrence, Scrutton and Avory, JJ.), April 17, June 2, 1916]

[Reported [1916] 2 K.B. 446; 85 L.J.K.B. 1360; 115 L.T. 114; 80 J.P. 305; 32 T.L.R. 560; 60 Sol. Jo. 588; 14 L.G.R. 854; 25 Cox, C.C. 441]

Food—Milk—Deficiency in fat—Deficiency due to cows being fed on "watery" grass—No interference with milk after it came from cow—Sale of Food and Drugs Act, 1875 (38 & 39 Vict., c. 63), s. 6.

A purchaser who demanded "new milk each morning" or "new morning milk" was supplied by the farmer who produced the milk with milk from cows that had been milked that morning which milk was deficient in milk fat to the extent of nine per cent. Nothing had been added to or abstracted from the milk by the farmer or his servants, the deficiency in milk fat being due to the fact that owing to heavy rains in recent months there had been an unusually heavy growth of "watery" grass on the farmer's farm and after the farmer's cows had been fed on it they produced a much larger quantity than usual of milk which, however, was of a poorer quality. On a prosecution of the farmer under s. 6 of the Sale of Food and Drugs Act, 1875 [now s. 2 (1) of the Food and Drugs Act, 1955] for selling to the prejudice of the purchaser milk which was not of the nature, substance and quality demanded by him,

Held by DARLING, J., A. T. LAWRENCE, J., and AVORY, J., BRAY, J., and SCRUTTON, J., dissenting: as the milk, when sold, was the morning product of healthy cows in its natural condition and had had nothing added to or abstracted from it, it was genuine new milk, and the prosecution failed.

Wolfenden v. McCulloch (1) (1905), 69 J.P. 228, and *Scott v. Jack* (2), 1912 S.C. (J.) 87, approved.

Smithies v. Bridge (3), [1902] 2 K.B. 13, not followed.

Notes. Distinguished: *Bowen v. Jones* (1917), 86 L.J.K.B. 802. Followed: *Gregg v. Smith* (1917), 87 L.J.K.B. 488; *Williams v. Rees* (1918), 87 L.J.K.B. 639; *Few v. Robinson*, [1921] 3 K.B. 504. Distinguished: *Bridges v. Griffin*, [1925] All E.R. Rep. 224. Considered: *Churcher v. Reeves*, [1942] 1 All E.R. 69. Referred to: *Highnam v. Turier*, [1951] 2 All E.R. 850.

As to adulteration of milk, see 17 HALSBURY'S LAWS (3rd Edn.) 534-540; and for cases see 25 DIGEST 127-131. For Food and Drugs Act, 1955, see 35 HALSBURY'S STATUTES (2nd Edn.) 91.

Cases referred to:

(1) *Wolfenden v. McCulloch* (1905), 92 L.T. 857; 69 J.P. 228; 21 T.L.R. 411; 3 L.G.R. 561; 20 Cox, C.C. 864, D.C.; 25 Digest 128, 498.

(2) *Scott v. Jack*, 1912 S.C. (J.) 87; 49 Sc.L.R. 989; 2 S.L.T. 151; 25 Digest 129, c.

- (3) *Smithies v. Bridge*, [1902] 2 K.B. 13; 71 L.J.K.B. 555; 87 L.T. 167; 66 J.P. 740; 50 W.R. 686; 18 T.L.R. 575; 46 Sol. Jo. 486; 20 Cox, C.C. 342, D.C.; 25 Digest 127, 491.
- (4) *Knight v. Bowers* (1885), 14 Q.B.D. 845; 54 L.J.M.C. 108; 53 L.T. 234; 49 J.P. 614; 33 W.R. 613; 1 T.L.R. 390; 15 Cox, C.C. 728, D.C.; 25 Digest 89, 151.
- (5) *Anness v. Griwell*, [1915] 3 K.B. 685; 85 L.J.K.B. 121; 113 L.T. 995; 79 J.P. 558; 13 L.G.R. 1215; 25 Cox, C.C. 190; 25 Digest 89, 154.
- (6) *Pain v. Boughtwood* (1890), 24 Q.B.D. 353; 59 L.J.M.C. 45; 62 L.T. 284; 54 J.P. 469; 38 W.R. 428; 6 T.L.R. 167; 16 Cox, C.C. 747, D.C.; 14 Digest (Repl.) 35, 51.
- (7) *Sandys v. Rhodes* (1903), 67 J.P. 352, D.C.; 25 Digest 89, 152.
- (8) *Anderson v. Britcher* (1913), 110 L.T. 335; 78 J.P. 65; 30 T.L.R. 78; 13 L.G.R. 10; 24 Cox, C.C. 60, D.C.; 25 Digest 90, 157.
- (9) *Pashler v. Stevenitt* (1876), 35 L.T. 862; 41 J.P. 136, D.C.; 25 Digest 90, 162.
- (10) *Webb v. Knight* (1877), 2 Q.B.D. 530; 46 L.J.M.C. 264; 36 L.T. 791; 41 J.P. 726; 26 W.R. 14, D.C.; 25 Digest 88, 146.
- (11) *Roberts v. Leeming* (1905), 69 J.P. 417; 3 L.G.R. 1031; 25 Digest 88, 150.
- (12) *White v. Bywater* (1887), 19 Q.B.D. 582; 51 J.P. 821; 36 W.R. 280; 3 T.L.R. 631, D.C.; 25 Digest 90, 160.
- (13) *Goulder v. Rook*, [1901] 2 K.B. 290; 70 L.J.K.B. 747; 84 L.T. 719; 65 J.P. 646; 49 W.R. 684, 701; 17 T.L.R. 503; 45 Sol. Jo. 504, 505; 19 Cox, C.C. 725, D.C.; 25 Digest 80, 96.
- (14) *Davidson v. M'Leod* (1877), 5 R. (Ct. of Sess.) 1; 3 Coup. 511; 15 Sc.L.R. 198; 42 J.P. 43; 25 Digest 83, 110 ii.
- (15) *Hoyle v. Hitchman* (1879), 4 Q.B.D. 233; 40 L.J.M.C. 97; 40 L.T. 252; 43 J.P. 430; 27 W.R. 487, D.C.; 25 Digest 83, 110.
- (16) *R. v. Field, etc., Justices, Ex parte White* (1895), 64 L.J.M.C. 158; 11 T.L.R. 240, D.C.; 25 Digest 88, 147.
- (17) *Shortt v. Robinson* (1899), 68 L.J.Q.B. 352; 80 L.T. 261; 63 J.P. 295, D.C.; 25 Digest 88, 148.
- (18) *Preston v. Redfern* (1912), 107 L.T. 410; 76 J.P. 359; 28 T.L.R. 435; 10 L.G.R. 717; 23 Cox, C.C. 166; 25 Digest 88, 149.
- (19) *Lane v. Collins* (1884), 14 Q.B.D. 193; 54 L.J.M.C. 76; 52 L.T. 257; 49 J.P. 89; 33 W.R. 365; 15 Cox, C.C. 677, D.C.; 25 Digest 127, 490.
- (20) *Banks v. Wooller* (1900), 81 L.T. 785; 64 J.P. 245; 19 Cox, C.C. 432, D.C.; 25 Digest 128, 497.
- (21) *Marshall v. Skett* (1912), 108 L.T. 1001; 77 J.P. 173; 29 T.L.R. 152; 11 L.G.R. 259; 23 Cox, C.C. 435, D.C.; 25 Digest 129, 502.
- (22) *Jones v. Just* (1868), L.R. 3 Q.B. 197; 9 B. & S. 141; 37 L.J.Q.B. 89; 18 L.T. 208; 16 W.R. 643; 39 Digest 434, 632.

Also referred to in argument :

Sandys v. Small (1878), 3 Q.B.D. 449; 47 L.J.M.C. 115; 39 L.T. 118; 42 J.P. 550; 26 W.R. 814; 25 Digest 83, 113.

Pearks, Gunston and Tec, Ltd. v. Ward, [1902] 2 K.B. 1; 71 L.J.K.B. 656; 87 L.T. 51; 66 J.P. 774; 18 T.L.R. 538; 20 Cox, C.C. 279, D.C.; 25 Digest 81, 101.

Case Stated by justices for the borough of Cambridge.

An information was preferred by Ernest Richardson, the respondent, under the Sale of Food and Drugs Act, 1875, s. 6 [see now Food and Drugs Act, 1955, s. 2 (1)], against John Hunt, the appellant, for that on Sept. 9, 1915, at the borough of Cambridge he did unlawfully sell to the prejudice of the purchaser, one David Cox, a certain article of food, to wit, milk, of which a sample was taken by the respondent as an inspector under the Food and Drugs Acts at the place

of delivery in the course of delivery to the purchaser and consigned in pursuance of a contract of sale to such purchaser, which milk was deficient in milk fat to the extent of nine per cent. and was not of the nature, substance, and quality demanded.

At the hearing of the information it was proved or admitted that the appellant was a farmer and cowkeeper living on a farm three miles from Cambridge. He had kept cows there for twenty-five years, and it was his practice to sell all his milk to retail dealers. On Sept. 9, 1915, he had a herd of forty-one good Shorthorn cows, of which twenty-eight were then giving milk. The cows were under the charge of three men, all of whom were competent and experienced in the management and milking of cows. These men milked the cows and no one else interfered with the milk in any way at any time before the sale to the respondent. The cows were milked twice daily—at 5 a.m. and 1 p.m. The cows were milked into pails and the milk was poured from the pails into another pail from which it was strained into churns. When the quantity of milk ordered by each customer had been poured into the churn intended for that customer, all the churns were put into a cart and driven into Cambridge by one of the appellant's men and delivered to the customers. Nothing was added to or abstracted from the milk by the appellant or his servants beyond the abstraction of impurities by the straining. The morning milking was done rather hurriedly. Beyond the mixing required for making up the quantity needed in each churn, there was no general mixing of all the morning milk. In consequence of the heavy rains in the previous July and August the growth of grass on the appellant's farm on Sept. 9 was "phenomenal in quantity," but it was in a watery condition, and the appellant's cows being fed on it had given a much larger quantity of milk than usual. The cows were given 3 lb. of cake each per day throughout this season of the year, which was the usual allowance in normal circumstances, and no special steps were taken to counteract the effect on the quality of the milk of the watery state of the herbage or to test by technical means the effect of the watery herbage on the milk. The appellant and his men were well aware of what was taking place, and in spite of this, shortly before Sept. 9, the cows were given green maize, which was even more watery, in order to keep up the quantity of milk. The quality of milk is affected by the quantity, and also by the state of health of the animal, the method of milking and the manner of feeding, and the time that elapses between successive milkings. If cows are not thoroughly milked out on any occasion the quality of the milk at that particular milking is poorer. One of the appellant's customers in Cambridge was a retail dealer named Cox. On Sept. 9 the appellant's man drove a churn to Cox's premises and was there met by the respondent, who informed him that he was an inspector and intended to take a sample of the milk then in course of delivery. The respondent then stirred up the milk in the churn, and took a pint of milk, which he divided into three parts, one part of which he had analysed. The analyst certified that the milk was deficient in milk fat to the extent of nine per cent. The respondent had taken samples of the appellant's milk before and had found them genuine. Milk taken from a healthy herd and mixed should not show less than three per cent. of milk fat. Under the Sale of Milk Regulations, 1901, issued by the Board of Agriculture, where a sample of milk contains less than three per cent. of milk fat it shall be presumed for the purposes of the Sale of Food and Drugs Act until the contrary is proved that the milk is not genuine by reason of the abstraction therefrom of milk fat or the addition thereto of water [see now Sale of Milk Regulations, 1939, regs. 1 and 2].

For the respondent it was contended that new milk deficient in milk fat to the extent of nine per cent. was an article of food which was not in accordance with the nature, substance, and quality demanded, and although the appellant had supplied it as it came from the cows he had not used proper care in regard to the abnormal conditions prevailing at the time in feeding the cows, but had

A endeavoured to get quantity without quality, and that, while the milk from a single cow might give less than three per cent. of milk fat, it was most improbable that the milk from a herd if properly mixed would do so. For the appellant it was contended that the milk was genuine milk as it came from the cows; that the cows had been properly milked; that morning milk was poorer in quality than afternoon milk; that the condition of this milk, which was morning milk, was, B due to the abnormal condition of the pastures; that, even if the appellant had fed the cows in a particular way so as to obtain a large quantity of milk, that was no offence, provided that he showed that the milk was supplied as it came from the cow, and that it was not of such poor quality as not to be legal milk at all, and that a mere deficiency of nine per cent. of milk fat did not warrant the justices in finding that this particular milk was not in fact milk. The justices C were of opinion that the milk was deficient in fat to the amount of nine per cent., but that it was as it had come from the cows without abstraction or addition. They found that the deficiency in milk fat was due to the manner in which the appellant had fed his cows with the object of obtaining a very large supply of milk without regard to quality, and they held that the milk was not of the nature, substance, and quality demanded. They, therefore, held that the offence was D proved, and they convicted the appellant, fining him 40s.

The Sale of Food and Drugs Act, 1875, s. 6, provided:

"No person shall sell to the prejudice of the purchaser any article of food, or any drug, which is not of the nature, substance, and quality demanded by such purchaser, under a penalty not exceeding £20. . . ."

E *Disturnal*, K.C., and W. H. Aggs for the appellant.
J. Ricardo for the respondent.

Cur. adv. vult.

June 2, 1916. The following judgments were read.

F **DARLING, J.**—The facts stated in this case as having been found by the justices, together with the justices' decision upon them, raise the question whether it is an offence against the Sale of Food and Drugs Act, 1875, to sell as new milk the natural product of the morning milk of several cows, such liquid being not otherwise than wholesome and pure, exactly as it was drawn from the cows.

G In my opinion, the statute in question, as well as the Sale of Food and Drugs Act, 1899, [repealed] and the regulations made thereunder by the Board of Agriculture were designed to prevent the sale of milk "not genuine" or "injurious to health" even if genuine. This is to be gathered from the words of the Act of 1899, and from the Sale of Milk Regulations, 1901, as well as from the preamble of the Act of 1875. I do not think that these statutes were intended to provide a standard regulating the proportions in which various matters must be present in a natural product to justify the sale of it by its market name. "Genuine" does H not mean rich, nor poor, nor thick, nor thin. The very case which we are considering shows that the evening milk from these same cows would have better satisfied the analytical test than that drawn in the morning, and it might, therefore, be possible to convince a chemist, and perhaps a court of law, that the evening draught was genuine milk and also the morning draught if qualified by the prefix "morning." So far as s. 6 of the Act of 1875 is concerned with milk, I think that I it makes it an offence to sell milk not in its natural state, be it rich or poor, but with some alteration of its "nature, substance, or quality" due to the addition of something. This view is strengthened by consideration of the various subsections of s. 6. I think it is also worth while to observe that although the statute of 1899 deals with "impoverished" milk and other articles when imported, and enacts a standard for some of these articles, it nowhere gives any indication as to what are the proper proportions in which the natural ingredients should be present in milk. That statute, as it seems to me, would have provided the very occasion for creating the offence now contended for, had the legislature desired to decree it.

All the reasoning of the Lords of the Court of Session in deciding *Scott v. Jack* (2) is equally applicable to this case. They expressly stated that in their view *Smithies v. Bridge* (3) was wrongly decided. As to that, my own opinion may be thought not free from prepossession, but I am confirmed in it by a passage in the judgment of LORD ALVERSTONE, C.J., delivered after my own, wherein he says ([1902] 2 K.B. at p. 20):

"As to the recent order of the Board of Agriculture, I do not think it purports to set up a standard of what is, or is not genuine milk, but only means to say that the want of a certain percentage of fat is to be *prima facie* evidence that the milk is not genuine, and it will still be open to the defendant to prove that the milk is genuine."

But the regulation which LORD ALVERSTONE quotes seems to me to lead to quite another conclusion, if only it be read to the end, for the word "genuine" is in the regulation amplified or explained by these words immediately following it, "by reason of the abstraction therefrom of milk fat or the addition thereto of water." Now, what should it profit the defendant to disprove that presumption, if he might yet be held guilty merely because he had milked his cow in the morning, or had allowed her to indulge too far her taste for aqueous herbage in pastures new? I think that this appeal should be allowed.

BRAY, J. (read by SCRUTTON, J.).—This was a Case stated by magistrates. The appellant was charged with having sold milk deficient in milk fat, and not of the nature, substance, and quality of the article demanded by the purchaser contrary to the provisions of s. 6 of the Sale of Food and Drugs Act, 1875. He was convicted, and the question for the court is whether, having regard to the findings of fact in the case, he was rightly convicted.

The main point raised by the appellant was that, in the case of milk from a healthy cow, if it were proved or found as a fact that the milk sold was milk which had come from the cow without any abstraction or addition, no offence against s. 6 can have been committed. It was further contended that, if the first point failed, the appellant still ought not to have been convicted on the facts stated in the Case. The Case came, in the first instance, before RIDLEY, J., AVORY, J., and myself, and, as we were asked by the appellant's counsel to overrule the decision of *Smithies v. Bridge* (3) and to adopt the decision of the Scottish Court in *Scott v. Jack* (2)—in other words, to decide that if the milk is genuine and unadulterated no offence can have been committed—it seemed to us that it ought to be referred to a full court as being a point of general importance and of considerable difficulty. Accordingly, the case was argued before us on April 17, when we reserved our judgment.

In my opinion, our decision on this main point must turn on the true construction of s. 6 of the Act of 1875. The important words of that section are:

"No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding £20."

The article ordered or demanded by the purchaser in this case was new milk each morning. Nothing turns upon the word "new," but something may turn upon the word "morning," as there was evidence that the morning milk is apt to be less rich in fat than afternoon milk. No particular quality was demanded, and the first question that arises is: What quality was the purchaser entitled to? This was a sale of goods by description, and seems to me clearly to come within the provisions of s. 14 (2) of the Sale of Goods Act, 1893, which is as follows:

"Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality."

A I may observe that this was not new law. The cases decided before the Act of 1893 established that this was part of the common law. It is clear that the appellant was a seller who dealt in goods described as milk. If that be so, the quality demanded was merchantable quality. I think that in his reply his leading counsel admitted this, but I prefer to examine the contentions to the contrary put forward on the part of the appellant and the cases that have been decided on the point.

B First it was said that, at all events, as regards milk and any other natural product, there could be no offence if the article was pure and unadulterated. Reliance was placed on certain words in the preamble of the Act of 1875: "and that the law regarding the sale of food and drugs in a pure and genuine condition should be amended." But if the words in the Act itself are clear and unambiguous their meaning cannot be altered by the preamble. The word "quality" seems to be quite unambiguous. As regards drugs, this point was decided in *Knigh v. Bowers* (4). In giving judgment in that case A. L. SMITH, J., said (14 Q.B.D. at p. 848):

D "I cannot escape from the terms of s. 6; and though I doubt whether the legislature meant to include the case of a man selling an article pure and unadulterated, but other than the article demanded by the purchaser, I can only say that they have included that case."

E That case was decided in the year 1885. It has never been questioned since, and though the Act of 1875 has been amended more than once, the wording of s. 6 has not been altered. This decision was in reference to a drug, but the words "of the nature, substance, and quality" apply also to any article of food. Nor can it make any difference whether such article is a natural product or not. Take another natural product, such as fruit. Could it be said that unripe or overripe fruit was of the quality demanded. In quite a recent case—*Anness v. Grivell* (5)—it was held that "quality" in s. 6 meant the commercial quality of the article sold. LORD READING, C.J., said ([1915] 3 K.B. at p. 691): "Quality means commercial quality, not the commercial description of the article." DARLING, J., said (ibid. at p. 693): "It is not equivalent to such a word as 'kind'." And LUSH, J., said (ibid. at p. 694) that if the article sold "was of the nature and substance and yet was not of the quality demanded an offence has been committed." I can come to no other conclusion than that under the Act of 1875 any article of food, whether natural product, such as milk, or artificial product, such as bread, must be of the quality demanded and that it is no answer to say that it is genuine and not adulterated.

G Then has the law been altered as regards milk by the Act of 1899? Section 4 provided that the Board of Agriculture might make regulations for determining what deficiency in any of the normal constituents of genuine milk should for the purposes of the Sale of Food and Drugs Acts raise a presumption that the milk was not genuine or was injurious to health. The regulation made in 1901 provided that milk containing less than three per cent. of milk fat or less than 8·7 per cent. of non-fatty solids should be presumed not to be genuine. It is impossible to read this section or the order made under it as altering in any way the provisions of s. 6 of the Act of 1875. It merely affected the mode of proof, and provided that, if the ingredients of the milk did not reach the particular standard, it should be presumed until the contrary was proved that the milk was not genuine. I think that the word "genuine" means unadulterated, and that s. 4 of the Act of 1899 gives some colour to the contention that if the milk is genuine no offence has been committed, but it cannot alter the plain meaning of the words in s. 6 of the Act of 1875.

I Nor indeed was it so contended before us. It remains, therefore, that the milk must be of the quality demanded, and if no particular quality was demanded, as here, that the milk must be of merchantable quality. What is the meaning of

the word "merchantable" in relation to milk? Counsel for the appellant contended that if the milk was genuine it must be merchantable, of however poor quality. On what ground is that contention put forward? He did not tell us. What is merchantable and what is not merchantable is a pure question of fact to be determined by the evidence of those who deal in the article, sellers and buyers. It is not a question of law at all. As soon as the quality gets lower than a certain point the article ceases to be merchantable. If the article be milk it ceases to be saleable as ordinary milk. I do not think that the standard of three per cent. set up by the Board of Agriculture implies that milk below that standard is not of merchantable quality, but the fact that that standard exists and that anyone selling milk below that standard runs the risk of prosecution, I have no doubt seriously affects the saleability of milk below that standard, and it may be in the opinion of sellers and buyers who know its real quality unsaleable. If a farmer advertised that he fed his cows so as to increase the quantity of milk at the expense of its quality and that in consequence it might not reach the standard of the Board of Agriculture, who would buy it as milk to be retailed at the ordinary way?

But, however that may be, it cannot be said as a matter of law that, however poor the milk may be, it must be of merchantable quality if it is genuine. If I am right in this conclusion *Scott v. Jack* (2) is wrong, and, in my opinion, it is wrong. I think the learned judges in that case were possibly misled by the arguments of counsel who supported the conviction. Their contention was that if the milk fell below the standard set up by the Board of Agriculture an offence had been committed, however genuine the milk was. The information was based on this contention. The court was quite right, in my opinion, in rejecting that contention. But they were wrong when they decided, as I think they did decide, that if the milk was genuine, i.e., not adulterated, no offence could have been committed. I think the judgment of CHANNELL, J., in *Smithies v. Bridge* (3) was right. He held that if the article sold as milk was not milk (by which I have no doubt he meant "not milk in the commercial sense") it was not of the nature, substance, and quality demanded. I think perhaps LORD ALVERSTONE laid too much stress upon the abnormal treatment of the cows. That, in my opinion, did not of itself make the milk not merchantable milk, though it was evidence of it. I think the decision in *Smithies v. Bridge* (3) was right. The magistrates found as a fact that the milk was not of the nature, substance, and quality demanded, and there is evidence to support the finding. The principle of law laid down in that case was followed in *Wolfenden v. McCulloch* (1), though the facts and findings of the magistrates being different, the conviction was quashed. LORD ALVERSTONE expressly adhered to what he had stated in *Smithies v. Bridge* (3), and neither of the other learned judges dissented from the judgments in that case. My answer to the main point is that *Smithies v. Bridge* (3) was rightly decided. *Scott v. Jack* (2) was wrongly decided. An offence may have been committed, although the milk is genuine and unadulterated.

I come, therefore, to the second point. I have to consider the facts and findings in this case. The magistrates have found as a fact that the milk was not of the nature, substance, and quality demanded, but they have based their decision upon the finding that the deficiency in milk fat was due to the manner in which the appellant fed his cows with the object of obtaining a very large supply of milk without regard to its quality. I do not think they have addressed themselves to the real point—viz., whether the milk was merchantable milk. I think the case ought to go back to them to find this fact. As I have already said, this is a question of fact. It may well be that the fact that there was a deficiency of milk fat to the extent of nine per cent. makes the milk unsaleable as ordinary milk in the trade, or that it makes it unsaleable if in addition it is known to the buyer that this deficiency has been caused by the deliberate and abnormal treatment of the cow. On the other hand, it may be that in the trade milk however

A deficient in milk fat or milk solids, however caused, is saleable as milk provided that it is not adulterated, though I should be very much surprised if this were the fact. It must be remembered that for the purpose of deciding whether the milk is merchantable or not it must be assumed that the purchaser knows the facts, and, as I have said, it is extremely unlikely that a man knowing the facts would buy such milk to sell again for human consumption.

B It was said that if the magistrates have to find whether milk is merchantable they have a very difficult task, and one bench of magistrates may differ from another in their finding; but in respect to all goods sold without any special warranty the task is one which judges and juries have often to discharge and on which they may differ. But that is no answer. It may be a very good reason why the legislature should ask the Board of Agriculture to fix a standard and enact that all milk below the standard should not be considered as of merchantable quality. Provided the standard is fairly fixed so as to exclude milk from abnormal cows or cows treated abnormally, as well as adulterated milk, it would be very greatly to the advantage of both the producer and the consumer. There is no reason why the farmer who feeds his cows in such a way as to reduce the quality of the milk should not be prevented from selling such milk to customers who are ignorant of all the facts. The customer suffers just as much as if the quality were reduced by the addition of water. The whole object of the Act is to protect the consumer. If *Scott v. Jack* (2) is good law the consumer is not protected, even if the farmer has deliberately reduced the quality of the milk. In point of morality, I cannot distinguish between that case and the case where he adds water. It is said that there are cows which naturally give milk below the standard fixed by the Board of Agriculture. This may be so, but the sooner they are sent to the butcher the better. The keeping of such cows should not be encouraged. The customers ought not to suffer.

E I think the case should go back to the magistrates. They have found that the milk was genuine, but they have not expressly found whether it was of merchantable quality or not. They ought not to find in this case that the milk was not of the nature, substance, and quality demanded unless they are satisfied that the milk is not of merchantable quality.

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A. T. LAWRENCE, J. (read by AVORY, J.).—In this case it is found as a fact that the milk in question was when sold the morning product in its natural condition of a herd of good cows. It had nothing abstracted from it or added to it. It was genuine new milk. There was no suggestion that it was injurious to health. The only thing said against it was that according to the certificate of an analyst it did not contain quite three per cent. of butter fats. This was said to be due to the fact that the cows had fed upon herbage described as “washy”; and the “washy” herbage was said to be due to an unusually wet season. The statute the Sale of Food and Drugs Act, 1875, does not enact any standard of quality in milk, nor does the Sale of Food and Drugs Act, 1899, or the regulations made thereunder. Every species of cow differs in the quality of its milk, and it is probable that every cows differs slightly from day to day in the quality of the milk it produces. The regulations of 1901 when they prescribed three per cent. of butter fats as a test of genuineness seemed to have foreseen the facts of this case and to have provided a defence which this appellant has established. He satisfied the justices that the deficiency in butter fats shown by the certificate was not due to any addition to or abstraction from the milk, but that he was selling as “new milk” that which was in fact recently taken from a healthy cow. The justices appear to have convicted the appellant because he knew that the condition of the herbage would cause the cows to give a very large supply of milk, and continued to feed them on it without regard to its effect upon the quality of the milk. This does not constitute an offence. Section 6 is not aimed at the use of milk-producing foods,

still less at the dairy-keeper's not taking steps to counteract the natural effects of changes of climate. I think the appeal should be allowed.

SCRUTTON, J.—This Special Case, which in view of the differences of opinion between the English and Scottish courts and among English judges themselves, is brought before a court of five judges, raises questions of some difficulty as to the sale of milk. Hunt was summoned for selling milk not of the nature, substance, and quality demanded by the purchaser; the magistrates have found that the milk was not of the nature, substance, and quality so demanded, and have convicted him. They have, however, found that he did not abstract anything from or add anything to the milk after it left the cow. They apparently rest the conviction on a statement of the analyst that the milk is deficient in milk fat to the extent of nine per cent., a figure which is reached by comparing 2·73 per cent., the actual percentage of milk fat in the milk in question, with three per cent., a figure contained in certain regulations of the Board of Agriculture, as to which the Case finds that milk taken from a healthy herd and mixed should show not less than three per cent. of milk fat. They also seemed to have been influenced by a finding that the deficiency in milk fat was due to the manner in which the appellant had fed his cows with the object of obtaining a very large supply of milk without regard to its quality. Shortly and barely stated, the contention of the appellant appeared to be that when the vendor had admittedly neither added to nor abstracted from a natural product he could not be convicted of an offence against s. 6 of the Act of 1875, which really only dealt with adulteration. The contention of the respondents was that the offence under s. 6 was selling an article not of the nature, substance, and quality demanded, and adulteration was only relevant as one of the ways of proving this offence, but whether the article was or was not of the nature, substance, and quality demanded was a question of fact for the magistrates and that there was evidence in this case on which they could find as they had done.

The Sale of Food and Drugs Act, 1875, repealed all previous Acts, but did not confine itself to codifying and consolidating them; it amended them. The special occasion of its enactment, as stated by GRANTHAM, J., in *Pain v. Boughtwood* (6) (24 Q.B.D. at p. 355), was the necessity of making clear when knowledge was or was not an ingredient in the offence. But opportunity was taken widely to vary the language of the Acts amended. I do not find that the expression "nature, substance, and quality" occurs in any earlier Act. The nearest words to it in the previous statute—the Act, passed in 1872, relating to the adulteration of food and drugs—are "every person who shall sell as unadulterated any article of food or drink which is adulterated," and these words are pointedly omitted in the Act of 1875. That Act has three classes of offences: (i) mixing in articles of food or drugs ingredients which make them injurious to health and selling such articles so mixed (ss. 3, 4, and 5) [see s. 1 (1) of Food and Drugs Act, 1955]; (ii) abstracting from articles of food any part so as injuriously to affect its substance, quality, or nature, or by selling such articles so treated (s. 9) [s. 1 (2) of Act of 1955]; (iii) selling any article of food or drug which is not of the nature, substance, and quality demanded by the purchaser, with certain exceptions (s. 6) [s. 2 of Act of 1955]. This offence, by s. 2 of the Sale of Food and Drugs Amendment Act, 1879, is committed if the article is defective in nature, substance, or quality. The true construction of s. 6 is of considerable public importance, as under it the great majority of prosecutions under the Act are instituted. It will be seen that while adding or abstracting so as to cause injury to health, are specifically dealt with in ss. 3 and 9, nothing is said about addition or abstraction in the definition of the offence in s. 6, though certain additions are excused in the exceptions to that section. It seems, therefore, to be clear that if the article sold is not of the nature, or substance, or quality demanded, it is immaterial that the vendor has not

A adulterated or tampered with it. For that reason the English Court in *Knight v. Bowers* (4) convicted a man of supplying unadulterated saffron when saffron was asked for, it not being of the nature and substance demanded. MATHEW, J., said that the preamble to the Act of 1875 did not show that every subsequent action was to be limited to adulteration and adulteration only, and A. L. SMITH, J., doubting whether the legislature meant to include the case of a man selling an article pure and unadulterated, but other than the article demanded by the purchaser, held that they had included that case. This decision is clear authority, unless it is overruled, for the proposition that it is an offence under s. 6 to supply an article not of the nature demanded, though the article is a natural product with nothing taken away or added by the vendor. Indeed, this is only what the statute says in plain words. On the other hand, where the substance sold, though not technically that demanded is generally known to the trade and public by the description demanded, no offence is committed. Thus in *Sandys v. Rhodes* (7) a sort of tapioca known to the trade and the public as sago and supplied as sago, and in *Anderson v. Britcher* (8) cane sugar from Mauritius supplied in answer to a demand for "Demerara sugar" and found to possess the qualities now connoted to the trade and to the public by the term "Demerara sugar," were held of the nature, substance, and quality demanded.

I should take it to be an offence to supply, under a demand for milk or cow's milk, ass's or goat's milk; and I notice that DARLING, J., in *Smithies v. Bridge* (3) said ([1902] 2 K.B. at p. 18):

E "I understand by the word milk, cow's milk; and I do not think that a person asking for milk would expect to get ass's milk or that of any other animal."

I gather that he would have convicted a vendor of milk who supplied ass's milk of supplying goods not of the nature demanded, though he had added nothing to or abstracted nothing from the natural product. The same view would apply to a man supplying chicory in answer to a demand for coffee, plaice in answer to a demand for soles, margarine with no butter in it in answer to a demand for butter. He has not supplied goods of the nature demanded, whether he has adulterated the goods supplied or not. It is not necessary to consider here what meaning "substance" has as distinct from "nature." Perhaps Reginald Picard of Stamford, who was convicted at the Fair of St. Ives in 1275 (see SELECT PLEAS IN MANORIAL COURTS, Selden Society, 1889, at p. 139), for selling a ring of brass for 5½d., saying that the ring was of the purest gold, and that he and a one-eyed man found it in the churchyard of St. Ives near the cross, could be convicted at the present day, among other offences, of selling an article not of the substance demanded.

H There remains the word "quality." Again, it appears that a vendor commits an offence who sells an article not of the quality demanded, whether he has added anything to or taken anything from the article he sells. Where natural products are sold as "firsts" or "seconds" according to quality, it would be, in my view, an offence to sell seconds when asked for firsts, though nothing had been done to the seconds by the vendor. This would apply to different qualities of coal or of eggs. A man who asked for new laid eggs and received cooking eggs—as those terms are understood in the market—would be convicted of supplying goods not of the quality demanded, though he had not adulterated the eggs by addition or abstraction. On the meaning of the word "quality" we have the guidance of the court in *Anness v. Grivell* (5). LORD READING, C.J., says ([1915] 3 K.B. at p. 691):

"Quality means commercial quality and not the commercial description of the article."

DARLING, J., says (*ibid.* at p. 693) :

"I quite agree that the word quality means the commercial quality and is not equivalent to such a word as 'kind.' I do not think we can limit it to the sort of use suggested on behalf of the appellant in the illustration that a purchaser would ask for Scotch or Irish, Lowland or Highland whisky. I think it means quality in the sense which my Lord has indicated."

LUSH, J., agrees and contrasts the most expensive and best quality with the cheapest and inferior quality. If this is so, the question for the magistrates in this case would be, was the article supplied of the nature, substance, and commercial quality demanded by the purchaser? This would be a question of fact for the magistrates.

This and the questions they have to consider have been laid down in numerous cases. In *Pashler v. Stevenitt* (9) gin was supplied containing seventy per cent. of water, forty-four degrees under proof. There was evidence that gin was sold of a strength down to twenty degrees below proof. A witness said he would describe the article supplied as "gin whose alcoholic strength was very low." The magistrates convicted, and the High Court said (35 L.T. 864) :

"The justices have come to the conclusion that this mixture is not of the quality of gin as known commercially . . . it is impossible for us to say they were wrong."

That case was followed in *Webb v. Knight* (10). The purchaser asked for gin, and being told there was gin at 2s. a pint and gin at 1s. 4d. a pint, selected the latter. A spirit 43 per cent. under proof was supplied. The magistrate convicted, and the High Court upheld the decision. MELLOR, J., said (2 Q.B.D. at p. 535) :

"I agree with the observations of the judges in *Pashler v. Stevenitt* (9) that the question whether the article is that demanded by the purchaser is one of fact for the justices . . . the appellant was at liberty to prove that gin like his own was commonly sold in the neighbourhood."

LUSH, J., said (*ibid.*) :

"I think it must always be a question for the magistrates whether the amount of dilution is in excess of what is reasonable, or in other words it was for them to say what quantity of water a purchaser may reasonably expect to find mixed with gin."

Parliament then by the Act of 1879, s. 6, helped the magistrates by providing it should be a good defence to prove that the admixture of water had not reduced the spirit more than thirty-five per cent. under proof for gin. But in cases where Parliament has not provided a statutory standard for the magistrates, the prosecution must provide evidence to show that the article supplied is not of the nature, substance, and quality demanded. Thus in *Roberts v. Leeming* (11) dealing with margarine the court, while differing on the facts, agreed on the law.

"The justices had to make their own standard according to the evidence before them and to say was this article in accordance with the standard or not."

In *White v. Bywater* (12) the demand was for tincture of opium, which, says A. L. SMITH, J., is the article known in commerce as "tincture of opium"; and, as the article supplied, though a tincture of opium, was of very inferior substance and quality to tincture of opium of commerce, the conviction was upheld. In the arsenic-in-beer case, *Goulder v. Rook* (13), the judgment of the court concludes ([1901] 2 K.B. at p. 298) :

"I must not be understood to suggest that every accidental introduction of deleterious matter into an article sold for food of necessity makes it different in nature, substance, and quality from the article demanded. It is for the magistrates in each case to find whether in fact the article supplied is of the nature, substance, and quality demanded."

A At this stage, applying the above remarks to the construction of s. 6 in regard to milk, it would seem that the magistrates have to find as a fact on evidence whether the article supplied is of the nature, substance, and quality demanded. They must ascertain the terms of the demand, interpreting those terms by evidence as to their commercial meaning when necessary, and by the implied warranties following from s. 14 of the Sale of Goods Act, reasonable fitness for

B consumption as human food under sub-s. (1), and merchantable quality, if the goods are brought by description, under sub-s. (2). They must then find as a fact whether the article supplied complies with the demand so interpreted. Before seeing how far this statement of the law is consistent with the cases on milk it is necessary to deal with the Sale of Food and Drugs Act, 1899, and the regulations made thereunder. Section 4 empowers the Board of Agriculture to make regulations

C for determining what deficiency in any of the normal constituents of milk or what proportion of water in milk shall raise a presumption until the contrary is proved that the milk is not genuine or is injurious to health. Regulation 1 of the regulations of 1901 made under this section provides that less than three per cent. of milk fat or 8·5 per cent. of milk solids other than fat raises a presumption that the milk is not genuine, by reason of abstraction of milk fat or solids other

D than milk fat or the addition thereto of water. It will be observed (i) that the regulation is not directed to injury to health as mentioned in s. 4 of the Act of 1901, or ss. 1, 2, and 9 of the Act of 1875; (ii) that there is an enactment in terms making it an offence to sell milk which is not "genuine," but that genuine must be used as equivalent to "of the nature, substance, or quality demanded." The only place where the word genuine is used in the preamble of the Act of 1875, where the words "pure and genuine" are used together, presumably having different meanings; (iii) that the only effect of the regulation is in the case of milk containing a smaller percentage of milk fat than the regulation to throw the burden of proof that nothing has been abstracted or added on the vendor; (iv) that if the vendor proves that nothing has been abstracted or added the prosecution under s. 6 must then prove that the article is not of the nature, substance, or quality demanded

F in some other way, or fail: they may, for instance, prove that the article sold as cow's milk is really goat's milk; (v) that if the vendor does not prove that nothing is abstracted or added there is a presumption that the milk is not genuine in the sense explained, i.e., not of the nature, substance, or quality demanded, and the vendor can be convicted; (vi) that the Act of 1899 and the regulation create no new offence, but only deal with burden of proof. The offence is still that of the Act of

G 1875, selling an article not of the nature, substance, and quality demanded.

I now proceed to consider the cases decided by the English and Scottish courts as to milk. In *Davidson v. M'Leod* (14) the majority of the High Court of Justiciary, four judges against two, held in a case of sale of cream (i) in the case of two of the majority that the article supplied must be deficient in nature, substance and quality, (ii) the case of all the majority that the official purchaser could not be prejudiced so that there was no offence under s. 6 in the case of an official purchaser. The two judges who took view (i) also held that you could not convict under s. 6 unless there was adulteration. The two judges who dissented held that the sheriff had found deficiency of quality as a fact, and they could not interfere. This view of the majority which made the Act a dead letter was dissented from by the English court in *Hoyle v. Hitchman* (15), and the legislature by the Act of 1879 gave statutory authority to the view of the English court. But in *Hoyle v. Hitchman* (15), LUSH, J., pointed out that the actual decision in *Davidson v. M'Leod* (14) might be supported, because, while the unadulterated cream was of an inferior quality to that ordinarily sold in Glasgow, "cream is not an article having any standard of quality. This was genuine cream though of inferior quality. It appears to me that the sale in such a case was not an offence within the Act at all." It is possible that the word "genuine" in the Act of 1899 came from the judgment. Whether there is a standard of quality for cream implied in asking

for cream is, in my view, a question of fact and evidence, not of law. If there was a commercial standard of cream or merchantable cream, I think an offence would be committed in supplying cream below that standard though no adulteration took place. If no evidence is given of any standard of quality the prosecution would apparently fail, unless on similar lines to *R. v. Field, etc., Justices, Ex parte White* (16) and *Shortt v. Robinson* (17), as limited by *Preston v. Redfern* (18), the magistrates were allowed for some reason to act either on their own knowledge or on documents not admissible as evidence. I note that LUSH, J., expressly declined to decide whether the Scottish judges were right in holding that s. 6 applies only to an admixture of foreign ingredients. He says also (4 Q.B.D. at p. 241):

"I do not decide whether if a person sold Indian rice when he was asked for Carolina rice such a case as that would be within the section."

I think it is admitted that it would be.

In *Lane v. Collins* (19) a seller was asked for milk and supplied skimmed milk, sixty per cent. deficient in butter fat. The magistrate dismissed the summons. MATHEW, J., and DAY, J., affirmed his decision on the ground that it was not shown that what was supplied was not what according to the ordinary use of the term a purchaser might reasonably have expected to get from the vendor under the designation of milk. If this decision proceeds on the ground that the analyst's certificate was not sufficient evidence of a commercial standard, I understand it though I cannot agree with it; if on any other ground I do not understand it and respectfully dissent from it. But the Act of 1899 and regulation of 1901 appear to deprive it of any effect, as under that statute on a sale of skimmed milk a vendor will not be able to prove that he has not abstracted milk fat, and so may have difficulty in overcoming the statutory presumption.

In 1900, in *Banks v. Wooller* (20), the analyst's certificate found ten per cent. of water added and the magistrates found the milk exceptionally good and held it was inexpedient to inflict any punishment. The court (CHANNELL and BUCKNILL, JJ.) remitted the case with the intimation that if the milk was exceptionally good after adulteration the magistrates might consider the offence too trifling to convict, but if the milk was only exceptionally good before adulteration the offence was not trifling, and the magistrates should convict. I should have thought the question was whether the milk was of the nature, substance, and quality demanded—that milk and water might not be a substance of the nature demanded, or it might be that the resultant fluid was not of the quality demanded, and the magistrates should have been asked to decide the question. This view agrees with that of the court in *Goulder v. Rook* (13).

In *Smithies v. Bridge* (3) new milk was asked for; milk with only 2.09 per cent. of fat was supplied, the analysis saying that the milk was deficient in the fat proper to genuine milk. The magistrates found that there had been no adulteration of or abstraction from the milk, but there was a long interval between the milkings, which increased the quantity of milk and decreased the percentage of fat in it. They found as a fact that the article supplied was not of the nature, substance, and quality of "new milk," without, as I understand, specifically finding in what respect it was defective. LORD ALVERSTONE and CHANNELL, J., took the view that the magistrates had to find as a fact whether the article was of the nature, substance, and quality of milk, and that the deficiency of fat, with the reason why it was deficient, was evidence on which the magistrates might come to their finding. CHANNELL, J., was, I think, inclined to say that the article was not of the nature of milk, "the cow was not in fact producing milk, but was producing another liquid which had not the constituent parts of milk." I should have preferred, if I had to find the fact, to say that the milk was not of the quality demanded, being milk so poor as to fall below the commercial standard, and I do not think that the previous treatment of the cow is material, except that it explains why the milk

A falls below the commercial standard either as to nature or quality. While I think the question for the magistrates is correctly stated, I think there might have been a clearer direction to them of what they should consider. I state my view of that direction hereafter. DARLING, J., in dissenting, says ([1902] 2 K.B. at p. 18):

B "I do not think that I should have taken the trouble to differ in this case if I thought that our decision would only apply to milk, because of the Departmental Order to which I have referred."

I do not understand this passage, in view of the importance which the learned judge attaches to the Departmental Order, as freeing the appellant in the present case. The earlier part of his judgment seems to treat the Order as setting up a fixed standard for milk instead of, as I think, a burden of proof. The learned judge continues (*ibid.* at pp. 18, 19):

C "I cannot help foreseeing the difficulties that might arise in such cases where no standard is in existence if it were to be held that a natural product was not of the nature, substance, and quality of the article demanded because it did not contain all the elements and in the same proportions in which those elements were usually present in normal examples of the natural product."

D I agree if no evidence of "commercial quality," merchantableness, or fitness for purpose can be given there can be no conviction in respect of "quality." I confine my dissent to cases where such evidence is available. The learned judge further says (*ibid.*):

E "In the case of other things than milk I think it would be highly dangerous for us to lay down that a man may be convicted under s. 6 of the Sale of Food and Drugs Act, 1875, for selling a natural product in the state in which he gets it. For example, a purchaser who had demanded apples and had received them as they were plucked from the tree might complain that they contained less malic acid or other essential than some analyst might prove to be usual in apples. Poor in quality they might be, but they would still be apples, and as nature produced them."

F But I understand the earlier part of the judgment to agree that the supplier of a natural product, "ass's" milk in the state in which he gets it, in response to a demand for milk or cow's milk, could be convicted—I suppose for supplying an article not of the nature demanded; and I think a man who when asked for apples supplied rotten apples could be convicted of supplying apples not of the quality demanded. I respectfully dissent from this judgment, though I should word the majority judgment somewhat differently.

G In *Wolfenden v. McCulloch* (1) milk was asked for; the analyst reported 2·81 per cent. of fat; the magistrates found milking at usual hours and no adulteration or abstraction, but held they were bound by the decision in *Smithies v. Bridge* (3) to convict. They did not specifically find anything about the nature, substance, or quality of the article supplied. LORD ALVERSTONE said that the justices might have considered for themselves whether the milk was of the nature, substance, and quality demanded, and that there was no evidence to connect the small deficiency in milk fat with anything abnormal, the milking hours being usual. LORD ALVERSTONE adhered to what he had said in *Smithies v. Bridge* (3), and neither of the other judges dissented.

I In 1912 a milk case came before the Scottish Courts in *Scott v. Jack* (2). The article demanded was sweet milk; the analysis showed only 2·57 per cent. of milk fat; the milk was found to be not tampered with or adulterated, but the vendor fed the cows so as to produce the largest yield of milk, and paid no attention to its quality. The sheriff found the deficiency in milk fat was due to a method of feeding intentionally adopted. He did not find whether the milk was of the nature, substance, and quality demanded, but dismissed the complaint. For some reason the vendor was charged with an offence against the milk regulations, which, as I understand them, create no offence, as well as against the statute. I think the

Scottish judges accept the view of DARLING, J., in *Smithies v. Bridge* (3). They seem to treat the regulation of 1901 as providing the only way in which an offence under s. 6 can be proved; they treat the question as one of law, dissenting from the English view laid down in numerous cases that it is a question of fact for the magistrates. Some of them hold that there can be no offence if there is no adulteration or abstraction, though they do not state their view of such English cases as *Knight v. Bowers* (4), where there was no adulteration or abstraction, but a conviction. For the reasons I have stated I respectfully disagree with these positions.

Lastly, in *Marshall v. Skett* (21), in December, 1912, milk was asked for; the analysis showed 26 per cent. deficiency; other evidence was given except that another sample of that milking showed just three per cent. of milk fat; and a sample taken a month later a very slight deficiency. The magistrates found that the milk was not of the nature, substance, and quality demanded, but, as they were satisfied that the milk was as it came from the cow, they did not convict. The court directed the magistrates to convict unless the respondent adduced further evidence. This is a decision that if the milk was not of the nature, substance, and quality demanded it is immaterial that it was as it came from the cow; with this I agree.

I agree with my brother DARLING in *Smithies v. Bridge* (3) that the principles laid down in this case cannot be limited to milk. For the Act of 1899 and the regulations of 1901 do not, in my view, alter the offence in s. 6, but only give one way of proving that it has been committed, which one way of proof can be negated or defeated in a specified way. The principles apply to all natural products. The first question is: Is the natural product of the nature demanded? The only materiality of the question whether the article supplied has had substances added or abstracted is in helping to show whether the article supplied is of the nature demanded. Milk and water may not be "milk." Gin and water may be "gin." But the offence may be committed though no addition to or subtraction from the article supplied be made. Savin supplied for saffron; pure ass's milk for cow's milk; neither adulterated, but both not of the nature demanded. The question is the same when quality is demanded. What has happened to the milk, whether by intentional faulty feeding or by subsequent addition or abstraction, may explain why the article supplied is not of the quality demanded; but the real question is: What is the quality demanded? Has it been supplied? If it has not, it is immaterial that there has been no adulteration or abstraction. New laid eggs asked for, bad eggs supplied—an offence against s. 6. The quality demanded is a question of fact; it may be the interpretation of a trade description; it may be evidence of the commercial quality spoken of by the court in *Anness v. Grivell* (5); it may be evidence of merchantable quality implied by the Sale of Goods Act in goods sold by description. But it is a question of fact for the magistrates, not of law for the court, who are not judges of fact and may not know accurately what they think they know about it. A natural product may be so poor in quality, though the genuine product of nature, that it does not possess the commercial or merchantable quality required by the custom of buyers and sellers, which is a question of evidence. It is, I think, common knowledge that some milk is so poor from the poor condition of the animal that it will not nourish; some meat so poor from the poor condition of the animal that no consumer except the poorest would have it on his table. In my view, to supply such products would be an offence though the products have not been tampered with.

It remains to apply these principles to the facts of the present case. The magistrates found a herd of good cows milked at the usual hours in the district, and nothing added to or abstracted from the milk. They found a deficiency of milk fat of nine per cent. from the standard of the Board of Agriculture (three per cent.) and that milk taken from a healthy herd and mixed should show not less than three per cent. of milk fat, and they find that the deficiency in milk

A fat was due to the manner in which the appellant had fed his cows with the object of obtaining a very large supply of milk without regard to its quality. The demand was for "new milk each morning." On this evidence they determined that the milk was not of the nature, substance, and quality demanded. I cannot help suspecting that they have been influenced by the fact that the milk is below the standard of the Board of Agriculture and that the appellant has fed his cattle so as to make it so, without addressing their minds to the question whether the milk supplied is of the commercial or merchantable quality required by the usage of buyers and sellers of milk. It may be of that quality though it is below the Board of Agriculture standard, or though the seller has fed his cows to get quantity; it may not be of that quality though it is not adulterated. It is a question of fact depending on evidence. If there is no evidence of such a standard of commercial and merchantable quality there can, in my view, be no conviction where the article is of the nature demanded. In my view, the case should go back to the magistrates to answer the question of fact whether the milk supplied was of the nature, substance, and quality demanded in view of the principles laid down in this judgment.

D **AVORY, J.**—The offence alleged in this case was the sale of milk to the prejudice of the purchaser which was not of the nature, substance, and quality of the article demanded by the purchaser, contrary to s. 6 of the Sale of Food and Drugs Act, 1875. The article demanded was, as appears by the contract with the appellant, "new morning milk"; the article supplied contained, according to the certificate of the analyst, 2.73 per cent. of milk fat and was in his opinion deficient in milk fat to the extent of nine per cent. The justices found that it was deficient in milk fat to the extent of nine per cent., but that there had been no abstraction of milk fat or any addition of water after it had come from the cow, and that the deficiency in the milk fat was due to the manner in which the appellant had fed his cows. They do not find that the article supplied was not milk, nor do they find that it was not new morning milk. If it was milk at all it was clearly new morning milk. They must be taken, I think, to have accepted the evidence that the morning milk from a healthy herd of cows frequently contained less than three per cent. of milk fat, and the only ground suggested in the Special Case for the finding that there was a deficiency and that the sale was to the prejudice of the purchaser is the regulation made by the Board of Agriculture under s. 4 of the Sale of Food and Drugs Act, 1899, set out in the Case. This section does not authorise the Board of Agriculture to define what is milk or to fix a standard of the normal constituents below which an article shall be deemed not to be milk, and the regulation providing that where a sample of milk contains less than three per cent. of milk fat it shall be presumed, until the contrary is proved, not to be genuine of necessity implies that it may be proved to be genuine although it contains less than three per cent. of milk fat. It is to be observed that s. 1 of the Act of 1899, which deals with the importation of adulterated or impoverished milk, provides in sub-s. (7) that for the purposes of that section milk shall be deemed to be adulterated or impoverished if it has been mixed with any other substance, or if any part of it has been abstracted so as in either case to affect injuriously its quality, substance, or nature. This I think confirms the view implied in the regulation that milk which has not been so treated although it be deficient in milk fat is none the less deemed to be milk for the purposes of s. 6 of the Sale of Food and Drugs Act.

In my opinion, the milk supplied in this case was proved to be genuine milk and there was no evidence upon which the justices could find it was not of the nature, substance, and quality of the article demanded. Milk may vary in quality according to the breed of the cow, the nature of the feed, and the season of the year, and a purchaser may demand a particular quality, but in this case there was no demand by the purchaser of any particular quality, but only of "new

morning milk," which was in fact supplied; and if, as BRAY, J., decides, there is on every purchase of new milk an implied demand that it shall be of merchantable quality—which I take to mean saleable in the market as new milk (*Jones v. Just* (22))—there was not, in my opinion, in this case any evidence that the milk in question was not of merchantable quality; and there is no ground for suggesting that it was not fit for human consumption.

As to the previous decisions of this court cited in argument, I think *Wolfenden v. McCulloch* (1) governs the present case, and I doubt if *Smithies v. Bridge* (3) is consistent with it. If it is, it can only be supported, I think, on the ground that there was evidence in that case upon which the justices could find that the article was not milk at all, which is the ground of the decision of LORD ALVERSTONE, C.J., as I understand it. I agree with the decision of the Scottish judges in *Scott v. Jack* (2) and adopt the passage in the judgment of LORD SALVESEN, where he says (1912 S.C. (J.) at p. 100):

"If the purchaser had demanded sweet milk containing three per cent. of milk fat or upwards, and had got milk of a poorer quality, an offence might have been committed, but the only demand here made was for sweet milk, and sweet milk unadulterated and not in any way tampered with was what was supplied."

Anness v. Grivell (5) is also an authority for the same proposition that if the purchaser gets what he asks for there is no sale to his prejudice. I do not decide that anything drawn from the udder of a cow is necessarily milk, but in the absence of any statutory enactment that an article shall not be deemed to be milk unless it conforms to a certain standard I do not think the farmer who contracts to supply new milk is bound to feed his cows artificially, or prevent them from drinking too much water, in order to maintain or produce milk of a particular quality. With all respect to the judgments of BRAY, J., and SCRUTTON, J., an obligation on the farmer, who contracts merely to supply new milk to customers in different parts of the country, to supply milk of a particular quality which is to be determined to be merchantable or otherwise, according to the varying views of magistrates in different parts of the country where it may be delivered, the farmer having no means of knowing beforehand in which district proceedings may be taken, or to what standard the milk must conform, would, in my opinion, render the provisions of the Act of 1899 and the regulations made thereunder quite illusory, and the enforcement of this penal statute under such conditions unjust and impracticable. I think the appeal should be allowed and the conviction quashed.

Solicitors: *Torr & Co.*, for *Algernon J. Lyon*, Cambridge; *J. E. Whitehead*, Cambridge.

[Reported by J. F. WALKER, Esq., Barrister-at-Law.]

HORLOCK v. BEAL

[HOUSE OF LORDS (Earl Loreburn, Lord Atkinson, Lord Shaw, Lord Parmoor and Lord Wrenbury), December 6, 7, 1915, January 21, 1916]

[Reported [1916] 1 A.C. 486; 85 L.J.K.B. 602; 114 L.T. 193;
32 T.L.R. 251; 60 Sol. Jo. 236; 13 Asp. M.L.C. 250;
21 Com. Cas. 201]

Contract—Frustration—Implication of term—Impossibility of performance—Cause beyond control of either party—Knowledge of parties that performance impossible if cause occurred—Seaman's wages—Termination of employment—Capture of ship by enemy—"Loss" of ship—Meaning of "loss"—Merchant Shipping Act, 1894 (57 & 58 Vict., c. 60), s. 158.

If the performance of a contract has become impossible by a supervening cause beyond the control of either party, and neither party has taken on himself the risk of such a supervening cause, and from the nature of the contract it appears that the parties from the first must have known that its fulfilment would become impossible if such a supervening cause occurred, on such a cause occurring both parties are excused from performance. In such a case a condition is implied that, if performance becomes impossible, the contract shall not remain binding.

By a contract of service dated May 21, 1914, the respondent's husband was employed to serve as a seaman in the appellant's ship, the *C.H.*, for a voyage not exceeding two years in duration. An allotment note allotting half his wages to the respondent was issued to the respondent under s. 141 of the Merchant Shipping Act, 1894. On Aug. 2, 1914, the *C.H.* entered the port of Hamburg, and on Aug. 4 she was detained, war having been declared between Great Britain and Germany. The crew, including the respondent's husband, were kept as prisoners on board the ship until Nov. 2 when they were taken ashore and interned.

Held by EARL LOREBURN, LORD ATKINSON, LORD SHAW, and LORD WRENBURY, LORD PARMOOR dissenting: as from Aug. 4 (per EARL LOREBURN, Nov. 2), 1914, the appellant lost the use of his ship; that loss, having arisen through a declaration of war, must be considered to have been caused for a period of indefinite duration; and, therefore, the contract of service then became impossible to perform, there had been a failure of something which had been at the basis of the contract in the minds and intention of the contracting parties, namely, the continued availability of the ship, and there must be implied in the contract a term that in such circumstances the contract would end, with the result that the respondent was not entitled to any payment under the allotment note in respect of wages payable to her husband after Aug. 4, 1914.

Per CURIAM: Section 158 of the Merchant Shipping Act, 1894, which provides for the termination of a seaman's service "by reason of the wreck or loss of the ship" had no application, for "loss" in that section means physical loss and not merely the loss of a ship to the owner owing to a prolonged detention by a third party.

Notes. Considered: *Barras v. Aberdeen Steam Trawling and Fishing Co.*, [1933] All E.R. Rep. 52. Referred to: *F. A. Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co.*, post, p. 104; *Scottish Navigation Co. v. Souter & Co.*, *Admiral Shipping Co. v. Weidner, Hopkins & Co.*, [1917] 1 K.B. 222; *Metropolitan Water Board v. Dick, Kerr & Co.*, post, p. 122; *Blackburn Bobbin Co. v. Allen*, [1918] 2 K.B. 467; *Ertel Bieber & Co. v. Rio Tinto Co., Ltd.*, [1918-19] All E.R. Rep. 127; *Naylor Benzoni & Co. v. Krainische Industrie Gesellschaft*, [1918] 1 K.B. 331; *Bank Line, Ltd. v. Arthur Capel & Co.*, [1918-19] All E.R. Rep. 504; *Re Comptoir Commercial Anversois and Power, Son & Co.*,

[1918-19] All E.R. Rep. 661; *Schostall v. Johnson* (1919), 36 T.L.R. 75; *Larrinaga & Co. v. Société Franco-Américaine Des Phosphates de Médulla, Paris* (1922), 38 T.L.R. 739; *Hirji Mulji v. Cheong Yue Steamship Co.*, [1926] All E.R. Rep. 51; *Browning v. Crumlin Valley Collieries*, [1926] All E.R. Rep. 132; *First Russian Insurance Co. v. London and Lancashire Insurance Co.*, [1928] Ch. 922; *The Penelope*, [1928] P. 180; *May v. May*, [1929] All E.R. Rep. 484; *Ottoman Bank v. Chakarian*, [1930] A.C. 277; *Walton Harvey, Ltd. v. Walker and Homfreys*, [1931] 1 Ch. 145; *Imperial Smelting Corp. v. Joseph Constantine Steamship Line, Ltd.*, [1940] 2 All E.R. 46; *Unger v. Preston Corp.*, [1942] All E.R. 200; *Morgan v. Manser*, [1947] 2 All E.R. 666; *Re Sergeant* (1948), 29 Ry. & Can. Tr. Cas. 84; *Davis Contractors, Ltd. v. Fareham U.D.C.*, [1956] 2 All E.R. 145.

As to the doctrine of frustration, see 8 HALSBURY'S LAWS (3rd Edn.) 185-194; and as to seamen's wages see *ibid.*, 2nd Edn., vol. 30, pp. 216 et seq. For cases see 12 DIGEST (Repl.) 436 et seq., and 41 DIGEST 224 et seq. For Merchant Shipping Act, 1894, see 23 HALSBURY'S STATUTES (2nd Edn.) 395. And see Law Reform (Frustrated Contracts) Act, 1943 (4 HALSBURY'S STATUTES (2nd Edn.) 662).

Cases referred to :

- (1) *The Olympic*, [1913] P. 92; 82 L.J.P. 41; 108 L.T. 592; 29 T.L.R. 335; 12 Asp. M.L.C. 318; sub nom. *Fraser and Weller v. Oceanic Steam Navigation Co. (No. 2)*, 57 Sol. Jo. 388, C.A.; 41 Digest 229, 680.
- (2) *Beale v. Thompson* (1804), 4 East 546; 1 Smith, K.B. 144; 102 E.R. 940; affirmed sub nom. *Thompson v. Beale* (1813), 1 Dow. 299, H.L.; 41 Digest 230, 690.
- (3) *Pratt v. Cuff* (1798), cited in 4 East, at p. 43; 102 E.R. 746, N.P.; 41 Digest 230, 689.
- (4) *Delamainer v. Winteringham* (1815), 4 Camp. 186; 171 E.R. 60, N.P.; 41 Digest 231, 697.
- (5) *Taylor v. Caldwell* (1863), 3 B. & S. 826; 2 New Rep. 198; 32 L.J.Q.B. 164; 8 L.T. 356; 27 J.P. 710; 11 W.R. 726; 122 E.R. 309; 12 Digest (Repl.) 696, 5333.
- (6) *Appleby v. Myers* (1867), L.R. 2 C.P. 651; 36 L.J.C.P. 331; 16 L.T. 669, Ex.Ch.; 12 Digest (Repl.) 696, 5334.
- (7) *Howell v. Coupland* (1876), 1 Q.B.D. 258; 46 L.J.Q.B. 147; 33 L.T. 832; 40 J.P. 276; 24 W.R. 470, C.A.; 12 Digest (Repl.) 429, 3304.
- (8) *Baily v. De Crespigny* (1869), L.R. 4 Q.B. 180; 10 B. & S. 1; 38 L.J.Q.B. 98; 19 L.T. 681; 33 J.P. 164; 17 W.R. 494; 12 Digest (Repl.) 420, 3249.
- (9) *Krell v. Henry*, [1903] 2 K.B. 740; 72 L.J.K.B. 794; 89 L.T. 328; 52 W.R. 246; 19 T.L.R. 711, C.A.; 12 Digest (Repl.) 435, 3327.
- (10) *Melville v. De Wolf* (1855), 4 E. & B. 844; 24 L.J.Q.B. 200; 25 L.T.O.S. 127; 19 J.P. 628; 1 Jur. N.S. 758; 3 W.R. 401; 3 C.L.R. 960; 119 E.R. 313; 12 Digest (Repl.) 421, 3253.
- (11) *The Friends* (1801), 4 Ch. Rob. 143; 165 E.R. 565; 41 Digest 231, 695.
- (12) *Moss v. Smith* (1850), 9 C.B. 94; 19 L.J.C.P. 225; 14 L.T.O.S. 376; 14 Jur. 1003; 137 E.R. 827; 29 Digest 259, 2096.
- (13) *Dahl v. Nelson, Donkin & Co.* (1881), 6 App. Cas. 38; 50 L.J.Ch. 411; 44 L.T. 381; 29 W.R. 543; 4 Asp. M.L.C. 392, H.L.; 41 Digest 517, 3471.
- (14) *Geipel v. Smith* (1872), L.R. 7 Q.B. 404; 41 L.J.Q.B. 153; 26 L.T. 361; 20 W.R. 332; 1 Asp. M.L.C. 268; 41 Digest 411, 2558.
- (15) *Jackson v. Union Marine Insurance Co.* (1873), 8 C.P. 572; 42 L.J.C.P. 284; 22 W.R. 79; affirmed (1874), L.R. 10 C.P. 125; 44 L.J.C.P. 27; 31 L.T. 789; 23 W.R. 169; 2 Asp. M.L.C. 435, Ex.Ch.; 41 Digest 330, 1859.
- (16) *R. v. Castlecharch (Inhabitants)* (1735), Burr. S.C. 70; 42 Digest 683, 967.
- (17) *R. v. Eaton (Inhabitants)* (1735), Burr. S.C. 47.
- (18) *Wiggins v. Ingleton* (1705), 2 Ld. Raym. 1211.
- (19) *The Elizabeth* (1819), 2 Dods. 403; 165 E.R. 1527; 41 Digest 252, 939.

- A (20) *Goss v. Withers* (1758), 2 Burr. 683; 2 Keny. 325; 97 E.R. 511; 29 Digest 272, 2207.
- (21) *Hadley v. Clarke* (1799), 8 Term Rep. 259; 101 E.R. 1377; 12 Digest (Repl.) 459, 3426.
- (22) *Esposito v. Bowden* (1857), 7 E. & B. 763; 8 State Tr. N.S. 807; 27 L.J.Q.B. 17; 29 L.T.O.S. 295; 3 Jur. N.S. 1209; 5 W.R. 732; 119 E.R. 1430, Ex.Ch.; 12 Digest (Repl.) 440, 3352.
- B (23) *Potts v. Bell* (1800), 8 Term Rep. 548; 101 E.R. 1540; 2 Digest (Repl.) 256, 562.
- (24) *The Hoop* (1799), 1 Ch. Rob. 196; 2 Digest (Repl.) 241, 435.
- (25) *Williams v. Lloyd* (1628), W. Jo. 179; Palm. 548; 82 E.R. 95; 3 Digest (Repl.) 98, 258.
- C (26) *Nickoll and Knight v. Ashton, Edridge & Co.*, [1901] 2 K.B. 126; 70 L.J.K.B. 600; 84 L.T. 804; 49 W.R. 513; 17 T.L.R. 467; 9 Asp. M.L.C. 209; 6 Com. Cas. 150, C.A.; 12 Digest (Repl.) 430, 3308.
- (27) *Sivewright v. Allen*, [1906] 2 K.B. 81; 75 L.J.K.B. 476; 94 L.T. 778; 70 J.P. 290; 54 W.R. 604; 22 T.L.R. 482; 50 Sol. Jo. 440; 10 Asp. M.L.C. 251; 11 Com. Cas. 167, D.C.; 41 Digest 229, 676.
- D (28) *Thompson v. Rowcroft* (1803), 4 East 34; 102 E.R. 742; 29 Digest 288, 2343.
- (29) *The Governor Raffles* (1815), 2 Dods. 14; 165 E.R. 1400; 41 Digest 847, 7103.
- (30) *Chandler v. Grieves* (1792), 2 Hy. Bl. 606, n.; 126 E.R. 730; 41 Digest 236, 763.

Also referred to in argument:

- E *Ford v. Cotesworth* (1870), L.R. 5 Q.B. 544; 10 B. & S. 991; 39 L.J.Q.B. 188; 23 L.T. 165; 18 W.R. 1169; 3 Mar. L.C. 468, Ex.Ch.; 12 Digest (Repl.) 439, 3348.
- Cunningham v. Dunn* (1878), 3 C.P.D. 443; 48 L.J.Q.B. 62; 38 L.T. 631; 3 Asp. M.L.C. 595, C.A.; 12 Digest (Repl.) 440, 3349.
- Embiricos v. Sydney Reid & Co.*, [1914] 3 K.B. 45; 83 L.J.K.B. 1348; 111 L.T. 291; 30 T.L.R. 451; 12 Asp. M.L.C. 513; 19 Com. Cas. 263; 12 Digest (Repl.) 441, 3355.
- The Boedes Lust* (1804), 5 Ch. Rob. 233; 165 E.R. 759; 37 Digest 591, 276.
- The Teutonia* (1871), L.R. 3 A. & E. 394; 41 L.J. Adm. 4; 24 L.T. 521; 20 W.R. 261; 1 Asp. M.L.C. 32; affirmed sub nom. *Duncan v. Köster, The Teutonia* (1872), L.R. 4 P.C. 171; 8 Moo. P.C.C.N.S. 411; 41 L.J. Adm. 57; 26 L.T. 48; 20 W.R. 421; 1 Asp. M.L.C. 214; 17 E.R. 366, P.C.; 12 Digest (Repl.) 459, 3428.
- G *Austin Friars Steam Shipping Co. v. Strack*, [1905] 2 K.B. 315; 74 L.J.K.B. 683; 93 L.T. 169; 53 W.R. 661; 21 T.L.R. 556; 49 Sol. Jo. 537; 10 Asp. M.L.C. 70, D.C.; on appeal [1906] 2 K.B. 499; 75 L.J.K.B. 658; 94 L.T. 875; 70 J.P. 528; 22 T.L.R. 701, C.A.; 12 Digest (Repl.) 457, 3418.
- H *Andersen v. Marten*, [1908] A.C. 334; 77 L.J.K.B. 950; 99 L.T. 254; 24 T.L.R. 775; 52 Sol. Jo. 680; 11 Asp. M.L.C. 85; 13 Com. Cas. 321, H.L.; 29 Digest 216, 1725.
- Polarrian Steamship Co., Ltd. v. Young*, [1915] 1 K.B. 922; 84 L.J.K.B. 1025; 112 L.T. 1053; 31 T.L.R. 211; 59 Sol. Jo. 285; 13 Asp. M.L.C. 59; 20 Com. Cas. 152, C.A.; 29 Digest 273, 2213.
- I *Lloyd v. Sheen* (1905), 93 L.T. 174; 10 Asp. M.L.C. 75, D.C.; 12 Digest (Repl.) 458, 3419.
- Palace Shipping Co., Ltd. v. Caine*, [1907] A.C. 386; 76 L.J.K.B. 1079; 97 L.T. 587; 23 T.L.R. 731; 51 Sol. Jo. 716; 10 Asp. M.L.C. 529; 13 Com. Cas. 51, H.L.; 12 Digest (Repl.) 458, 3421.
- Curling v. Long* (1797), 1 Bos. & P. 634; 126 E.R. 1104; 41 Digest 647, 4783.
- Button v. Thompson* (1869), L.R. 4 C.P. 330; 38 L.J.C.P. 225; 20 L.T. 568; 17 W.R. 1067; 3 Mar. L.C. 231; 41 Digest 225, 632.

The Chile, [1914] P. 212; 84 L.J.P. 1; 112 L.T. 248; 31 T.L.R. 3; 58 Sol. Jo. 852; 12 Asp. M.L.C. 598; 37 Digest 643, 956. A

The Florence (1852), 19 L.T.O.S. 304; 16 Jur. 572; 41 Digest 846, 7091.

The Marie Glaeser, [1914] P. 218; 84 L.J.P. 8; 112 L.T. 251; 31 T.L.R. 8; 59 Sol. Jo. 8; 12 Asp. M.L.C. 601; 37 Digest 654, 1106.

Appeal by the shipowner from an order of the Court of Appeal (SWINFEN EADY and BANKES, L.J.J., PHILLIMORE, L.J., dissenting) which affirmed an order of ROWLATT, J. B

George Wallace, K.C., and *Raeburn* for the appellant.

Greer, K.C., and *Neilson* for the respondent.

The House took time for consideration.

Jan. 21, 1916. The following opinions were read. C

EARL LOREBURN.—This is a case of great importance at the present time. A seaman had the misfortune to be serving on a British ship which entered the port of Hamburg on Aug. 2, 1914. The ship was detained by the German authorities when, on Aug. 4, war broke out. Ever since that date the ship and the crew have been detained in Germany. We do not know whether the ship has been condemned or not, but we know that she has been kept and her crew imprisoned. From Aug. 4 till Nov. 2 they were kept as prisoners on their own ship, and on Nov. 2 they were removed to other places of confinement. In these circumstances this seaman's wife sues on an allotment note. Her right to recover admittedly depends on the question: Was the seaman entitled to his wages for the period from Aug. 2, 1914 to April 10, 1915? His contract of service required him to serve on the ship *Coralie Horlock* for a voyage not exceeding two years in duration. These articles were signed on May 21, 1914. An allotment note was issued in favour of the present plaintiff for a monthly payment of £4 15s. D

In my view, the first question to be decided is whether or not, and at what date, the performance of this contract of service became impossible, which means impracticable in a commercial sense. It was at first possible that she might be released in accordance with a practice which has been common in former wars and is recommended, though not required, by the Hague Convention. But the removal of the crew from their ship and their imprisonment elsewhere, and the lapse of time, made it clear that, whatever hope there may have been of restoration, could no longer be entertained. Looking back upon what happened, we may think that there was never any hope. Or we may think that there was a period of suspense during which it was not determined whether there should be, in accordance with common practice, a release on both sides of ships so situated. There is hardly anything to help us, except the fact that the men were detained on their own ship until Nov. 2. On the whole, it seems to me that there was a period of suspense, and judging as best I can, I take Nov. 2 as the date. It is a surmise, but the opposite view also is a surmise on what is a question of fact. Assuming this to be so, does that impossibility of performance dissolve the contract of service and disentitle the seaman to wages from that time onwards? The law, both as it is found in the Statute Book and as it has been administered in Admiralty courts, has always been in some respects peculiarly tender and benevolent towards seamen in regard to their contracts of service, though in earlier days with a notable exception embodied in the maxim that freight is the mother of wages. That was a cruel exception, which has been removed now by Act of Parliament. Yet it has always to be remembered in scrutinising the older decisions, because what prevented freight from being earned might prevent wages from being recoverable. E

Is there, then, either in any Act of Parliament or in Admiralty law, any rule which prescribes the effect of such a detention by the enemy as makes the performance of a contract of service impossible? There is no proof of condemnation F

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A by a court. We were referred to s. 158 of the Merchant Shipping Act, 1894 [amended by s. 1 of the Merchant Shipping (International Labour Conventions) Act, 1925]. That section tells us what is to be done in regard to wages if there is a wreck or loss of the ship. In my opinion, these words refer to physical loss. It is true that a ship is lost to her owner in a real sense when she has been captured and condemned by a competent court. It was argued that she may be equally
B lost to her owner by a prolonged detention. I should be disposed to say that where the property remains his, and ultimate recovery is to be expected, she is not lost even to him. But if I am right in thinking that both the words used in this section—namely, “wreck” and “loss”—refer to the ship herself and to her physical condition, then they have no bearing on this case. I will merely add that the Court of Appeal in *The Olympic* (1) did not decide anything inconsistent with this
C view. They merely used the frustration of the voyage as a test by which to determine whether or not the physical injury inflicted amounted to “wreck.”

Coming to the law as administered in Admiralty, three cases were cited with a view of showing that prolonged detention of a ship and its crew by a foreign Power did not dissolve a seaman's contract of service. Two of these authorities are in 4 EAST—namely, *Beale v. Thompson* (2) and *Pratt v. Cuff* (3)—the former of which
D was affirmed in this House more than 100 years ago, but there is no record to show on what grounds. The third is a case at nisi prius. *Delamainer v. Wintringham* (4). All of them are cases in which ships and crews were confined for a long time, but were ultimately released, and the interrupted voyage completed so as to earn freight, and, therefore, wages. It was held that wages continued to be payable throughout. This could be supported, and was supported, in the judgments on
E the ground that both employers and employed treated the service as not terminated by the temporary interruption, though there are passages in the judgments which admit of a broader interpretation. There is no distinct authority for the proposition that if a seaman is willing to fulfil his contract he is still entitled to wages, though the performance of it has been made impracticable on both sides by a prolonged captivity.

F Accordingly neither statute nor Admiralty law provides special guidance, and I must recur to common law. The contract was for service on a ship for a voyage within a period of two years. Both ship and crew were forcibly detained, the contemplated service became impracticable, so far as I can judge, on Nov. 2, 1914. Had the ship and crew been released on Nov. 2 I do not think common law would
G have treated the contract of service as ended, and I do not think the chance of her release was ended before Nov. 2. In my opinion, neither party was any longer bound by that contract from that date. If they were bound, it must mean that wages were to be paid, without any service in return, for the entire duration of this war, or, in the present case, till the expiry of two years from the commencement of the service. The Napoleonic war after the rupture of the Peace of Amiens
H lasted for eleven years. I think it was an implied term of this service, subject to any special law affecting seamen, that it should be practicable for the ship to sail on this voyage, in that sense which disregards minor interruptions and takes notice only of what substantially ends the possibility of the service contemplated being fulfilled. Both employer and employed made their bargain on the footing that whatever temporary interruption might supervene, the ship and crew would be
I available to carry out the adventure. Accordingly, I think that the appeal should be allowed in respect of the period after Nov. 2. I learned with satisfaction that provision is to be made for cases of this kind from public funds. It cannot, of course, affect the decision of a court of law, but it is in accordance with the spirit which has always influenced both courts of law and the legislature in dealing with a deserving class of men. The shipowner in this case has brought it before the courts in order to settle the law, which has been in doubt, and is not open to any reflection.

LORD ATKINSON.—The sole question for decision on this appeal is whether the admitted facts establish satisfactorily that the respondent's husband, Thomas Beal, ceased to be entitled to £9 10s. per month on Aug. 4, 1914, or if not then at what later date if at all. The ancient doctrine that freight was, as it was said, the mother of wages, that the crew and the owners of the ship were co-adventurers in the enterprise of earning freight out of which the seaman was to be paid, has been abolished by s. 157 of the Merchant Shipping Act, 1894, and the seaman is now entitled to be paid his wages whether freight be earned or not. Still his contract is a contract to render his service for the achievement of the adventure or adventures upon which it is contemplated by both parties to his contract the ship is to embark, and though, undoubtedly, many provisions of the Merchant Shipping Act are framed to protect sailors from the result of their well-known improvidence, still there is no reason whatever why a rule of law applicable to contracts in general should not be applied to the contracts of seamen, where these latter are not expressly or impliedly excluded from its operation.

The rule I refer to is laid down by BLACKBURN, J., in *Taylor v. Caldwell* (5) in these words (3 B. & S. at p. 833):

"Where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract may become unexpectedly burdensome or even impossible. . . . But this rule is only applicable where the contract is positive and absolute, and not subject to any condition express or implied; and there are authorities which, as we think, establish the principle, that where from the nature of the contract, it appears the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract they must have contemplated such continuing existence as the foundation of what there was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible by the perishing of the thing without default of the contractor."

This principle applies not only to contracts in their executory stage, but when they have been in part performed.

In *Appleby v. Myers* (6) the rule was, by the judgment of the Exchequer Chamber, applied to the case where the plaintiff contracted to erect certain machinery on the defendant's premises, and to keep it in repair for two years, the price to be paid on the completion of the work. After some portions of the work had been finished, and others were in the course of completion, the premises and all the machinery and materials were destroyed by an accidental fire. It was held that both parties were excused from the further performance of the contract, and that the provision as to the payment of the price only after completion, disabled the plaintiff from recovering anything in respect of the work done by him. In *Howell v. Coupland* (7) it was applied to a case where a crop which was sold perished by disease. In *Baily v. De Crespigny* (8) the performance of a covenant was rendered impossible by an Act of Parliament, and the covenantor was held to be discharged. In *Krell v. Henry* (9) it was applied to a case where a flat in Pall Mall was hired in order to see the contemplated procession on the occasion of the coronation of his late Majesty King Edward VII, which ceremony was postponed. The contract of hiring did not contain any express reference to the procession, but it was held that the proper inference to be drawn from the surrounding circumstances was that both parties to the contract contemplated the taking place of the procession along the proclaimed route as the foundation of the contract. In *Melville v. De Wolf* (10) the impossibility arose from an act of

- A State as the primary cause. The plaintiff in the action was a seaman who had signed articles to serve on a voyage to the Pacific and back to a port in the United Kingdom for a term of three years at £7 per month. The captain was sent home from Monte Video by a naval court, constituted under the Mercantile Marine Act, 1850 [repealed by Merchant Shipping Repeal Act, 1854], to be tried for shooting one of the crew. The plaintiff was sent home by the same court as a witness against
- B him, and he attended the trial in this country in that capacity. When the trial was over the ship was in the Pacific, and it was practically impossible for him to return to her. The plaintiff claimed wages at the above rate up to the time the trial terminated. The defendant paid into court a sum sufficient to cover the plaintiff's wages up to the time he left his ship. It was held that he was not entitled to any wages after he left the ship. LORD CAMPBELL, in delivering judgment,
- C said (4 E. & B. at p. 849):

"After he was sent home from Monte Video to England he neither served under the articles actually nor constructively, and as from that time the relation of employer and employed could not be renewed within the scope of the original hiring, we think that the contract must be considered to be dissolved by the supreme authority of the State, which is binding on both parties."

- D
- E It will be observed that the contract so dissolved was not a mere executory contract, but a contract in part performed. In *The Friends* (11) the impossibility was the result of the act of a hostile State. The plaintiffs' ship, a British ship, manned by a British crew, was, in the course of a voyage from London to Newcastle and back, captured by a French privateer. The plaintiff and some members of the crew were taken, as prisoners of war, to France, not because of their special connection with this particular ship, but because they were British subjects. While they were in custody the ship was recaptured, which as far as possible, according to law, restored the antecedent condition of things, but a new hand had been hired to fill the plaintiff's place. The ship continued her homeward voyage and
- F reached the port of London. The plaintiff sued for the wages which would have been due to him had he served on the homeward journey. SIR WILLIAM SCOTT, in giving judgment, said (4 Ch. Rob. at pp. 144, 145):

- G "Nothing can be better settled than that the act of capture defeats all rights and interests, but it is contended that the former interests revive upon recapture . . . The claimant was not on board at the recapture, but had been sent a prisoner to France, whilst the owner was obliged to hire another person in his place, to work the vessel on the returned voyage. Under these circumstances the utmost that could be demanded, with any show of reason, would be the small portion earned prior to the capture, two days' service, and that subject to salvage. Beyond this it is impossible to advance a pretension; for
- H what right can a person in captivity have to demand the benefit of the labour of those who carried the ship on to London, or still more of those who were hired in his place for the returned journey?"

- I The contract in that case also was in part performed, but the service in aid of the adventure which the parties to the contract contemplated the seaman should render in return for his wages was made impossible by his incarceration, and each party to the contract was held, therefore, to be relieved of the obligation it imposed.

In my opinion, the provision contained in the 158th section of the Merchant Shipping Act, 1894, to the effect that the service of a seaman and his title to wages cease when his ship is lost is but a statutory application of this same principle. I think that the loss referred to in this section does not mean merely the loss of the use of the ship, but physical loss. Physical loss, however, is not to be confined to the foundering of the ship, or such like but physical loss as defined in the judgment of MAULE, J., in *Moss v. Smith* (12), applicable generally to

mercantile contracts, and approved of by LORD BLACKBURN in *Dahl v. Nelson, Donkin & Co.* (13) (6 App. Cas. at p. 52). MAULE, J., said (9 C.B. at p. 103):

"It may possibly be physically possible to repair the ship, but at an enormous cost, and then also the loss would be total; for in matters of business a thing is said to be impossible when it is not practicable, and a thing is impracticable when it can only be done at an excessive or unreasonable cost. If a ship sustains such extensive damage that it would not be reasonably practicable to repair her, seeing that the expense of repair would be such that no man of common sense would incur the outlay, the ship is said to be totally lost."

LORD BLACKBURN points out that, though these words were used in the case of a policy of insurance, they were spoken generally of mercantile contracts, and that it was on the principle thus laid down that *Geipel v. Smith* (14), and *Jackson v. Union Marine Insurance Co.* (15), were decided. It was contended that this s. 158 is exhaustive, and that no loss other than the physical loss there referred to can terminate the seaman's contract, or his right to wages. In my opinion, that is wholly erroneous. It leaves out of consideration effective capture by a belligerent which transfers the property in the ship from its owners to the captor and enables that captor to give an effective title to his vendee, and it also leaves out capture by pirates, which transfers the possession and custody of the ship, though not her ownership.

The above-mentioned cases are clearly distinguishable from *Beale v. Thompson* (2) as was pointed out by LORD CAMPBELL in *Melville v. De Wolf* (10). In the former case the ship went out in ballast from England to St. Petersburg to bring cargo from thence to London, and was to be paid freight by the ton. The Emperor Paul of Russia, though at peace with England, had this ship, with others, seized and her crew imprisoned. On his death, in six months, the ship and crew were released. They were taken back on board their ship, got her cargo, navigated her back to England, and earned the proper freight. LORD ELLENBOROUGH, in delivering judgment, approved of, and relied upon the doctrine laid down in different words by LORD HARDWICK, in *R. v. Castlechurch (Inhabitants)* (16), and in *R. v. Eaton (Inhabitants)* (17), respectively, to the effect in the first place,

"that where a servant returns and the master receives him, it is always esteemed a dispensation of the master, and helps the discontinuance, and works in the nature of a remitter,"

and in the next:

"the absence of the servant for three weeks was purged by the master's receiving him again, which ought to be received in that case as a dispensation, and in strictness of law, he still continues in the service of the master, notwithstanding such absence."

LORD ELLENBOROUGH held that, owing to the terms upon which the ship was released, and the property belonging to the ship and the crew restored or compensated for, under the order of the Russian government, there was no capture, notwithstanding the hostile nature of the seizure, and laid it down that the right of a mariner to wages depends, first, on his earning freight for his owners on that voyage for which he was hired, and secondly, upon the performance by the mariner of the service he has agreed to perform, in respect of his owners during the voyage. The jury found that the plaintiff had performed his services properly, and the freight was admittedly earned. Taking these three facts into consideration, the reception back of the plaintiff by the owners into their service, the earning of the freight, and the proper performance by the plaintiff of his service it was held that he was entitled to his wages during the time of his captivity and until he reached London on the return voyage. *Delamainer v. Winteringham* (4) is to the same effect. In the present case the owners have not taken back

A the seaman, Beal, into their service. On the contrary they insist that the contract with him is at an end, and that his right to wages has been determined.

In *Wiggins v. Ingleton* (18), a seaman, after serving three months on a voyage from Carolina to London, was impressed, under the Queen's authority, before reaching the delivery port. It was held that, even though the ship reached that port, he was only entitled to wages pro tanto for the time he actually served.

B In *Dahl v. Nelson, Donkin & Co.* (13), LORD BLACKBURN said (6 App. Cas. at p. 53) that it was

C "held in *Geipel v. Smith* (14) by the whole court, and in *Jackson v. Union Marine Insurance Co.* (15), by the majority in the Common Pleas, and in the same case in error by a majority of the Court of Exchequer Chamber that a delay in carrying out a charterparty caused by something for which neither party was responsible, if so great and long as to make it unreasonable to require the parties to go on with the adventure, entitled either of them, at least while the contract was executory, to consider it at an end."

LORD WATSON (*ibid.* at pp. 61 and 62) analysed these two cases at length, and approved of the decisions in them, and LORD SELBORNE stated he had read the judgments of his two colleagues and concurred in them. In the first of these cases the defendant vessel had been chartered by the plaintiff to load at a particular place a cargo of coals to be taken to Hamburg. Before any breach of the agreement the port of Hamburg had been blockaded by the French fleet, and the Queen of England had by proclamation enjoined her subjects to strict neutrality and not to commit any violation of the law of nations. Thereupon the voyage to Hamburg became illegal. The defendant refused to load his ship, and it was held he was justified in so doing, as the charterparty was for a single adventure to commence at once, and, the contract being executory, the further performance of it within a reasonable time was prevented by an excepted cause—the blockade, which was a restraint of princes. LUSH, J., in giving judgment, put the pith of the case thus. He said (L.R. 7 Q.B. at p. 414):

F "If the impediment had been in its nature temporary I should have thought the plea bad, but a state of war must be presumed to be likely to continue so long, and so to disturb the commerce of merchants as to defeat and destroy the object of a commercial adventure like this."

It is not necessary, therefore, in such a case to wait till the delay has occurred.

G It is legitimate to come to the conclusion that the delay caused by war will be long, and so disturbing to commerce as to defeat the adventure and to act accordingly at once. In the second case, the plaintiff, a shipowner, entered into a charterparty dated in November, 1871, by which his ship was to proceed with all despatch from Liverpool to Newport and there load a cargo of iron rails for San Francisco. The plaintiff effected an insurance on the chartered freight. The ship sailed from Liverpool on Jan. 2 and ran aground on the following day in Carnarvon Bay.

H On Feb. 15, while she was aground, the charterers threw up the charterparty and chartered another ship. On the 18th she was floated, but the necessary repairs could not be effected till August. The plaintiff sued on the policy for the chartered freight. The jury found that the time necessary for getting the ship off, and repairing her, was so long as to put an end to the adventure in a commercial sense. This, according to BRAMWELL, B., amounted to finding that the voyage the parties contemplated had become impossible, and that a voyage undertaken after the ship had been repaired would have been a different voyage, a different adventure, and held that there was an implied condition precedent in the contract that the ship should arrive at the port of loading in a reasonable time, the non-performance of which not only gave the charterer a cause of action, but released him from the contract, that he was not bound to load the ship, and that there was, therefore, a loss of the charterer's freight by perils of the sea. The charterer did not wait till a reasonable time had elapsed before he repudiated the contract.

He did that at once when a long delay in the process of repairing was reasonably probable.

In a case tried before SIR WILLIAM SCOTT he practically applied, many years earlier, the same principle to an executed contract, namely, *The Elizabeth* (19). This vessel sailed from London to St. Petersburg, took in cargo there, and started on her return voyage. She grounded on a reef of rocks at Gothland, was floated, and brought to Ostergman, where she was beached in order to examine her injuries. She was so damaged that she could not be repaired within the Baltic season—i.e., when the Baltic was sufficiently free from ice to be navigable. Though it is a general rule that a captain cannot discharge his crew in a foreign port, it was held that, under these circumstances, and having regard to the anticipated delay, he was clothed with authority in this case to do so. He did discharge them against their will (as it was taken to be), at once, making provision for their passage home to England. The ship returned to England in the month of April following, manned by a new crew. The plaintiff sued for wages up to the time of the return of the ship to the home port. It was held that he was only entitled to wages up to the date of his discharge. The learned judge, LORD STOWELL, said (2 Dods. at p. 408):

“The ship proceeded on the original voyage under the expectation entertained on both sides that she would return in the ordinary course of such voyage. A total loss by wreck happens. This operates as a total loss of wages. There may be cases much short of this semi-naufragium which were not occasioned by the default of either party, but where it has originated from vis major, the act of God, which neither party had in contemplation at the time of the contract. . . . I am, therefore, clearly of opinion that they have no right to claim, as they have done, wages up to the time of the return of the *Elizabeth*. If they had obstinately stayed with the ship they would have done wrong, both with respect to the owners and to themselves. I think the master had a right to dismiss them under this extreme pressure.”

Here the contract of the seamen was not executory; it was in part performed. The time necessary to make the repairs had not elapsed. The delay had only been anticipated when the dismissal took place. It was the prospect that a long time must elapse before the ship was rendered fit for use, not the actual lapse of that time, which justified the captain in treating the adventure for which the crew contracted to serve as at an end, and their contracts as terminated.

This case was cited in *The Olympic* (1), and commented upon by BUCKLEY, L.J. In that case, as in *The Elizabeth* (19) and as in the present case, the contract of the seamen was in part performed. *The Olympic*, though very seriously injured, was well worth repairing, but it was the prospect of the delay necessary to effect the repairs required to render her seaworthy which in the opinion of the court rendered her a wreck within the meaning of this s. 158 of the Act of 1894 and justified her owners in treating the particular adventure for which the crew contracted to serve as ended, and justified their dismissal. In my view the provision touching wreck contained in s. 158 of the Merchant Shipping Act, 1894, is merely a statutory application of the principle first laid down in *The Elizabeth* (19) to cases when the ship sustains physical injury, not so grave as to amount to loss, yet sufficiently serious to render her unseaworthy until repairs, requiring a substantial time to effect, are carried out upon her. In the present case it does not appear that the ship is physically injured. Once interned by this enemy power, the prospect of being interned for a length of time to which nobody can place a limit opened up to her owners. Moreover, any day something may be done which would transfer the property in the ship from them to her captors.

In *Beale v. Thompson* (2) LORD ELLENBOROUGH said (4 East, at p. 561):

“Seizure, even hostile seizure, is not necessarily capture, though such is its usual and probable result. The ultimate act or adjudication of the State by which the seizure has been made assigns its proper and conclusive quality

A and denomination to its own original proceedings. If it condemn in such case it is a capture ab initio. If it award restitution as an act of justice as the order of June 5, 1801, expressly does, it pronounces upon its own act as not being a valid act of capture, but as an act of temporary seizure and detention upon grounds not warranting the condemnation of the property or the dealing with it as captured. It seems to make no material difference for
B this purpose whether the restitution were awarded by the government of the country as an act of State, as in this case it was, or by any of the ordinary courts of civil judicature to which the administration of justice on these subjects is usually delegated."

The meaning of that passage I take to be this, that seizure per se is an equivocal act that whether it shall amount to capture or not depends upon the intention of
C the captor in making it, that this intention may be shown by acts subsequent, namely, either the condemnation in the proper judicial tribunals of the State of the property taken as lawful prize, or by an act of the government of the country of the captors as an act of State, and that when that intention is shown it operates by relation back to the original seizure, turning it either into a capture ab initio, or into a temporary detention ab initio not amounting to capture. Thus the circular of June 5, 1801, was held to determine the character and purpose of the seizure made over six months previously. In *Goss v. Withers* (20), LORD MANSFIELD (2 Burr. at pp. 693-695), deals with the principles adopted and practices followed by different European countries on this question of prize. He leaves the matter, in many respects, quite undecided. And consistently with everything that has
D been laid down in these two authorities, it may well be that any act of the government of a belligerent Power indicating that they have treated a seized ship as their own property, such as the sale of it, for instance, would be sufficient to determine the character and purpose of the original act of seizure so as to make it either a capture proper with all its consequences or mere detention. We are deciding this case without knowing whether anything of the kind has occurred in this
E instance. The fact, however, that it might occur at any moment after seizure, renders it all the more reasonable, just, and natural for the owners to have come to the conclusion on Aug. 4, 1914, that the adventure upon which their ship was embarked was put an end to, and the contracts of the crew, and their right to wages determined. They acted upon that conclusion in the only way, and to the only extent possible under the circumstances, by refusing to pay the allotment. In reference to *Hadley v. Clarke* (21), it has been already pointed out that the
G embargo imposed by the Order in Council appeared only to contemplate a temporary detention, as it was made till "further order." The point was never made that an embargo, even if originally intended to be temporary, might not put an end to the contract of affreightment if it were prolonged (see LORD KENYON (8 Term Rep. at p. 265)). All that was, in fact, decided was the abstract point that a temporary interruption of a voyage by an embargo does not put an end to such
H a contract. Moreover, the judgments of GROVE, J., and LAURENCE, J., especially that of the latter, rather indicate that they treated the contract to carry the goods to Leghorn as a positive and absolute contract to do so within a reasonable time—the dangers of the seas only excepted. The latter learned judge says (*ibid.* at p. 267) they

I "absolutely engaged to carry the goods, the dangers of the seas only excepted; that, therefore, is the only excuse which they can make for not performing the contract. If they had intended that they should be excused for any other cause they should have introduced such an exception into the contract."

Of course, if the contract of the parties be thus positive and absolute, they are bound by it, however impossible the performance of it may become. The contract with the crew in this case was not a positive and absolute contract, and the above case does not appear to me to touch the present case. Section 134 of the

Act of 1894 does not, I think, touch this case. It obviously does not refer to the forcible act of an enemy. No point was raised as to the two days which elapsed between Aug. 2, the day of arrival, and Aug. 4, the day of the outbreak of war. In my opinion, therefore, the judgment of the Court of Appeal, as well as that of ROWLATT, J., was erroneous and should be reversed.

LORD SHAW.—The question in the case, accordingly, is whether Beal has become entitled to wages from and after the time when a state of war existed between Great Britain and Germany. The declaration of war took effect as from 11 p.m. on Aug. 4, 1914. The *Coralie Horlock* was then in the port of Hamburg, where she had arrived on the 2nd. The ship still remains there. Apart from exceptional or provisional rules or directions agreed to by the belligerent States, for her owners or master to trade with the enemy was, of course, illegal; for her crew it was equally illegal to assist in trading with the enemy; to attempt an escape, whether with or without cargo, may have been physically impossible; in any case it would have exposed the ship to risk of destruction.

In *Esposito v. Bowden* (22), WILLES, J., reviewing the case law and referring especially to *Potts v. Bell* (23), and to the judgment of LORD STOWELL in *The Hoop* (24), stated the law in terms which have never since been doubted (7 E. & B. at p. 779):

"It is now fully established that, the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the licence of the Crown, is illegal."

Without fault on the part of either party to the contract of service, law and force combined to stop the prosecution of this voyage, and the adventure was consequently lost. In my humble opinion, that stoppage and loss, having arisen from a declaration of war, must be considered to have been caused for a period of indefinite duration, and so to have effected a solution of the contract arrangements for and dependent upon the completion of further continuance of the adventure. I say this advisedly, in consequence of the argument presented to the House, and founded on the possibility that after a declaration of war peace may be concluded within a short time, ships may be released, and voyages and shipping adventures be resumed. As the cases show, such resumption does of consent take place, and courts of law pay respect to the terms upon which the resumption was made. But apart from the private arrangements of parties, the contracts are, in my opinion (and subject to the point as to a period of grace hereafter dealt with), brought to an end by a declaration of war, and all interested are entitled to have affairs settled upon that footing. I am further of opinion that the contract of service between owners and crews is also terminated in the same way, because it is a contract whose incidents stand or fall with the adventure with which it was bound up. I do not think that any other rule would be in accord with law or would work. When a ship is put under detention by a declaration of war, I cannot see room for a condition of affairs which would leave parties in suspense, feeling that they are bound if the war be short but free if the war be long. In the case of a vessel in an enemy port, the war descends upon master and crew alike, taking no regard of either contract right or obligations, but putting all alike on the common footing of British citizens, and as such placing their liberty completely at the disposal of the enemy Power. Germany made no lesser claim in the present case. From Aug. 4, 1914, the owners "were deprived of the possession of this said vessel, and the said Tom Rea Beal, with the officers and other members of the crew, were on or about Nov. 2 removed from the said vessel to a lodging ship in Hamburg, and on or about Nov. 8 were interned at Ruhleben, near Berlin," where they still remain. While the general question as to

A the effect of a declaration of war should, in my opinion, be resolved as stated, I should also feel entirely free to hold that the circumstances of the present case leave no doubt as to disruption of the contract relations of parties and the loss of the adventure.

Germany allowed no period of grace for loading or unloading, or for departure with freedom from capture on transit. The practice of nations in this particular has greatly varied. I refer with much satisfaction to the treatment of this subject in Mr. HIGGINS' valuable work on THE HAGUE PEACE CONFERENCES. On the outbreak of the Crimean War in 1854, enemy trading ships were allowed a period of six weeks, by Russia on the one hand and Britain and France on the other. In 1866 Prussia made the same allowance to Austria. Very liberal concessions on this head were made by the United States of America to the ships of Spain on the outbreak of war between those countries in 1898. Since that time the instances show less indulgence to peaceful commerce. On the occurrence of the Russo-Japanese War in 1904, Japan allowed a week, Russia forty-eight hours. In the present instance no allowance was made. The circumstances are specially notable. Great Britain was manifestly willing that the spirit of the Hague Convention should be obeyed and that days of grace should be allowed. On the day of the declaration of war—namely, Aug. 4, 1914—an Order in Council was issued referring to the practice in the past and to the terms of the Convention. It provided that a period of grace for loading, unloading, and departure should be allowed to all German vessels in British ports—namely, until midnight of Aug. 14. This was subject to information being received not later than the 7th, that “the treatment accorded to British merchant ships and their cargoes which, at the date of the outbreak of hostilities, were in the ports of the enemy, or which subsequently entered them, is not less favourable than the treatment accorded to enemy merchant ships” by the Order in Council. Germany did not accept this overture. The uncertainties and hesitations of nations upon the question are reflected in art. 1 of the Hague Convention of 1907, in which the international consent was reduced to the mere proposition that “it is desirable” that a merchant ship in an enemy port should “be allowed to depart freely, either immediately or after a reasonable number of days' grace.” As applied to the case of the *Coralie Horlock* at Hamburg the enunciation of this sentiment has proved worthless. I observe, however, that s. 2 of the Convention is also founded on in the courts below. It provides that such a ship “may not be confiscated. The belligerent may detain it, on condition of restoring it after the war, without payment of compensation, or he may requisition it on condition of paying compensation.”

I am not in a position to say whether this head of the Hague Convention will be respected by the government of Germany. That learned judge, SWINFEN EADY, L.J., says that

H “in the absence of any evidence to the contrary it must be presumed that she is merely detained on condition of being restored after the war.”

It is not necessary, in the view which I take, to discuss the point at length. I have already referred to the action of Germany in regard to the subject of days of grace. Other circumstances might also have to be considered on the point whether the Hague Convention afforded any presumptive aid in the construction of rights or obligations, or in regard to the action of the present belligerents. Whether even—conventions having been disregarded—rights would have to be determined as in pre-convention days—the days, according to LORD MANSFIELD (2 Douglas, 614a), of confiscation “if no reciprocal agreement is made”—on such points no opinion need be indicated. But they do bear on the question of presumption from the terms of the Hague Convention, which is referred to in the courts below. I must express the gravest doubt whether any such presumption is in place in the present case. Speaking for myself I should not feel justified upon the terms of

this international convention in allowing my mind to be swayed by such presumptions as would be appropriate to an inviolate document or to one which is backed by the sanctions of municipal law. What, in short, during the course of the war or under the stress of circumstances, may happen to this ship, no one can foresee: destruction, confiscation, or return—any of these things may occur; and all are involved in the overwhelming uncertainty both as to time and circumstance which follows from the present state of war. With regard to the effect of a declaration of war there is certainly, however, one presumption. It has been expressed in various decisions, but was clearly stated by LUSH, J., in *Geipel v. Smith* (14) (L.R. 7 Q.B. at p. 414):

“A state of war must be presumed to be likely to continue so long, and so to disturb the commerce of merchants, as to defeat and destroy the object of a commercial adventure like this.”

The judgments of the courts below proceed upon the two propositions—(i) that the ship is in esse—she is neither wrecked nor lost, and (ii) she is temporarily detained, and, therefore, that the principle of the old embargo cases applies. I again take leave to refer to this second point. I think an analysis of the embargo cases shows that they depended largely if not altogether on these considerations. In the first place, in the working of the old rule that freight is the mother of wages, the question whether wages were due could not be adjusted until after the voyage was over and the freight was earned. Accordingly, in the leading case of *Beale v. Thompson* (2), the essential fact founded on was that after an embargo laid on by the Tsar Paul had been taken off by that erratic Sovereign the voyage was resumed, the same ship and the same men employed, and all the men taken on to complete the same voyage, under circumstances which showed

“a recognition on the part of the master that he and the sailors then stood in their original relative situation to each other under the articles by which that relation was constituted”: 4 East, at p. 565.

The rule as to the dependency of wages on freight has long ago been abolished by statute; and while, of course, it might be possible under special bargain to continue or resume contract relations upon special terms, I have great doubt whether the embargo cases to which I have referred can be now relied upon in support of any part of the modern law of seaman's wages. These observations apply in terms to other cases cited—e.g., to *Delamainer v. Winteringham* (4). Upon, however, the proposition that the ship is neither wrecked nor lost, I agree with the learned judges in the courts below. Upon the other hand, I cannot see my way to hold that there is, therefore, an indefeasible right to recover, under s. 158 of the Act, unless and until such wreck or loss occurs. I venture respectfully upon that subject to adopt the judgment of my noble and learned friend, SWINFEN EADY, L.J., now LORD WRENBURY.*

I now come, accordingly, to what is by far the most important point in the case. Granted that a state of war exists, with consequences which include the stoppage of the voyage and the internment of officers and crew, are wages due for

* On this point SWINFEN EADY, L.J., in the Court of Appeal said: “It was then contended that there had been a ‘wreck or loss’ of the ship within s. 158 of the Merchant Shipping Act, 1894, and that the word ‘loss’ ought to bear a meaning somewhat similar to that of the word ‘wreck’; and for the purpose of showing the meaning of the word ‘wreck’ in the section, reliance was placed upon a passage in the judgment of BUCKLEY, L.J., in *The Olympic* (1). He there said ([1913] P. at p. 107): ‘The wreck of the ship in this context, I think, is anything happening to the ship which renders her incapable of carrying out the maritime adventure in respect of which the seaman's contract was entered into.’ It was urged in the present case that by the detention of the ship for nearly twelve months there was a loss of adventure. But in this passage BUCKLEY, L.J., is obviously referring to something physical happening to the ship which injures and damages her, so as to make her unseaworthy for so long a time as to make a continuance of her voyage useless as a commercial adventure. In my judgment, there has not been any loss of this ship within s. 158 of the Merchant Shipping Act, 1894.”

A a period subsequent to the declaration of war, the ship itself having been neither wrecked nor lost, and being still in the port of Hamburg? It may be conceded that the continued existence of the subject-matter of the contract has formed a large part in the consideration of such a question. Under the law of Rome the illustration of the solution of a contract obligation was frequently given from the case of a promise with regard to a slave. In such a case, if the slave died or was manumitted before being handed over, the contract was at an end. The vendor, however, remained, of course, answerable if he was responsible for what had occurred—if he had himself killed the slave or set him free. In all cases, however, where no fault attached, the failure of the corpus certum released the contracting parties. Several of the citations from the DIGEST on this subject are made by BLACKBURN, J., in the leading case of *Taylor v. Caldwell* (5), and one can entirely assent to that very learned judge's view that the principle is adopted in the civil law as applicable to every obligation of which the subject is a thing certain. He cites POTHIER in support of a definition of much precision as follows (3 B. & S. at p. 835):

D "The debtor corporis certi is freed from his obligation when the thing has perished neither by his act nor his neglect, and before he is in default, unless by some stipulation he has taken on himself the risk of the particular misfortune which has occurred."

In another passage of this judgment BLACKBURN, J.'s, remarks (*ibid.* at p. 839):

E "In none of these cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance: but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel."

In the course of laying down these principles the cases which had occurred in the English courts were referred to, and that of *Williams v. Lloyd* (25), was especially founded on.

F It is manifest that the principle last adumbrated was capable of a wider practical and logical application than to the failure of a certum corpus. The underlying ratio is the failure of something which was at the basis of the contract in the minds and intention of the contracting parties. This ratio has, I am humbly of opinion, been properly developed in recent years. I do not go through all the decisions, but I think it right to mention that of *Krell v. Henry* (9), in which I desire to attach my respectful and pointed concurrence in the opinion delivered by VAUGHAN WILLIAMS, L.J., in these passages ([1903] 2 K.B. at p. 748):

H "Whatever may have been the limits of the Roman law, the case of *Nickoll and Knight v. Ashton, Edridge & Co.* (26) makes it plain that the English law applies the principle not only to cases where the performance of the contract becomes impossible by the cessation of existence of the thing which is the subject-matter of the contract, but also to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things going to the root of the contract."

I This view is fully discussed by the learned judge. I think it to be in entire accord with that doctrine of frustration of voyage which has become fully accepted since *Jackson v. Union Marine Insurance Co.* (15), with the doctrine underlying *Taylor v. Caldwell* (5), and with sound legal principle.

BLACKBURN, J., in *Taylor v. Caldwell* (5), in discussing the civil law, only cited DIGEST 45, 1, 33 and DIGEST 45, 1, 23, and confined his survey of that law to the failure of a corpus certum, developing the doctrine, as it were from that point. VAUGHAN WILLIAMS, L.J., in *Krell v. Henry* (9), reasons upon the same limited premises, stating that "the Roman law dealt with obligations de certo corpore." The passages cited are from the book "de verborum obligationibus." The subject

is too large for treatment here, but it may be said that the same principle appears in book 18, "de contrahendâ emptione." Even in regard to book 45, however, another text shows that the development and wider application of the principle was not unknown to Roman jurists and was approved. It is DIGEST 45, 1, 91. After dealing with the case of a slave, the ordinary illustration of a certum corpus, and of his death, the review of the principle is broadened thus :

"Si sit quidem res in rebus humanis, sed dari non possit, ut fundus religiosus (puta) vel sacer factus, vel servus manumissus, vel etiam ab hostibus si capiatur"

—then in each of these instances liability under the obligation flies off, if the occurrences do not arise from the promissor's fault. MR. HUNTER in his invaluable work thus paraphrases the dictum as to the sale of a piece of land (ROMAN LAW, p. 638) :

"Sempronius promises to give a small plot of ground to Maevius. After doing so he buries a dead body in the place and thus makes the land extra-commercium. Sempronius must pay its value. If the land had belonged to another who had buried a body in it, he would have been released."

The illustration is not inapt even to the present case, for it shows that it was no answer to say "the land, the certum corpus, is there," for the land having through no fault of the promisor become extra-commercium, by burial of the dead, then the basis of the transaction, the root of the contract as that had been contemplated by the parties, had gone, or had suffered such an alteration as to release them from the obligation itself. This was a case analogous to that of the slave who was still alive but had been manumitted or had been captured by the enemy. It is thus not without interest to observe that not only had the principle been laid down, but its modern development had been foreshadowed in Roman times. The application of the principle in the present case can, in my opinion, lead to only one result, namely, that a dissolution of the relation of master and servant occurred in the case of the *Coralie Horlock* upon the declaration of war between Germany and Britain. The vessel being then in the port of Hamburg, remains there; her master, officers, and crew are interned as prisoners; the voyage and adventure contemplated have been brought to an end. No light is thrown upon the question by illustrations of contracts of service which have been terminated, say, by a bankruptcy or a cessation of business; in such cases the servant, having lost his employment, is able to say: "I am here, willing and able, to render the service contracted for." In the present case these ideas would be fictional; the ship cannot be navigated, no orders in that regard by the master could be obeyed, and the crew, unhappily, is prevented by hostile force from rendering the ship any service whatsoever. In such circumstances I do not see my way to hold the seaman to be entitled in law to wages which, through no fault of the owners, he is entirely unable to earn by service. Such cases, no doubt, will take their rank among the many desolating circumstances which demand remedial attention at the hand of Parliament or the executive power. I think that the appeal should succeed.

LORD PARMOOR.—In this appeal, involving a question of great general importance, I agree with the decision of ROWLATT, J., and of the majority in the Court of Appeal.

In the course of the argument arts. 1 and 2 of the Hague Convention, No. 6 of 1907, were referred to. They are as follows :

"When a merchant ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately or after a number of days' grace, and to proceed, after being furnished with a pass, direct to its port of

- A destination or any port indicated to it. The same principle applied in the case of a ship which has left its last port of departure before the commencement of the war and has entered a port belonging to the enemy while still ignorant that hostilities have broken out."
- Then art. 2:
- B "A merchant ship which, owing to circumstances beyond its control, may have been unable to leave the enemy port within the period contemplated in the preceding article, or which was not allowed to leave, may not be confiscated. The belligerent may merely detain it on condition of restoring it after the war without payment of compensation, or he may requisition it on condition of paying of compensation."
- C The case appears to have been argued on the footing that the vessel was detained in accordance with the conditions of these articles. These articles could not be referred to if they contained provisions inconsistent with the agreed statement of fact, but I think that they are in accord with the said statement, and that there is no objection to the reference which has been made to them in the judgments of the courts below. The respondent has proved, pursuant to s. 143 (2) of the Merchant Shipping Act, 1894, that she is the person mentioned in the allotment note, and that the note was given by the owner or by the master or some other authorised agent. Her husband, therefore, is to be presumed to be duly earning his wages, unless the contrary is shown under sub-s. (2) (d):
- D "by such other evidence as the court in their absolute discretion consider sufficient to show satisfactorily that the seaman has ceased to be entitled to the wages out of which the allotment is to be paid."
- E The question is whether this onus has been discharged. The writ was issued on April 10, 1915, and judgment has been given in favour of the respondent for the amount of the allotment note up to the date of the writ. It is important that this limitation should be observed. My opinion is based on the conditions as they then existed—namely, a detention which had operated from Aug. 4, 1914, to April 10, 1915, and of which the subsequent length was indeterminate and not capable of exact definition.
- F The first question to be decided is whether, under the conditions stated in the agreed statement of facts, the matter is determined by statutory enactment. It is not suggested that Tom Rea Beal has been discharged abroad under the provisions of the Merchant Shipping Act, 1906, or that his right to wages has been suspended under the Merchant Shipping Act, 1894. The relevant section is s. 158, which enacts that where the services of a seaman terminate before the date contemplated in the agreement by reason of the wreck or loss of the ship, or of his being left on shore at any place abroad under a certificate granted as provided by that Act of his unfitness or inability to proceed on the voyage, the seaman shall be entitled to wages up to the time of such termination, but not for any longer period. If there has been a loss of the ship within the meaning of this section the appellant is not liable. It is not necessary to attempt to define exhaustively all the cases which might be included within the term "loss of the ship," but, in my opinion, it does not include such a case as that of the *Coralie Horlock*, of the possession of which the appellant has been deprived since Aug. 4, 1914, by reason of its detention in the port of Hamburg. The ship has not been lost by any physical accident, such as might have caused a wreck, and there is no evidence that it has been requisitioned by the German authorities, or that there has been any confiscation of ownership. The use of the vessel has been lost for an indeterminate time. I doubt whether the loss of the use of the vessel comes in any sense within the words "loss of the ship" in s. 158 of the Act, 1894. It is not necessary to decide this point. There is no finding in the agreed statement of facts which could justify the inference that, owing to its detention, the ship has no longer a commercial value, or that the expense incurred, or to be incurred,
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in not abandoning her, is such that no man as a matter of business would incur the outlay.

I am in agreement with ROWLATT, J., when he said ([1915] 3 K.B. at p. 208) :

"Now, what I have stated with regard to the position of the ship in Hamburg under the Hague Convention, if it is right, negatives any question as to the loss of the ship. She is there; the property in her has not changed; she is simply detained, and apart altogether from what was said in *Sivewright v. Allen* (27), which was cited to me, it is impossible to hold that the ship is lost."

It was argued on behalf of the appellant that, although s. 158 was not exhaustive of the cases in which a seaman was entitled to wages up to a given time, but not for any longer period, yet that the section did cover and was intended to cover, a case such as the present, in which if the seaman is no longer entitled to his wages it is by reason of the alleged loss of the ship. I think that there is good reason for this contention, but I prefer to place my opinion on wider grounds. Assuming that s. 158 has no application, Tom Rea Beal was, in my opinion, entitled to the payment of his wages up to the date of the issue of the writ on the construction of the contract of service, and the respondent succeeds in her claim as allottee.

The articles, which contain the contract of service, make no express reference to the contingency which has happened, and which is said to have dissolved the contract and to have defeated any claim to wages. The detention of the vessel, and the imprisonment of the mariners, did render it impossible in fact for Tom Rea Beal to be in a position to perform the duties of his service as a mariner, but this condition was not brought about by any default on his part, and there is no suggestion of disobedience to any command or to any refusal on his part to do his duty. Whether under such circumstances the contract is dissolved, or a claim to wages under the contract is defeated, depends on the bargain of the parties as expressed or implied in the contract which they have made. If the events which have happened subsequent to the date of the contract, and operate to make its performance no longer possible, are of such a nature and character that they can reasonably be supposed to have been within the contemplation of the contracting parties at the time when the contract was made, then the subsequent contingency does not dissolve the contract or release either party from a continuing liability under the contract. Even though the general liability under the contract continues, the claim of a plaintiff may be defeated by proof of non-compliance with any one or more of the special contract stipulations. An illustration arises in the leading case of *Beale v. Thompson* (2). One of the arguments urged on behalf of the defendant in that case was that the articles contained a special stipulation against mariners going on shore, under any pretence, before the voyage was ended, without the leave of the commanding officer on board, and that the plaintiff had gone on shore in contravention of this stipulation. LORD ELLENBOROUGH having found that the freight had been earned, and that the contract had not been dissolved, says (4 East, at p. 562) that

"the only remaining question necessary to be decided in order to perfect the plaintiff's claim to have his wages paid out of that fund [i.e., freight] is:

Has his service as a mariner under his articles been duly performed by him?"

The special verdict of the jury had found that the plaintiff did his duty as a seaman during the voyage, but it was said that the facts stated in the special verdict showed that during a considerable period of the time, for which the wages are claimed, the master was out of possession of the vessel, and the crew were all marched up the country and detained as prisoners. LORD ELLENBOROUGH held that the stipulation in the articles that the plaintiff should not be on shore under any pretence before the voyage was ended without the leave of his commanding officer on board did not apply to a case of imprisonment, and must be understood as being on shore by the party's own unauthorised act. In the present case there

A is no question of the breach of a special stipulation in the articles, such as would defeat the claim to wages, if the contract is not dissolved. It was further held in *Beale v. Thompson* (2) that if the imprisonment on shore could be considered as a breach of the stipulations in the articles, such breach had been remedied by the subsequent action of the master, but this alternative finding does not affect the principle of the decision, and is not applicable in the present case.

B The question, therefore, to be determined is whether the detention of the vessel and the imprisonment of the mariners have dissolved the contract of service. The general rule of the common law is that a contract is not dissolved, or the parties excused from their obligations, in cases in which the performance has become impossible, owing to conditions which have only become operative subsequent to the contract date. The object of this rule of construction is to give

C effect to the intention of the contracting parties as expressed in their contract, and it is not applicable if a contrary intention is expressed or implied in a particular contract. In a mariner's contract for wages it has been held in a decision confirmed in this House (*Beale v. Thompson* (2)) that the hostile detention of the vessel and the internment of the crew do not of themselves dissolve the contract of service, and this decision appears to have been uniformly recognised. In *Beale*

D *v. Thompson* (2) the vessel was detained by hostile seizure for a period of about six months and then released. The voyage was continued, and the freight had been specifically earned and received by the owners of the vessel. At this date the doctrine that freight was the mother of wages prevailed, and it was necessary that freight should be earned before a claim to wages could be made good. This condition having been fulfilled, it became necessary to decide whether the detention

E of the vessel and the imprisonment of the mariners dissolved the contract of service on which the seaman relied for his claim. LORD ELLENBOROUGH, in his judgment, draws a distinction between detention and capture, and holds that detention, as distinguished from capture, did not defeat the plaintiff's claim to wages. It should be noted that this decision was given in reference to a detention which had lasted for a period of about six months and had terminated; but if the detention of the

F vessel and the imprisonment of the mariners had of themselves operated to dissolve the contract, such contract would have been dissolved as at the date of the commencement of the detention and imprisonment, and there would have been a severance between such contract and any contract subsequently entered into by the master when the vessel was released. This decision was brought before this

G House by writ of error, and confirmed. The Journals of this House contain the order made:

"That the said judgment be in all things affirmed, and that it stand in full force and virtue notwithstanding the causes and matters aforesaid as above assigned in error."

H I am unable to draw any material distinction between the relevant facts in *Beale v. Thompson* (2) and the agreed facts of this case. In *Beale v. Thompson* (2) the vessel was unable to leave the port and continue her voyage by reason of hostile detention by the Russian authorities, and in this case by reason of hostile detention by the German authorities. In each case there is a hostile seizure, which LORD ELLENBOROUGH distinguishes from capture. In *Beale v. Thompson* (2) the mariners were removed from the ship and imprisoned on land; in the present case the crew were first removed to a lodging ship at Hamburg, and subsequently, on or about Nov. 8, were interned at Ruhleben, near Berlin.

I The earlier case of *Pratt v. Cuff* (3) is referred to in *Thompson v. Rowcroft* (28). In this case a vessel was captured by the Dutch and carried to Delfzeil. The plaintiff was confined on board ship for seven months and subsequently in Haerlingen prison until Jan. 23 in the following year, when the vessel and the plaintiff were released. The jury found in favour of the plaintiff for wages during the period of his imprisonment, subject to the opinion of the court. At a subsequent trial

the jury found that the freight had been received by the defendant. LORD KENYON is said to have expressed so strong an opinion for the plaintiff that the case was never afterwards pressed by the defendant.

In *Hadley v. Clarke* (21) the defendants had contracted to carry goods from Liverpool to Leghorn. On the arrival of the vessel at Falmouth an embargo was laid on her for an indeterminate period, "until the further Order of Council." It was held that even after two years, when the embargo was taken off, the defendants were answerable in damages for the non-performance of the contract. The report shows that it was argued on behalf of the defendant that the case fell within the rule that when a contract which was possible and legal at the time of making it became afterwards impossible by the act of God, or illegal by an instrument of the State, the obligation is discharged. This argument was not accepted by the court as referable to a contract of this character, and LORD KENYON bases his judgment on the general proposition "that a temporary interruption of a voyage by an embargo does not put an end to such a contract as this." LORD KENYON further expresses the opinion that no line can be drawn dependent on the duration of the embargo; but it is not necessary to indorse so wide a proposition in the present instance. This decision was given on a contract of carriage, and not on a contract of service, but the principle and reasoning are equally applicable to a contract of service.

This case was referred to both in the judgment of BRAMWELL, B., and the dissentient judgment of CLEASBY, B., in *Jackson v. Union Marine Insurance Co.*, but its authority is not impugned. In the judgment of BRAMWELL, B., it is said: "It may safely be said that there the question was wholly different from the present." CLEASBY, B., quotes with approval (L.R. 10 C.P. at p. 135) a passage from the judgment of BOVILL, C.J., in the court below:

"I have no difficulty in subscribing to the doctrine laid down in *Hadley v. Clarke* (21) that a common embargo does not put an end to any contract between the parties, but is to be considered as a temporary suspension of the contract only, and that the parties must submit to whatever inconvenience may arise thereon, unless they have provided against it by the terms of their contract. . . . The principle of *Hadley v. Clarke* (21) is that an embargo is a circumstance against which it is equally competent for the parties to provide as against dangers of the sea, and, therefore, if they do not provide against it, they must abide by the consequences of their contract."

In *Delamainer v. Winteringham* (4), the plaintiff claimed to receive wages during a hostile embargo in a foreign port, while he was imprisoned on shore on proof—which was then necessary—that the voyage had been completed and the freight earned. Objection was taken that the nature of the embargo had not been proved. LORD ELLENBOROUGH, however, gave judgment for the plaintiff, presuming the fact that the embargo was not of such a nature as to put an end to the contract between the master and owners of the ship and the mariner, and finding that there was no severance of service.

I am unable to find any case in conflict with the principle laid down by LORD ELLENBOROUGH and confirmed in this House in *Beale v. Thompson* (2), but I have not overlooked the cases quoted in the argument before your Lordships. In *Melville v. De Wolf* (10), it was held that where a seaman had been sent home as a witness against his captain on a trial for shooting one of the crew, there was a complete dissolution of the contract of service, and no claim for wages could be maintained. In this case, however, a distinction was drawn between such a dissolution of the contract of service and a temporary detention. LORD CAMPBELL, C.J., in his judgment (4 E. & B. at pp. 849, 850), expressly approves *Beale v. Thompson* (2):

"We are certainly bound by the case of *Beale v. Thompson* (2) . . . we entirely approve of that decision; for there nothing had occurred to dissolve the

A contract, and the relation constituted between the parties when the ship's articles were signed might well be considered as enduring till the return of the ship to England. The ship was only detained under an embargo, which in its nature is only a temporary act, and it might have been removed at any time from day to day."

B In *The Friends* (11), SIR WILLIAM SCOTT says in his judgment (4 Ch. Rob. at p. 144):

"Nothing can be better settled than that the act of capture defeats all rights and interests: but it is contended that the former interest revives on recapture."

C In *The Governor Raffles* (29), SIR WILLIAM SCOTT says (2 Dods. at p. 17):

"The moment the capture is effected by an enemy the crew are discharged from their duty to their employers."

D It is not necessary, however, to refer to further cases of a similar character, since, whatever may be the result of a hostile capture, LORD ELLENBOROUGH in *Beale v. Thompson* (2) draws the distinction between the case of capture and the case of detention.

The opinion above expressed finds strong confirmation in a passage from the judgment of KENNEDY, L.J., in *The Olympic* (1) ([1913] P. at p. 111), which is quoted in the judgment of SWINFEN-EADY, L.J.:

E "The embargo which prevents a laden ship from proceeding from port on her voyage does not dissolve the mariner's engagement, any more than it dissolves the contract between the shipowner and the merchant whose cargo has been loaded."

KENNEDY, L.J., then refers to a passage in LORD TENTERDEN'S LAW OF MERCHANT SHIPS AND SEAMEN (5th Edn., 1827), p. 450; (14th Edn., 1901), p. 252, and says:

F "In this sentence one of the greatest of judicial authorities, on matters of shipping, clearly indicates his opinion, even in the case of the embargo of a laden ship, i.e., in the case of an obstacle to the prosecution of the voyage imposed by the Government, an obstacle of indefinite and unascertainable duration (which the detention for repairs is not), that, while in his own interest, and in order to save himself the risk of expense, it may be a reasonable, and, indeed, a very prudent, step on the part of the shipowner to discharge the greater part of the crew, yet, if that step is taken, the shipowner must compensate those whom he so discharges for the loss of the wages during the unfulfilled residue of the contract period, unless, as is likely enough, they find equally remunerative employment in another ship. And I may add that what is true of an embargo by the government to which the ship belongs is true also of the seizure for a temporary purpose by a hostile Power."

H I think that the claim of the allottee is good, and that, up to the date of issue of the writ, there was no severance of service under the contract, and that the judgment of the Court of Appeal should be affirmed.

I **LORD WRENBURY.**—The respondent is entitled to one-half her husband's wages if any. The question for decision is whether after Aug. 4, 1914, or some later date, the husband is entitled to wages. The appellant denies that he is entitled to wages after Aug. 4, 1914. He founds himself upon either s. 158 of the Merchant Shipping Act, 1894, or upon the common law or the law merchant as applicable to the case of a seaman if, as he contends, the statute has not rendered that law inapplicable.

I may dispose of the question upon s. 158 in few words. It was decided in *The Olympic* (1) that there is a "wreck of the ship" within the section where the vessel has suffered such physical damage by a casualty in the nature of wreck

as that she has ceased to be in a seaworthy condition to continue with a reasonable time the adventure as a commercial adventure. The same, I think, is true of the word "loss" in the section. If there have been such a loss as that the adventure has failed as a commercial adventure the section, I think, applies. But it remains to determine the meaning of the word "loss." It is confined, I think, to physical loss. The wreck and the loss referred to in the section I understand to be a physical injury if it be a wreck and a physical loss if it be a loss. Upon the evidence in this case the ship was at Hamburg on Aug. 4. She was still there on Nov. 2; there is no evidence as to what has happened to her since. She may be there, she may not. She may be in existence, she may not. She has not, so far as appears, been confiscated. If Germany has obeyed the Hague Convention she will not have been confiscated. I make no assumption that Germany will have obeyed the Hague Convention. It suffices to say that the appellant has not proved confiscation. The result is that the appellant has proved, not that the ship has been physically destroyed, or injured, or that the property in the ship has been taken from him, but only that from Aug. 4, 1914, to the present time he has been deprived of the use of her. In my judgment detention or deprivation of use is not loss within s. 158. It follows that, in my opinion, s. 158 does not apply. So far I think the respondent is right.

The respondent next began by contending that s. 158 is exhaustive—that if that section offer no defence the seaman is entitled to his wages. This seems to me an impossible contention. When a statute provides that in certain events a certain result shall ensue, it is plainly not enacting what is to result in other events. The contention was then modified, and was that the section is exhaustive in the cases with which it deals. This may be, and I think is true, but it leaves the matter where it was. Upon my view of the word "loss" the section does not deal with the case before the House. It follows that the section does not exclude the common law or the law merchant in the case of seamen.

Where a contract has been entered into, and by a supervening cause beyond the control of either party its performance has become impossible, I take the law to be as follows. If a party has expressly contracted to do a lawful act, come what will—if, in other words, he has taken upon himself the risk of such a supervening cause he is liable if it occurs, because by the very hypothesis he has contracted to be liable. But if he has not expressly so contracted, and from the nature of the contract it appears that the parties from the first must have known that its fulfilment would become impossible if such a supervening cause occurred, then upon such a cause occurring both parties are excused from performance. In that case a condition is implied that if performance becomes impossible the contract shall not remain binding. The leading case on the subject is *Taylor v. Caldwell* (5). *Krell v. Henry* (9) is an illustration of the application of the principle. On Aug. 4, 1914, there occurred, in the case of this ship, a supervening cause which resulted in the impossibility of continuing that adventure which was the subject of the seaman's contract of May 21, 1914, and that impossibility has continued for such a time as that its character, which might have proved to be temporary, is now known to be for a time so indefinite and so long that the adventure which was the whole basis of the contract has failed. The case falls, I think, within the principle of *Taylor v. Caldwell* (5). *Melville v. De Wolf* (10) is a like case. The plaintiff there was taken from his employment and sent home by the order of a court, and, as LORD CAMPBELL, C.J., put it, the contract was "dissolved by the supreme authority of the State." The plaintiff was not entitled to wages from the date when he was taken away from the ship and his services closed.

The respondent's counsel was, I think, not prepared to contend that if this had been the case, not of a mariner, but of a commercial traveller, subsequent wages could have been claimed. But the case of a mariner, he contends, stands in a different position. *Chandler v. Grieves* (30) was a case of a seaman disabled by accident while on board, who was held entitled nevertheless to payment of

A his wages for the whole voyage. The case establishes very little for the present purpose. Section 160 of the Act of 1894 seems to assume—and, I think, to assume rightly—that a seaman incapable by illness to perform his duty is nevertheless entitled to his wages during the continuance of the adventure in which, by the terms of the employment, he took part. On the other hand *The Friends* (11) is authority that when the ship is captured and the seaman taken from the vessel his wages cease, and that even if the ship be recaptured his case is not bettered if he has been taken from the vessel and renders no service after the recapture. *Wiggins v. Ingleton* (18), which was the case of a seaman taken by the press gang, and *The Governor Raffles* (29), where the ship had been taken by mutineers, are authorities to the same effect, although the latter is in point only for the dictum of SIR WILLIAM SCOTT (2 Dods. at p. 17) that

C “the moment capture is effected the crew are discharged from their duty to their employers, and the contract between the parties is at an end.”

Reverting to the statute, the respondent relies on s. 134. I fail to see that the section helps her. Section 134 (a) speaks of the event that the seaman “lawfully leaves the ship at the end of his engagement.” These words do not cover the event of the seaman being forcibly removed by the enemy from his employment and from the ship. Section 134 (c) provides that the seaman’s wages shall continue to run unless the delay to make payment of his wages is due “to any other cause not being the wrongful act or default of the owner or master.” The cause here was an extraneous and supervening cause, and was not any wrongful act or default of the owner or master. Then s. 143 is cited. By sub-s. (2) of that section it is provided in favour of the allottee of wages that

E “the seaman shall be presumed to be duly earning his wages, unless the contrary is shown to the satisfaction of the court . . . (d) by such other evidence as the court in their absolute discretion consider sufficient to show satisfactorily that the seaman has ceased to be entitled to the wages out of which the allotment is to be paid.”

F This simply throws the onus of proof on the employer.

Beale v. Thompson (2) was a case decided when the doctrine prevailed that “freight is the mother of wages,” a doctrine which has been brought to an end by statute: see s. 157 of the Merchant Shipping Act, 1894; and it was a case in which the seaman—after the detention of the vessel was over—took part in her voyage home. The decision involves no more than this, that if the adventure is ultimately carried to a conclusion the seaman is entitled to his wages for the whole period. *Delamainer v. Winteringham* (4) is similar. In *Hadley v. Clarke* (21) there was no finding that the adventure had been frustrated. For the purpose of the decision I may take it that the plaintiff did not care when his goods reached Leghorn so long as they got there. The defendants contracted to take them there and failed to do so. The plaintiff, therefore, recovered damages. In *Jackson v. Union Marine Insurance Co.* (15) BRAMWELL, B., points out the grounds upon which the decision can be supported. It is, I think, no authority for the general proposition that a contract of marine adventure remains binding when a supervening cause has rendered it impossible to perform it within such a time as that the adventure can be fulfilled as a commercial adventure. When this vessel was detained at Hamburg on Aug. 4, 1914, the owner was deprived, and he has ever since remained deprived, of the use of her. On Aug. 5, if her current charter had been at an end, he could not have offered her to a new charterer for he could not have ensured that he could deliver possession of her under the charter, and events have shown that in fact he could not have done so. The contract with the seaman for employment on the ship for not exceeding two years from May 21, 1914, was a contract while the owner from no fault of his own was unable to fulfil. As from Aug. 4 the adventure had become impossible and the contract, in my judgment, ceased to be binding. It is unnecessary, therefore, to consider the

latter date of Nov. 2, when the seaman was removed from the vessel to another vessel for detention, or that of Nov. 8, when he was removed to Ruhleben. If anything more was wanted, I think it clear that the seaman (for no fault of his own it is true) was at those dates taken by superior authority from the place of his employment and from the possibility of performing his service. *Melville v. De Wolf* (10) is authority against his claim as from those dates. From what I have said it follows that I cannot agree with the learned judge who tried the case or with the majority in the Court of Appeal. In my judgment, this appeal must be allowed.

Solicitors: *Holman, Birdwood & Co.*; *Ellis, Davies, Roberts & Co.*, for *Miller, Taylor & Holmes*, Liverpool.

[Reported by W. E. REID, ESQ., Barrister-at-Law.]

F. A. TAMPLIN STEAMSHIP CO., LTD. v. ANGLO-MEXICAN PETROLEUM PRODUCTS CO., LTD.

[HOUSE OF LORDS (Lord Buckmaster, L.C., Earl Loreburn, Viscount Haldane, Lord Atkinson and Lord Parker of Waddington), March 23, 27, 28, July 24, 1916]

[Reported [1916] 2 A.C. 397; 85 L.J.K.B. 1389; 115 L.T. 315; 32 T.L.R. 677; 13 Asp. M.L.C. 467; 21 Com. Cas. 299]

Contract—Frustration—Charterparty—Implication of term—Continued existence of thing or state of things—Impossibility of performance going to root of consideration.

Per EARL LOREBURN: A court can, and ought to, examine a contract and the circumstances in which it was made, not to vary, but to explain, it, to see whether or not from its nature the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. If they must have done so, a term to that effect will be implied, though it be not expressed in the contract. Such a term can only be implied where the discontinuance is such as to upset altogether the purpose of the contract.

Per VISCOUNT HALDANE: When people enter into a contract which is dependent for the possibility of its performance on the continued availability of a specific thing, and that availability comes to an end by reason of circumstances beyond the control of the parties, the contract is regarded as dissolved. The contingency which has arisen is treated, in the absence of a contrary intention made plain, as being one about which no bargain at all was made. The principle applies equally whether performance of the contract has not commenced or has in part taken place.

Per LORD ATKINSON: If the impossibility to perform or continue to perform the contract goes to the root of the consideration, both parties are released from their engagements.

Per LORD PARKER OF WADDINGTON: The principle which underlies all cases in which a contract has been held to determine on the happening of some event which renders its performance impossible or otherwise frustrates the objects which the parties to the contract have in view is one of contract law depending on some term or condition to be implied in the contract itself and not on something entirely dehors the contract which brings the contract to an end.

A It is, of course, impossible to imply in a contract any term or condition inconsistent with its express provisions, or with the intention of the parties as gathered from those provisions.

By a charterparty dated May 18, 1912, the owners of the tank steamer *F. A. Tamplin* chartered the steamer to charterers for sixty calendar months, i.e., from Dec. 4, 1912, until Dec. 4, 1917, at a specified hire for voyages between named ports. The charterparty provided that the owners would provide officers and crew, with their provisions and wages, and would maintain the ship in an efficient state. The captain was put under the order and direction of the charterers, and was to be furnished by them with all requisite instructions and sailing directions. By cl. 19, if the vessel be lost, the hire was to cease, and by cl. 20, inter alia, arrest and restraint of princes, rulers, and peoples, were excepted. On Feb. 15, 1915, the ship was requisitioned by the British government for war service, and the requisition was continuing in July, 1916.

C **Held** by LORD BUCKMASTER, L.C., EARL LOREBURN, and LORD PARKER OF WADDINGTON, VISCOUNT HALDANE and LORD ATKINSON dissenting, applying the above principles to the construction of the charterparty, the requisition of the steamer did not put an end to the charterparty.

D Decision of Court of Appeal, [1916] 1 K.B. 485, affirmed.

Notes. Considered: *Chinese Mining and Engineering Co. v. Sale*, [1917] 2 K.B. 599; *Countess of Warwick Steamship Co. v. Le Nickel Société Anonyme, Anglo Northern Trading Co., Ltd. v. Emlyn Jones and Williams*, [1918] 1 K.B. 372.

E Applied: *Modern Transport Co. v. Duneric Steamship*, [1917] 1 K.B. 370; *Elliott Steam Tug Co., Ltd. v. Charles Duncan & Sons, Ltd.* (1918), 34 T.L.R. 583. Considered: *Metropolitan Water Board v. Dick, Kerr & Co.*, post p. 122; *Bank Line, Ltd. v. Arthur Capel & Co.*, [1918-19] All E.R. Rep. 504; *Dominion Coal Co. v. Maskinonge Steamship Co.*, [1922] 2 K.B. 132; *Larrinaga & Co. v. Société Franco-Américaine des Phosphates de Médulla, Paris* (1922), 27 Com. Cas. 160; *Larrinaga & Co. v. Société Franco-Américaine des Phosphates de Médulla, Paris*, [1923] All E.R. Rep. 1; *First Russian Insurance Co. v. London and Lancashire Insurance Co.*, [1928] Ch. 922; *Walton Harvey, Ltd. v. Walker and Homfrays, Ltd.*, [1931] 1 Ch. 274; *Court Line, Ltd. v. Dant and Russell Inc.*, [1939] 3 All E.R. 314; *Tatem, Ltd. v. Gamboa*, [1938] 3 All E.R. 135; *Morgan v. Manser*, [1947] 2 All E.R. 666; *British Movietonews, Ltd. v. London and District Cinemas, Ltd.* [1951] 2 All E.R. 617; *Davis Contractors, Ltd. v. Fareham U.D.C.*, [1955] 1 All E.R. 275. Referred to: *Leiston Gas Co. v. Leiston cum-Sizewell U.D.C.* (1915), 80 J.P. 95; *Nordman v. Rayner and Sturges* (1916), 33 T.L.R. 87; *Scottish Navigation Co. v. Souter, Admiral Shipping Co. v. Weidner, Hopkins & Co.*, [1917] 1 K.B. 222; *Clapham Steamship Co. v. Handels-en-Transport Maatschappij Vulcaan of Rotterdam*, [1917] 2 K.B. 639; *Heilgers & Co. v. Cambrian Steam Navigation Co.* (1917), 33 T.L.R. 348; *Lloyd Royal Belge Société Anonyme v. Stathatos* (1917), 33 T.L.R. 390; *Marshall v. Glanville*, [1917] 2 K.B. 87; *Orconera Iron Ore Co. v. Fried Krupp Akt.* (1917), 86 L.J.Ch. 613; *Blackburn Bobbin Co. v. Allen*, [1918] 2 K.B. 467; *E. Hulton & Co., Ltd. v. Chadwick and Taylor, Ltd.* (1918), 34 T.L.R. 230; *Naylor, Benzon & Co. v. Krainische Industrie Gesellschaft*, [1918] 1 K.B. 331; *Schostall v. Johnson* (1919), 36 T.L.R. 75; *Re Thellusson, Ex parte Abdy*, [1919] 2 K.B. 735; *Re Badische Co., Bayer Co., etc.*, [1921] 2 Ch. 331; *Re Thornett and Fehr and Yuills, Ltd.*, [1921] 1 K.B. 219; *Willis v. Willis*, [1928] P. 10; *The Penelope*, [1928] P. 180; *Hyman v. Hyman, Hughes v. Hughes*, [1929] P. 1; *May v. May*, [1929] All E.R. Rep. 484; *Chandler Bros., Ltd. v. Boswell*, [1936] 3 All E.R. 179; *Kirk v. Eustace*, [1936] 3 All E.R. 520; *Duke of Westminster v. Howard* (1940), 85 Sol. Jo. 106; *Joseph Constantine Steamship Line, Ltd. v. Imperial Smelting Corp., Ltd.*, [1940] 2 All E.R. 46; *Heyman v. Darwins, Ltd.*, [1942]

1 All E.R. 337; *Unger v. Preston Corpn.*, [1942] 1 All E.R. 200; *Denny, Mott and Dickson, Ltd. v. James B. Fraser & Co.*, [1944] 1 All E.R. 678; *Court Line, Ltd. v. R., The Lavington Court*, [1945] 2 All E.R. 357; *Davis Contractors, Ltd. v. Fareham U.D.C.*, [1956] 2 All E.R. 145; *Port Line, Ltd. v. Ben Line Steamers, Ltd.*, [1958] 1 All E.R. 787; *Carapanayoti & Co., Ltd. v. E. T. Green, Ltd.*, [1958] 3 All E.R. 115.

As to the doctrine of frustration, see 8 HALSBURY'S LAWS (3rd Edn.) 185-194; and for cases see 12 DIGEST (Repl.) 436 et seq. And see Law Reform (Frustrated Contracts) Act, 1943 (4 HALSBURY'S STATUTES (2nd Edn.) 662).

Cases referred to :

- (1) *Horlock v. Beal*, ante p. 81; [1916] A.C. 486; 85 L.J.K.B. 602; 114 L.T. 193; 32 T.L.R. 251; 60 Sol. Jo. 236; 13 Asp. M.L.C. 250; 21 Com. Cas. 201, H.L.; 12 Digest (Repl.) 433, 3322.
- (2) *Dahl v. Nelson, Donkin & Co.* (1881), 6 App. Cas. 38; 50 L.J.Ch. 411; 44 L.T. 381; 29 W.R. 543; 4 Asp. M.L.C. 392, H.L.; 41 Digest 517, 3471.
- (3) *Geipel v. Smith* (1872), L.R. 7 Q.B. 404; 41 L.J.Q.B. 153; 26 L.T. 361; 20 W.R. 332; 1 Asp. M.L.C. 268; 12 Digest (Repl.) 418, 3245.
- (4) *Jackson v. Union Marine Insurance Co.* (1873), 8 C.P. 572; 42 L.J.C.P. 284; 22 W.R. 79; affirmed (1874), L.R. 10 C.P. 125; 44 L.J.C.P. 27; 31 L.T. 789; 23 W.R. 169; 2 Asp. M.L.C. 435, Ex.Ch.; 12 Digest (Repl.) 438, 3339.
- (5) *Appleby v. Myers* (1867), L.R. 2 C.P. 651; 36 L.J.C.P. 331; 16 L.T. 669, Ex.Ch.; 12 Digest (Repl.) 696, 5334.
- (6) *Paradine v. Jane* (1647), Aleyn, 26; Sty. 47; 82 E.R. 897; 12 Digest (Repl.) 417, 3236.
- (7) *Taylor v. Caldwell* (1863), 3 B. & S. 826; 2 New Rep. 198; 32 L.J.Q.B. 164; 8 L.T. 356; 27 J.P. 710; 11 W.R. 726; 122 E.R. 309; 12 Digest (Repl.) 696, 5333.
- (8) *Poussard v. Spiers and Pond* (1876), 1 Q.B.D. 410; 45 L.J.Q.B. 621; 34 L.T. 572; 40 J.P. 645; 24 W.R. 819; 12 Digest (Repl.) 426, 3279.
- (9) *Tully v. Howling* (1877), 2 Q.B.D. 182; 46 L.J.Q.B. 388; 36 L.T. 163; 25 W.R. 290; 3 Asp. M.L.C. 368, C.A.; 41 Digest 356, 2052.
- (10) *Admiral Shipping Co., Ltd. v. Weidner, Hopkins & Co.*, [1916] 1 K.B. 429; 85 L.J.K.B. 409; 114 L.T. 171; 13 Asp. M.L.C. 246; reversed [1917] 1 K.B. 222; 86 L.J.K.B. 336; 115 L.T. 812; 33 T.L.R. 70; 61 Sol. Jo. 85; 13 Asp. M.L.C. 539; 22 Com. Cas. 154, C.A.; 12 Digest (Repl.) 437, 3335.

Also referred to in argument :

- Nickoll and Knight v. Ashton, Edridge & Co.*, [1901] 2 K.B. 126; 70 L.J.K.B. 600; 84 L.T. 804; 49 W.R. 513; 17 T.L.R. 467; 9 Asp. M.L.C. 209; 6 Com. Cas. 150, C.A.; 12 Digest (Repl.) 430, 3308.
- Krell v. Henry*, [1903] 2 K.B. 740; 72 L.J.K.B. 794; 89 L.T. 328; 52 W.R. 246; 19 T.L.R. 711, C.A.; 12 Digest (Repl.) 435, 3327.
- Brown v. Turner, Brightman & Co.*, [1912] A.C. 12; 81 L.J.K.B. 387; 105 L.T. 562; 12 Asp. M.L.C. 79; 17 Com. Cas. 171, H.L.; 41 Digest 439, 2758.
- Hudson v. Hill* (1874), 43 L.J.C.P. 273; 30 L.T. 555; 2 Asp. M.L.C. 278; 41 Digest 332, 1874.
- Sanday & Co. v. British and Foreign Marine Insurance Co.*, [1915] 2 K.B. 781; 84 L.J.K.B. 1625; 113 L.T. 407; 31 T.L.R. 374; 59 Sol. Jo. 456; 13 Asp. M.L.C. 116; 20 Com. Cas. 305, C.A.; affirmed sub nom. *British and Foreign Marine Insurance Co., Ltd. v. Samuel Sanday & Co.*, post p. 134; [1916] 1 A.C. 650; 85 L.J.K.B. 550; 114 L.T. 521; 32 T.L.R. 266; 60 Sol. Jo. 253; 13 Asp. M.L.C. 289; 21 Com. Cas. 154, H.L.; 29 Digest 276, 2236.

Appeal by the shipowners from the decision of the Court of Appeal (LORD COZENS-HARDY, M.R., and BANKES and WARRINGTON, L.JJ.), which affirmed a

A judgment of ATKIN, J., upon an award stated in the form of a Special Case by an arbitrator.

The facts are stated in the headnote and their Lordships' opinions.

George Wallace, K.C., and *Raeburn* for the appellants.

Sir R. Finlay, K.C., *MacKinnon, K.C.*, and *R. A. Wright* for the respondents.

The House took time for consideration.

July 24, 1916. The following opinions were read.

EARL LOREBURN.—The tank steamer, *F. A. Tamplin*, was chartered by the respondents for five years. She was to be managed and controlled by the owners, but the use to be made of her in carrying merchandise within prescribed limitations depended upon the direction of the charterers. From December, 1912, till December, 1914, she was employed accordingly. From that date till the hearing of the case she has been employed by His Majesty's government for purposes connected with the war. There are, therefore, nineteen months of the five years unexpired. No one knows how long the government will continue to use this vessel, but, so long as they do use her, neither party to the contract can carry out their common adventure. It may be as well to say that the first requisition of this ship was in December, 1914, and the second in February, 1915, but she was not released from the day she was first taken over. In these circumstances the owners maintain that the award of the arbitrator, *Mr. Leck, K.C.*, holding that this charterparty came to an end when the steamer was requisitioned in February, 1915, is right.

In order to decide this question it is necessary to ascertain the principle of law which underlies the authorities. I believe it to be as follows. When a lawful contract has been made and there is no default, a court of law has no power to discharge either party from the performance of it unless either the rights of someone else or some Act of Parliament give the necessary jurisdiction. But a court can, and ought to, examine the contract and circumstances in which it was made, not, of course, to vary, but only to explain, it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. If they must have done so, then a term to that effect will be implied, though it be not expressed in the contract. In applying this rule it is manifest that such a term can rarely be implied except where the discontinuance is such as to upset altogether the purpose of the contract. Some delay or some change is very common in all human affairs, and it cannot be supposed that any bargain has been made on the tacit condition that such a thing will not happen in any degree. In *Horlock v. Beal* (1) this House considered the law upon this subject, and previous decisions were fully reviewed, especially in the opinion delivered by *LORD ATKINSON*. An examination of those decisions confirms me in the view that, when our courts have held innocent contracting parties absolved from further performance of their promises, it has been upon the ground that there was an implied term in the contract which entitled them to be absolved. Sometimes it is put that performance has become impossible and that the party concerned did not promise to perform an impossibility. Sometimes it is put that the parties contemplated a certain state of things which fell out otherwise. In most of the cases it is said that there was an implied condition in the contract which operated to release the parties from performing it, and in all of them I think that was at bottom the principle upon which the court proceeded. It is, in my opinion, the true principle, for no court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted.

When this question arises in regard to commercial contracts, as happened in *Dahl v. Nelson, Donkin & Co.* (2), *Geipel v. Smith* (3), and *Jackson v. Union Marine Insurance Co.* (4), the principle is the same, and the language used as to

"frustration of the adventure" merely adapts it to the class of cases in hand. In all these three cases it was held, to use the language of LORD BLACKBURN (6 App. Cas. at p. 52),

"that a delay in carrying out a charterparty, caused by something for which neither party was responsible, if so great and long as to make it unreasonable to require the parties to go on with the adventure, entitled either of them, at least while the contract was executory, to consider it at end."

That seems to me another way of saying that from the nature of the contract it cannot be supposed the parties, as reasonable men, intended it to be binding on them under such altered conditions. Were the altered conditions such that, had they thought of them, they would have taken their chance of them, or such that as sensible men they would have said: "If that happens, of course it is all over between us"? What, in fact, was the true meaning of the contract? Since the parties have not provided for the contingency, ought a court to say it is obvious they would have treated the thing as at an end?

Applying the principle to the present case, I find that these contracting parties stipulated for the use of this ship during a period of five years, which would naturally cover the duration of many voyages. Certainly both sides expected that these years would be years of peace. They also expected, no doubt, that they would be left in joint control of the ship, as agreed, and that they would not be deprived of it by any act of State. But I cannot say that the continuance of peace or freedom from any interruption in their use of the vessel was a tacit condition of this contract. On the contrary, one at all events of the parties might probably have thought, if he thought of it at all, that war would enhance the value of the contract, and both would have been considerably surprised to be told that interruption for a few months was to release them both from a time charter that was to last five years. On the other hand, if the interruption can be pronounced, in the language of LORD BLACKBURN already cited, "so great and long as to make it unreasonable to require the parties to go on with the adventure," then it would be different. Both of them must have contracted on the footing that such an interruption as that would not take place, and I should imply a condition to that effect. Taking into account, however, all that has happened, I cannot infer that the interruption either has been or will be in this case such as makes it unreasonable to require the parties to go on. There may be many months during which this ship will be available for commercial purposes before the five years have expired. It might be a valuable right for the charterer during those months to have the use of this ship at the stipulated freight. Why should he be deprived of it? No one can say that he will or that he will not regain the use of the ship, for it depends upon contingencies which are incalculable. The owner will continue to receive the freight he bargained for so long as the contract entitles him to it, and if, during the time for which the charterer is entitled to the use of the ship, the owner received from the government any sums of money for the use of her he will be accountable to the charterer. Should the upshot of it all be loss to either party, and I do not suppose it will be so, then each will lose according as the action of the Crown has deprived either of the benefit he would otherwise have derived from the contract. It may be hard on them as it was on the plaintiff in *Appleby v. Myers* (5). The violent interruption of a contract always may damage one or both of the contracting parties. Any interruption does so. Loss may arise to someone whether it be decided that these people are or that they are not still bound by the charterparty. But the test for answering that question is not the loss that either may sustain. It is this: Ought we to imply a condition in the contract that an interruption such as this shall excuse the parties from further performance of it? I think not. I think they took their chance of lesser interruptions and the condition I should imply goes no further than that they should be excused if substantially the whole contract became impossible of performance, or,

A in other words, impracticable, by some cause for which neither was responsible. Accordingly I am of opinion that this charterparty did not come to an end when the steamer was requisitioned and that the requisition did not suspend it or affect the rights of the owners or charterers under it, and that the appeal fails. If it were established that this ship would be used by the government for substantially the remainder of the five years, I should be of a different opinion. **LORD**
B **BUCKMASTER, L.C.**, desires me to say he concurs in the judgment prepared by **LORD PARKER**.

VISCOUNT HALDANE.—The general principles by which this appeal must be decided do not appear to me to be difficult of ascertainment. The real uncertainty in the case lies in their application. As to this it is with reluctance that I find
C myself differing from the conclusions at which others of your Lordships have arrived.

When people enter into a contract which is dependent for the possibility of its performance on the continued availability of a specific thing, and that availability comes to an end by reason of circumstances beyond the control of the parties, the contract is regarded as dissolved. The contingency which has arisen
D is treated, in the absence of a contrary intention made plain, as being one about which no bargain at all was made. The principle applies equally whether performance of the contract has not commenced or has in part taken place. There may be included in the terms of the contract itself a stipulation which provides for the merely partial or temporary suspension of certain of its obligations, should some event (such, for instance, as in the case of the charterparty under
E consideration, restraint of princes) so happen as to impede performance. In that case the question arises whether the event which has actually made the specific thing no longer available for performance is such that it can be regarded as being of a nature sufficiently limited to fall within the suspensory stipulation, and to admit of the contract being deemed to have provided for it and to have been intended to continue for other purposes. Although the words of the stipulation may
F be such that the mere letter would describe what has occurred, the occurrence itself may yet be of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared, and the contract itself has vanished with that foundation. If the course of events can be regarded as consistent with the continuance of the contract, it will follow that when the event possesses the more limited character there will, under the terms
G of the special stipulation be mere suspension of particular rights and duties which would otherwise arise under the general terms agreed on. The circumstance that the contract is one, not for a single service, but for a succession of such services, to continue for a definite time, is a relevant fact in considering whether there is a mere temporary suspension. And where the interruption is simply one of an interim character and likely to cease so soon as to leave the rest of the period
H stipulated free for the revival of the rights and duties of the parties after what amounts to no more than a temporary cessation of the power of performance, then, not only where there is an express stipulation covering the case which has occurred but possibly even where there is no such stipulation, the contract may be regarded as not destroyed, but only suspended. The question must always turn mainly
I on the facts. But if the facts be such that it appears that the power of performance has been wholly swept away to such an extent that there is no longer in view a definite prospect of this power being restored, then the contract must be looked upon as being wholly dissolved, and the courts cannot take any course which would in reality impose new and different terms on the parties. On the general principle there is a long series of authorities, extending from the decision of *Paradine v. Jane* (6), more than two centuries ago, through such cases as *Taylor v. Caldwell* (7) down to the recent appeal to this House in *Horlock v. Beal* (1), in which last case many of the previous authorities were considered and classified.

In the main the decisions given are consistent, although there are dicta which are not everywhere easy to reconcile. But the differences in expression which these authorities disclose do not affect the fundamental principles which they recognise, and I think that what I have ventured to state as the law is in accordance with the weight of judicial opinion. It is important to endeavour to formulate these principles in a case like the present, where the task of the tribunal is essentially one of ascertaining the true bearing on the particular facts of the case.

To these facts I now turn. By a charterparty dated May 18, 1912, on which the question arises, the owners of the tank steamer *F. A. Tamplin* agreed to let the steamer to the respondents as charterers for sixty calendar months from the date at which she was placed at the disposal of the latter, a term which would expire on Dec. 4, 1917. The steamer was to be employed

"in such lawful trades for voyages between any safe port or ports in the United Kingdom and/or continent of Europe and/or any safe port or ports in the United States of America and/or Mexico and/or North and South America and/or Africa and/or Asia and/or Australasia and back, finally to a coal port in the United Kingdom, for the carriage of refined petroleum and/or crude oil and/or its products, but warranted no B.N.A. or Atlantic except for coaling; warranted no Baltic between Oct. 1 and April 1; warranted no White Sea between Oct. 1 and April 1, as charterers or his agents shall direct,"

on certain conditions. Among these was that the charterers should pay £1,750, reducible later on to £1,700, a month, that on the last voyage the charterers should, if the vessel had been carrying other than refined oil or spirit, clean the vessel, and load a cargo of refined oil or spirit on that voyage under the charter; that no goods contraband of war were to be shipped, and the vessel was not to be required to enter any port which was blockaded or where hostilities were in progress; that no voyage was to be undertaken or goods or cargoes loaded which would involve risk of seizure, capture, or penalty by British or foreign rulers, and no acids or cargoes injurious to the steamer were to be shipped; that the charterers were to have the option of subletting the steamer to the Admiralty or other service without prejudice to the charterparty, but the charterers to remain responsible. The owners were to provide and pay the crew and for stores and maintenance. Any dispute arising during the execution of the charterparty was to be settled by arbitration. It is, of course, obvious that, although the contract was described as one of lease, there was and could have been no lease properly so called. The real relation was that the owners retained through the officers and crew the possession of the vessel, and that the charterers were entitled to use it for certain purposes and under certain restrictions during a term of five years. There was another important clause in the charterparty to which I have to refer. This was the usual one providing that certain perils should be excepted. These perils included "arrests and restraints of princes, rulers, and people." The effect of the clause was that if and to the extent to which the perils mentioned interfered with the fulfilment of their obligations the parties were exempted from liability for non-performance.

Early in December, 1914, the steamer was requisitioned by the British government for Admiralty transport service and was engaged in such service until about Feb. 10, 1915. No question has been raised as to this requisition, which appears to have been accepted by both parties as a merely temporary burden upon their rights under the charterparty. But about the latter date notice was given by the Admiralty Director of Transports to the charterers that the steamer was again requisitioned and that she would be specially fitted by the government for the service on which she was to be employed. This was done shortly thereafter, and the government made structural alterations, and used her for the transport of troops. She has since then, according to what was stated at the Bar, been in part at all events restored to something resembling her original condition, and

A has been used for the carriage of oil. But I think it is clear that the Admiralty neither regarded their powers as in any way restricted, nor had any intention of limiting the period during which they claimed to use the steamer. Had the charterers done what the government has done, their action would have constituted such a breach of contract as would have entitled the owners to treat the contract as at an end.

B In these circumstances a dispute arose between the owners and the charterers as to their rights, and this dispute was, under the arbitration clause, referred to MR. LECK, K.C. The owners claimed that what had happened could not be treated as a subletting under the contract, but that the basis of the contract was gone, inasmuch as the steamer could no longer be made available under the charterparty, which was therefore either entirely at an end or was indefinitely suspended under C the restraint of princes clause. The charterers argued that in reality there had been what was tantamount to a subletting to the Admiralty, and that the uses by the latter for purposes outside those prescribed by the charterparty, and the making of the structural alterations, did not amount to breaches of contract by the charterers, inasmuch as they were covered by the restraint of princes clause. D If the charterers were right it would no doubt follow that they would be entitled to retain the largely increased monthly payment which the government has been making for the use of the steamer, paying to the owners only the monthly sum stipulated for by the charterparty. If the owners, on the other hand, were right, the charterers would be able to claim compensation from the government for loss of rights under the terms of a general proclamation issued by the latter, but the owners would be the persons entitled to the hire paid by the Admiralty for the E steamer to the use of which the charterers would no longer be entitled. The question of compensation was not, however, raised before the arbitrator, and it is not before us. The only point referred was whether the charterparty was brought to an end or at all events fully suspended by the second requisition and what was done under it. The arbitrator decided this question in the affirmative, but stated a Special Case. On the argument of this Special Case, ATKIN, J., and the Court F of Appeal differed from him, and gave judgments to the effect that the contract remained in existence, and that the restraint of princes clause kept the contract alive while precluding the owners from insisting that the diversion of use and alteration of structure were breaches for which the charterers could be held responsible.

G It may well be that, at all events where there is such a clause, in the case of a time charter with a substantial period yet to run, an event might occur which, while it temporarily interfered with its performance, would not destroy its existence. On the other hand, in the case of a charter for a single voyage, the same event might be sufficient to destroy the very basis in the case of voyage charter when it would not have been sufficient to destroy that of a time charter. The H question in each case is one of the application of the general principles to which I referred earlier to the facts and circumstances of the particular case, and I think that similar considerations must govern the question whether what has happened in the present case can be regarded as falling within the meaning of the restraint of princes clause. That clause may apply to mere structural alterations made by a government. It is a more difficult question whether it can cover a taking possession I which may, so far as appears, outlast the period of the charter. In one aspect the act of the government may come within the clause, but in another and equally important aspect it may mean so much more that by destroying the possibility of performing the contract as a whole it destroys the applicability of the clause. In the case before us I am, accordingly, of opinion that, if the conclusion is once reached that the requisition was of such a character that it would otherwise supersede or indefinitely suspend the contract, the special clause cannot assist the charterers. Now it is no doubt true that the charter was to remain in force until Dec. 4, 1917. But the requisition by the Admiralty was one which enabled it to

use the steamer for purposes altogether outside the contract, and that for a time to which no limit could be assigned. The time might extend until after the period of the charterparty had run out. It is impossible for any court to speculate as to the duration of the war on which the Admiralty requirements may depend. It is enough that events which are of public notoriety indicate the duration as one about which there is no apparent certainty as to a speedy close of which a court of justice can take cognisance. The question whether the contract was brought to an end must be judged in the light of events as they were in February, 1915. The requisition was of a character so sweeping that I think the burden of showing that the purposes of the charter could continue to subsist concurrently with its operation rested on those who maintained the affirmative. *Primâ facie* the entire basis of the contract, so far as concerned either performance in February, 1915, or performance at any calculable period in the future, seems to me to have been swept away. It might thereafter have proved possible to make a fresh start within what turned out to remain over of the time of the charter. But it equally might not.

I am, therefore, unable to see how the contract can be properly looked on as only temporarily interrupted. Such interruption has a meaning if the restraint of princes clause covers the interrupting event. The clause is introduced for the very purpose of saving the foundation of the contract. But if that foundation is gone the contract is gone and the clause with it. Now the basis of the contract here was that the owners should provide a steamer to be used by the charterers for certain purposes only. The use of the ship and the fulfilment of the purposes are swept away by *vis major* for a period to which no limit can be assigned. It is possible that under different circumstances and with a period as to which there was an obvious inference of fact that it would in all probability outlast the duration of the war the *vis major* might have been regarded as a mere temporary interruption which the special clause covered. But it seems to me that the charterers cannot bring their case up to the point at which it is legitimate to draw such an inference. I am, therefore, driven to the conclusion that there was here no mere temporary suspension of a subordinate obligation of the charterers. I think that the entire contract was avoided, and with it the clause providing for restraint of princes, and that the appellants were consequently entitled to judgment.

LORD ATKINSON.—This case came before ATKIN, J., upon an award in the form of a Special Case stated by an arbitrator, and the question for the court to determine was stated to be whether, on the facts stated in the Case, the arbitrator was right in holding that the charterparty dated May 18, 1912, came to an end when the steamer (i.e., the tank steamer *F. A. Tamplin*) was requisitioned by the British government on Feb. 15, 1915. Your Lordships were informed that this is a test case, and the parties on both sides desired that the House should not confine its attention to the facts found by the arbitrator, but should consider in addition all relevant matters which have taken place since the hearing before him, with a view of determining whether or not this charter has come to an end.

By the charterparty the British tank steamer *F. A. Tamplin*, in process of being built at the date of the document, was chartered to the respondents for a period of sixty calendar months, commencing from Dec. 4, 1912, and expiring on Dec. 4, 1917, at the hire of £1,750 per calendar month for the first twelve months and £1,700 per month for the remaining forty-eight months. Under the terms of the charterparty the steamer, described as a tank steamer, was to be placed at the disposal of the charterers at Newcastle-on-Tyne, in a dock or place in which she could safely lie afloat, as the charterers should direct immediately on being ready, she being then tight, staunch, and strong, fully equipped with a full complement of officers, seamen, engineers, and firemen necessary for that service. The service for which she was rendered fit and for which she was delivered was this—for voyages between any safe port or ports in the United Kingdom, the continent of Europe, or the seven other countries named, and back finally to a coal port in

A the United Kingdom, for the carriage of refined petroleum or crude oil or its products. It is quite true that the charterers are not, according to the letter of this clause, bound to employ this vessel on the particular service named, but they are bound not to employ her on any other service. They might possibly retain her in dock during the entire period of five years, or any part of it, at a cost of £1,750 or £1,700 per month. But if the parties were not business people, as they are, but merely rational beings, they could not when they entered into the charter-party have contemplated anything of the kind. Whether that be so or not, the contract had secured to the charterers the power to determine whether or not the vessel should be employed in the trade authorised on such voyages as they might select between the ports named, and one of the assumptions upon which I think the contract must have been based was that the charterers should remain free to exercise, as and when they deemed fit, the powers secured to them by their contract.

B Else why enter into it at all. The same remark applies to the owner. The parties have, no doubt, in one article—art. 20, with which I shall presently deal—specified several instances in which the will and intentions of each of them might be overborne by force majeure, but if one looks through the conditions upon which the contract was made, it will plainly appear that neither party could perform his

C side of the contract unless he be left a free agent. For instance, the first condition requires that the owners shall provide all provisions and wages for the crew and maintain the ship in a thoroughly efficient state in hull, machinery, and equipment for and during the service. Article 6 requires that the crew, the servants of the owners, for whom they are responsible, shall do certain work in a particular manner, in the process of loading the ship. By art. 2 the charterers are bound to provide and

D pay for oil fuel, galley coals, port charges, pilotage, &c. By art. 3 the hire is to continue for the time specified for termination of the charter and until the re-delivery to the owner (unless lost) at a coal port in the United Kingdom, as provided. By art. 13 the captain, although appointed by the owners, is put under the order and direction of the charterers as regards employment, agency, or other arrangements. By art. 12 the captain is bound to prosecute his voyages with the

E utmost dispatch, and render all customary assistance with ship's crew, winches, and boats, and proceed to sea when ordered, if tide and weather permit. If the charterers have reason to be dissatisfied with the conduct of the captain, officers, or engineers, the owners, on receiving particulars of the complaint should investigate the same and, if necessary, make a change in the appointment. By art. 15 it is

F provided that the master should be furnished from time to time with all requisite instructions and sailing directions and shall keep a full and correct log of the voyage or voyages, which shall be submitted to the charterers or their agents when required. Thus, by these several articles, and many others which might be referred to, powers are conferred and obligations imposed upon each of the contracting parties, and active duties are required to be performed by each. None of these

G things can be done unless the charterers retain possession and control of the ship, and both parties retain their freedom of action. It cannot, in my view, be possibly supposed that they by this charter, apart from art. 20, ever intended to enter into an absolute contract to perform the impossible—that is, to exercise these powers, fulfil these obligations, and discharge these duties after the ship, in and upon which all these things were to be done, had been taken possession of by a third

H party who had lawfully removed her from the control of both of them for a considerable portion of the period of hiring, and might continue so to do for the whole of that period.

I

Now I turn to art. 20. It is immediately preceded by art. 19, which provides that "if the vessel be lost the hire is to cease." But why? Surely because the charterers would thereby lose, possibly through one of the excepted perils, such as the act of God or perils of the sea, the thing they had contracted to pay for—namely, the use of the ship. Yet according to the contention of the respondents the hire is not to cease, though they should lose for the entire period of hiring the

use of the ship by another of the excepted perils, the restraint of princes. Article 20 then provides that the

“act of God, perils of the sea, fire, barratry of the master and crew, pirates, thieves, arrest and restraint of princes, rulers, and peoples, collisions, strandings, and other accidents of navigation always excepted, even when occasioned by the negligence, default, or error in judgment of the pilot, master, master mariners, or other servants of the shipowner.”

I think it plain that this clause was introduced mainly for the protection of the shipowner. Either party could, however, rely upon it as a defence to an action brought upon the charterparty to recover damages for a breach of contract, consisting in the omission to do an act that party was bound to do if he was prevented from doing it by one of the excepted perils. This, however, is not all. If the act omitted to be done was the performance or non-fulfilment of a condition precedent, then, in addition, the contract might come to an end, and both parties be released from all obligations under it. The fallacy underlying the respondents' contention appears to me to be this, that such a contract can never be put an end to through the operation of one of the excepted perils. The following authorities show, I think, that is not the law.

Two well-known cases, many times approved of and followed, establish, in my view, this proposition. First, *Geipel v. Smith* (3) and, second, *Jackson v. Union Marine Insurance Co.* (4), decided in the Exchequer Chamber on appeal from the Court of Common Pleas. In the first of these two cases the charterparty contained a clause, somewhat similar to this art. 20, excepting the act of God, Queen's enemies, restraint of princes, rulers, &c. Yet the owners were relieved from their contract to take on board a cargo and carry it to Hamburg, since the port of Hamburg was blockaded by the French fleet, that blockade clearly being a restraint of princes and peoples. BLACKBURN, J., said (L.R. 7 Q.B. at p. 412):

“The defendants, therefore, the shipowners, could not fulfil their contract by delivery of the cargo without running the blockade. I am unable to see why this was not a restraint of princes; it was clearly a restraint of the then Emperor of France, preventing the cargo from being carried to Hamburg. But then comes another question: Conceding that while the blockade lasted there was a restraint—an obstacle to the fulfilment by the defendants of their obligations under the charterparty, it is said that the moment the blockade was raised the ship might have gone off, and therefore she ought to have been ready with her cargo on board to start at any moment. But I cannot agree that, however long the blockade existed—which might be during all the time the war lasted, and therefore might have been for years—the ship and cargo must be ready to sail as soon as wind and weather permitted after the blockade was raised. It would be most inconvenient to give such a construction to the contract, and would be to frustrate the very object of such a contract—namely, the speedy transfer of the shippers' goods and the remunerative employment of the shipowners' vessel.”

LUSH, J., said (*ibid.* at p. 414):

“I think the fifth plea may also be treated as valid. It alleges the breaking-out of war between France and Germany and a blockade of the port of Hamburg. If the impediment had been in its nature temporary, I should have thought the plea bad; but a state of war must be presumed to be likely to continue so long, and so to disturb the commerce of merchants as to defeat and destroy a commercial adventure like this.”

In the second of the cases—*Jackson v. Union Marine Insurance Co.* (4)—the action was brought on a policy of insurance effected by the plaintiff on chartered freight valued at £2,900 to be earned by the plaintiff's vessel, the *Spirit of Dawn*, on a voyage at and from Liverpool to Newport, in tow, and thence to San Francisco.

A By the charter, dated Nov. 22, 1871, entered into between the plaintiff and Messrs. Rathbone & Co., this ship was to proceed with all convenient speed from Liverpool to Newport (dangers and accidents of navigation excepted), and there load a cargo of iron rails for San Francisco. The ship, in performance of her owners' obligation under the charterparty, started on the first stage of her voyage, i.e., from Liverpool to Newport, but, en route, took the rocks in Carnarvon Bay, and was got off after
B considerable delay much damaged. It is an error to suppose that at the time of the accident the owners' contract was in the position of a merely executory contract. It was, in truth, part performed. The rails were required for the construction of a railway in San Francisco. Time was a matter of importance to the charterers. They, accordingly, immediately threw up the charter and chartered another ship. The defendants, relying on the clause excepting "dangers and accidents of navigation," denied in their defence that there was any loss by a peril insured against.
C The case was tried before BRETT, J. The jury answered in the affirmative three questions left to them. First, "whether there was a constructive total loss of the ship?" Second, "whether the time necessary for getting the ship off the rocks and repairing her so as to be a cargo-carrying ship was so long as to make it unreasonable for the charterers to supply the agreed cargo at the end of such
D time"; and third, "whether such time was so long as to put an end to it in a commercial sense, &c." The learned judge being of opinion that there was no evidence of a constructive total loss of the ship, and no evidence of a loss of freight by the perils insured against, directed a verdict to be entered for the defendants, reserving leave to the plaintiff to move to enter a verdict for him. A rule nisi having been obtained by the plaintiff to enter a verdict for him, on
E cause being shown, it was held by KEATING and BRETT, JJ., that the charterers were absolved from loading the vessel, and that the shipowner, therefore, might recover for the loss of the freight. BOVILL, C.J., on the contrary, held that the charterers were not entitled to throw up the charter and consequently the plaintiffs were not entitled to recover against the underwriters, and that the findings of the jury were immaterial.

F The decision of the majority was affirmed in the Exchequer Chamber by BRAMWELL, B., BLACKBURN, MELLOR, and LUSH, JJ., AMPHLETT, B., dissenting. It is, therefore, a case of high authority. The judgment of the majority was delivered by BRAMWELL, B. That distinguished judge points out (L.R. 10 C.P. at p. 144) that as no date was fixed for the arrival of the ship at Newport, it should be held that there was an implied condition in the charterparty that she should
G arrive within a reasonable time. He then proceeds:

"Now what is the effect of the exception of perils of the seas and of delay caused thereby? Suppose it was not there and not implied, the shipowner would be subject to an action for not arriving in a reasonable time, and the charterers would be discharged. Mr. Benjamin says the exception would be
H implied. How that is it is not necessary to discuss, as the words are there; but if it is so, it is remarkable as showing what must be implied from the necessity of the case. The words are there. What is their effect? I think it is this. They excuse the shipowner, but give him no right. The charterer has no cause of action, but is released from the charter. When I say he is, I think both are. The condition precedent has not been performed by the default of
I neither. It is as though the charter were conditional on peace being made between countries A and B, and it was not, or as though the charterer agreed to load a cargo of coals, strike of pitmen excepted. If a strike of probably long duration began, he would be excused from putting the coals on board, and would have no right to call upon the shipowner to wait till the strike was over. The shipowner would be excused from keeping his ship waiting, and have no right to call on the charterer to load at a future time. This seems in accordance with general principles. The exception is an excuse for him

who is to do the act, and operates to save him from an action and makes his non-performance not a breach of contract, but does not operate to take away the right the other party would have had, if the non-performance had been a breach of contract, to retire from the engagement. And if one party may, so may the other."

If, therefore, it be an implied condition precedent of the contract in the present case that both the parties to it should not without any default on their respective parts be, by the operation of a force majeure, such as the restraint of princes, deprived for the whole or a substantial portion of this period of five years of all power to exercise the rights or discharge the obligations conferred and imposed by it, the action of the Admiralty destroyed the basis upon which the contract was in the contemplation of the parties based, and in this sense rendered the fulfilment of the condition precedent impossible: see judgment of LORD BLACKBURN in *Taylor v. Caldwell* (7) (3 B. & S. at p. 833). Article 20 saves each of the parties from a claim for damages for breach of contract at the suit of the other, but it does not deprive either of them of the right to free himself or themselves from the contract on the ground that the basis upon which it rested has been destroyed.

It is only necessary, I think, to cite one authority in addition to those cited in *Horlock v. Beal* (1). It is *Poussard v. Spiers and Pond* (8). There the plaintiff agreed in writing with the defendants to sing and play in the chief female part in a new opera about to be brought out at the defendants' theatre at a weekly salary of £11 for three months commencing about Nov. 14, provided the opera should so long run. The first performance of the piece was not announced till Nov. 28, but no complaint was made as to this delay. It was an implied, though not an express term of the contract, that Madame Poussard should attend rehearsals. Owing to delays on the part of the composer, the music was not in the hands of the defendants till a few days before Nov. 28. The later and final rehearsals did not take place till the week ending Nov. 28. Madame Poussard, though she attended some of the rehearsals, unfortunately was ill on Nov. 23 and had to leave the rehearsal. On Dec. 4, having recovered, she offered to take her place in the opera, but was refused, another artiste having, in the meantime, been engaged to fill the part. The judgment of the Court of Queen's Bench was delivered by BLACKBURN, J. He said (1 Q.B.D. at p. 413):

"My brother FIELD, at the trial, expressed his opinion that the failure of Madame Poussard to be ready to perform under the circumstances went so much to the root of the consideration as to discharge the defendants, and that he should therefore enter judgment for the defendants,"

but he left five questions to the jury. They found that the non-attendance of Madame Poussard on the night of the opening was not of such material consequence to the defendants as to entitle them to rescind the contract; but in answer to another question they found that it was of such consequence as to render it reasonable for the defendants to employ another artiste. LORD BLACKBURN held that this finding enabled the court to decide, as a matter of law, that the defendants were discharged. He said (*ibid.* at p. 414):

"The analogy is complete between this case and that of a charterparty in the ordinary terms, where the ship is to proceed in ballast (the act of God, &c., excepted) to a port and there load a cargo. If the delay is occasioned by excepted perils the shipowner is excused, but if it is so great as to go to the root of the matter, it frees the charterer from his obligation to furnish a cargo: see per BRAMWELL, B., delivering the judgment of the majority of the Court of Exchequer Chamber in *Jackson v. Union Marine Insurance Co.* (4). And we think that the question whether the failure of a skilled and capable artiste to perform in a new piece through serious illness is so important as to go to the root of the consideration must, to some extent, depend on the evidence, and is a mixed question of law and fact."

- A *Horlock v. Beal* (1) decided that these principles apply to the contract of a sailor to serve on a very lengthened voyage or series of voyages, the duration of which was not to extend beyond a period of two years. The detention of a ship by a hostile Power, which might last for more than two years, was held to terminate, before that period had arrived, the contract of the owners to pay the sailor wages.
- B I am unable to agree with the contention urged by the respondents that the principle of these decisions can never apply to a time charter. It is by no means true that a time charter must necessarily be of longer duration than a charter for a single voyage or a round voyage to many different ports. That depends upon the length of the term for which the ship is chartered. It may well be that the "impediment," to use the words of LUSH, J., in *Geipel v. Smith* (3) should be of longer duration in the case of a time charter than in that of a charter for a single voyage, for it to be treated as "defeating and destroying" the object of the commercial adventure of the charterer and shipowner. For instance, I think it would be impossible to contend that this adventure would not be "destroyed and defeated" if the restraint was, to the knowledge of both parties, expressly imposed by the prince or government for the entire length of the period of hiring, or for that portion of it which remained unexpired when the restraint was imposed.
- C I do not think it can make any substantial difference if possession should be taken for a substantial portion of the whole or of the unexpired portion of that period, coupled, as in this case, with a probability or possibility that it may continue till the end of the period. In any of these events the charterer would not get anything like the thing he contracted for—namely, the use of the ship for the stipulated period, but something wholly different. He could hardly be obliged, while deprived of the use of the ship, to pay her hire. That would be monstrously unjust. This is not like a grant or demise of land, where the right of property passes though the possession should be withheld. In truth, the imposition of the restraint for a lengthened period creates a condition of things to which the charterparty is inapplicable. I can find no authority for the proposition that such a contract as the present sinks into abeyance while the restraint is imposed and the possession of the ship
- D is withheld, and springs into active existence again when the restraint terminates, regulating the right of the parties for the residue of the period of hiring. If the restraint be prolonged for a substantial portion of that period it goes, I think, to the root of the consideration as it did in *Jackson v. Union Marine Insurance Co.* (4) and *Poussard v. Spiers and Pond* (8), and relieves both parties to the contract from their engagements. And this though the contract be not in the merely executory stage, but part performed, as it was in both these cases.
- E Turning to the facts of this case, one finds that early in December, 1914, the steamship *F. A. Tamplin* was requisitioned by the British government for the Admiralty transport service, and was retained in that service until Feb. 10, 1915. No question was raised before the arbitrator as to this requisition. At its date over two years of the period of hiring had elapsed. On Feb. 10, about two years and nine months of that period remained unexpired. The ship was again requisitioned by the government, and immediately after that date alterations were made in her to fit her for the transport of troops. She has been since retained in the service of the Admiralty, and it is said she has been restored to her former condition as a tank steamer. She may be retained in the same service while the present war lasts, and even after
- F it has terminated. Nobody can possibly tell how long it will last. At the present moment about one year and eight months of the five years remain unexpired. Up to the present time the charterers have only had, during the two years from December, 1912, till December, 1914, what they contracted for and what they were only bound to pay for. They may never get any further use of her. The owners cannot deliver the ship into their possession and control and may not for years be in a position to do so. Neither of the parties are in default. In March, 1915, the owners refused to be longer bound by the charterparty. In my view, there is here involved such a substantial invasion of that freedom of both parties to
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exercise the rights and discharge the obligations secured to and imposed on them by the charter, the continued existence of which must, I think, have necessarily been in their contemplation as the foundation of this contract when they entered into it, that, in the events which have happened, each of them is now entitled to treat it as at an end.

I have dealt with the case altogether apart from the question of the amount which the charterers have received as compensation for the use of the ship. The charterers have been treated by the Crown as if they had sublet the ship to the Admiralty. They have not, in fact, done so. What they have received they have got from the bounty of the Crown. They have no legal right to it. The receipt of it is, therefore, in my view, quite irrelevant. To consider it, it only obscures the legal point for decision. When the legal rights of the parties have been determined, the Crown will, no doubt, endeavour to do justice to the parties according to those rights. Judging from what has happened up to the hearing of this appeal, I am of opinion that the charterparty is now at an end and that the parties to it are released from all obligations under it. The appeal, under these circumstances, I think, succeeds.

LORD PARKER OF WADDINGTON.—In considering the question arising on this appeal, it is, I think, important to bear in mind the principle which really underlies all cases in which a contract has been held to determine upon the happening of some event which renders its performance impossible, or otherwise frustrates the objects which the parties to the contract have in view. This principle is one of contract law, depending on some term or condition to be implied in the contract itself and not on something entirely dehors the contract which brings the contract to an end. It is, of course, impossible to imply in a contract any term or condition inconsistent with its express provisions, or with the intention of the parties as gathered from those provisions. The first thing, therefore, in every case is to compare the term or condition which it sought to imply with the express provisions of the contract, and with the intention of the parties as gathered from those provisions, and ascertain whether there is any such inconsistency. Again, in determining whether any such term or condition can be properly implied, the nature of the contract is of considerable materiality. If, for example, the contract be for the hire of a particular horse on a particular day, it would be easy to imply a condition that the horse should still be living on the day in question. If, however, the contract were for the hire of a horse generally, it would be difficult, if not impossible, to imply a term relieving the hirer from liability, if his only horse died before the day arrived. Moreover, some conditions can be more readily implied than others. Speaking generally, it seems to me easier to imply a condition precedent defeating a contract before its execution has commenced than a condition subsequent defeating the contract when it is part performed. A contract under which A. is to have the use of B.'s horse for two days' hunting might well be defeated by the death of the horse before the two days commenced. It would be easy to imply a condition precedent to that effect. But the case would be very different if the horse died at the end of the first day, and it was sought to imply a condition subsequent relieving A. in that event of liability to pay the sum agreed for the hire.

The simplest cases of the application of the principle are, no doubt, those of contracts de certo corpore, as in *Taylor v. Caldwell* (7). Here there was an agreement by A. to allow B. the use of his music hall on certain specified days, and the music hall was burnt down before the first of those days arrived. A condition precedent could easily be implied. A similar case is that of *Appleby v. Myers* (5). Here A. contracted to erect machinery in buildings belonging to B., and the buildings were burnt down before the work was finished. It was not difficult to imply a condition subsequent. But the principle applies also to cases when the existence or continued existence of some specific thing is in no way involved, and in such cases its application is not so easy. It applies, for instance, to contracts

A of service which, from some causes not contemplated by the contract itself, have become impossible of fulfilment. A good instance of this may be found in the recent decision of your Lordships' House in *Horlock v. Beal* (1). It applies also to charterparties where some commercial adventure contemplated by the parties, and in the fulfilment of which both are interested, is brought to an end by the happening of some event for which neither is to blame.

B The leading case on this branch of the law is *Jackson v. Union Marine Insurance Co.* (4). Here the ship was to proceed with all possible dispatch (dangers and accidents of navigation excepted) from Liverpool to Newport, and there load and carry to San Francisco a cargo of iron rails. The ship left Liverpool on Jan. 2, and on Jan. 3 ran aground in Carnarvon Bay, sustaining considerable damage. It would necessarily be many months before she could be got off and put in such repair as to be able to continue her voyage. In the commercial sense, therefore, C the voyage contemplated in the charterparty had been brought to an end, and under these circumstances the contract was held to have determined. The voyage, if resumed when the ship had been got off and repaired, would have been a different voyage—"as different," to use LORD BRAMWELL's words, "as though it had been described as intended to be a spring voyage, while the one after the D repairs would have been an autumn voyage." The season within which the adventure was to be carried out was, in fact, of importance to both parties to the bargain, and it was thus easy to imply a condition that if the voyage became impossible of completion within that season the contract should be at an end. The exception as to dangers of the sea and accidents of navigation no doubt showed that the parties were contemplating and providing for the case of some delay arising E from these causes, but they were evidently not contemplating a delay so great that the spring voyage would become altogether impossible. The particular adventure being a voyage to be carried out within reasonable limits of time furnished a definite standard by which it could be determined whether the delay which actually occurred was or was not within the exception clause. There was, therefore, no inconsistency between the implied condition and the express provisions F of the contract.

There is, so far as I can find, no case in which this principle has been applied to time charterparties as distinguished from charterparties which contemplate particular voyages. It was suggested in argument that *Tully v. Howling* (9) was such a case. There the charterparty was a time charterparty for twelve months G from the completion of the voyage on which the vessel was then engaged. After the completion of this voyage, and when the charterer was ready to load, the vessel was detained by the Board of Trade as unseaworthy. It took two months to make the vessel seaworthy, and meanwhile the charterer had repudiated the contract. It was held that he was justified in so doing on the ground that time was of the essence. There had been, in fact, a breach of the contract by the owners H so material as to give the charterer a right to rescind. Only BRETT, J., put the case as one of the frustration of a commercial adventure. Without laying it down that the principle can in no circumstances be applicable to time charterparties, I am of opinion that its application is in such cases much more difficult than in the case of charterparties which contemplate a definite voyage within certain limits of time. I concur in this respect with what is said by BAILHACHE, J., in *Admiral Shipping Co., Ltd. v. Weidner, Hopkins & Co.* (10) ([1916] 1 K.B. at I pp. 437, 438). My reasons will appear when I come to consider the terms of the charterparty in the present case.

The contract in the present case is contained in the charterparty of May 18, 1912, whereby the owners of the steamship *F. A. Tamplin* agreed to provide her with a full complement of officers, seamen, engineers, and firemen, and hold her at the disposition of the charterers for the voyages and other purposes therein mentioned for a period of sixty calendar months from Dec. 4, 1912, subject, nevertheless, to the conditions therein specified. The charterers were to pay the owners

monthly in advance for the first twelve calendar months £1,750, and thereafter £1,700 per month by way of freight. By the seventeenth condition the freight was suspended in the event of loss of time by reason of deficiency in men or stores, or any defect or breakdown of machinery or damage or accident preventing the working of the vessel for more than twenty-four consecutive hours. By the nineteenth condition the payment of freight was to cease altogether in the event of the vessel being lost. By the twentieth condition the act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates and thieves, arrests or restraints of princes, rulers, or people, and strandings and other accidents of navigation were excepted even when occasioned by negligence, default, or error of the pilot, master mariners, or other servants of the owners. As I read this contract, the parties are not contemplating the prosecution of any commercial adventure in which both are interested. They are not contemplating the performance of any definite adventure at all. The owners are not concerned in the charterers doing any specific thing beyond the payment of freight as it becomes due. They are only concerned that the charterers shall pay the freight and shall not use the ship contrary to the provisions of the charterparty. It would be to the interest of the owners that the charterers should not make any use of the ship at all. They would thus save the cost of repairs due to wear and tear. On the other hand, the charterers only stipulated that the vessel shall be at their disposal for certain defined purposes. If they so desire, they retain full liberty not to use the vessel for any purpose whatever. Further, the contract contemplates that though the charterers desire to use the vessel, it may for intermittent periods of indefinite duration be impossible for them so to do. In such cases there are express provisions differing according to the particular circumstances from which such impossibility arises. In cases within condition 17 there is a suspension of freight only. In cases within condition 20, and not within condition 17, the payment of freight continues, and the owners incur no liability. Thus if the ship cannot put to sea because of deficiency of seamen, freight will be suspended. If, however, the vessel cannot put to sea because of an embargo, the freight continues to be payable, nor are the owners liable in damages. It makes no difference at what period during the term of the charter the deficiency of seamen or the embargo occurs. Whether it occurs within the first or last six months of the term the result is to be the same. I entertain no doubt that the requisitioning of the steamship by His Majesty's government in the present case is a "restraint of princes" within the twentieth condition. The parties, therefore, have expressly contracted that during the period during which by reason of such restraint the owners are unable to keep the ship at the disposition of the charterers, the freight is to continue payable, and the owners are to be free from liability. This period may be long or short. It may be certain or indefinite. It may occur towards the beginning or towards the end of the term of the charterparty. The result is to be the same, unless indeed the circumstances are such that the ship can be said to be lost within the meaning of condition 19. Moreover (and this seems me the vital point), the charterparty does not contemplate any definite adventure or object to be performed or carried out within reasonable limits of time, so as to justify a distinction being drawn between days which may render such adventure or object impossible and delays which may not.

Under these circumstances it appears to me to be difficult, if not impossible, to frame any condition by virtue of which the contract of the parties is at an end, without contradicting the express provisions of the contract, and defeating the intention of the parties as disclosed by these provisions. The nearest I can get is a proviso to the twentieth condition conceived as follows:

"Provided that if the period during which the ship cannot be held at the disposition of the charterers by reason of any of the matters referred to in

A this condition, though indefinite, be such as will in all reasonable probability extend beyond the term of the charterparty, the contract between the parties shall be determined."

But, in my opinion, even this would contradict the express term of contract. It could, for example, except from its provisions cases in which the ship ran aground so near the end of the term of the charterparty that it would be impossible to get her off or ready to put to sea once more within such term. This would, in my opinion, be contrary to the provisions of condition 20. Further, even if it were permissible to imply such a proviso to the twentieth condition, there is, in my opinion, no reason for holding that the government will, in all reasonable probability, retain the vessel for the remainder of the term of the charterparty. Whether they will do so or not seems to me to depend on all sorts of circumstances as to which a court of justice cannot speculate. They may do so or they may not. I do not think that one event is more likely than the other. Having regard to the difficulty of framing any conditions which can be implied without contradicting the express terms of the contract having regard to the nature of the contract, which is a time charter only and does not contemplate any commercial adventure in which both parties are interested, or indeed any definite commercial adventure at all—and, finally, having regard to the fact that the condition which is sought to be implied is a condition defeating a contract already part performed and not a condition precedent to a contract which remains purely executory—I have come to the conclusion that the decision of the Court of Appeal was right and ought not to be disturbed.

E I desire to add this. I cannot help thinking that the question really at issue has been somewhat obscured by the fact that the government has under the terms of the Royal Proclamation of Aug. 3, 1914, to pay compensation to "the owners," to be settled in case of difference by arbitration. Owners must in this proclamation include all parties interested. It cannot, in the present case, mean the owners exclusive of the charterers or the charterers exclusive of the owners. Both are entitled to compensation, and if such compensation be not agreed with either separately, but with both together, the amount so agreed will be divisible between them according to their respective rights and interests. The case was argued before your Lordships on the footing that it would determine which of two possible claimants was to be held entitled to all which might be payable by the government by way of compensation under the proclamation. I entirely dissent from this view. The appeal should, in my opinion, be dismissed with costs.

F Solicitors: *Holman, Birdwood & Co.; Thomas Cooper & Co.*

[*Reported by W. E. REID, Esq., Barrister-at-Law.*]

METROPOLITAN WATER BOARD v. DICK, KERR & CO., LTD.

[HOUSE OF LORDS (Lord Finlay, L.C., Lord Dunedin, Lord Atkinson and Lord Parmoor), October 23, 26, November 26, 1917]

[Reported [1918] A.C. 119; 87 L.J.K.B. 370; 117 L.T. 766; 82 J.P. 61; 34 T.L.R. 113; 62 Sol. Jo. 102; 16 L.G.R. 1]

Contract—Building contract—Frustration—Implication of term—Interruption of contract—Government order forbidding work during war—Prohibition not contemplated by parties.

By a contract dated July 24, 1914, and made between the appellant Board and the respondents, contractors, it was agreed that the respondents would construct a reservoir and water works and deliver them to the Board within six years from Aug. 10, 1914. By condition 32 of the contract it was provided that if, by reason of any difficulties, obstructions, oppositions, doubts, disputes, or differences, whatsoever or howsoever occasioned, the contractors should in the opinion of the engineer (whose decision was final) have been unduly delayed or impeded in the completion of the contract, it should be lawful for the engineer, if he should so think fit, to grant such extension of time within which the work was to be completed as to him might seem reasonable, without thereby prejudicing or in any manner affecting the validity of the contract, or the adequacy of the contract price, and any and every such extension of time should be deemed to be in full compensation and satisfaction for every actual or possible loss or injury sustained or sustainable by the respondents. Work commenced on Aug. 10, 1914. On Aug. 4 war was declared between Great Britain and Germany. On Feb. 21, 1916, under an order by the Ministry of Munitions, made under the Defence of the Realm Acts and Regulations, all work under the contract was stopped and the greater part of the plant requisitioned. It was admitted that thereafter the prosecution of the works would have been illegal.

Held: condition 32 was intended to apply only to more or less temporary difficulties and did not cover such an interruption of the work as had occurred; the effect of the prohibition by the Ministry was that the work could not be resumed for at least the indeterminate period until the end of the war when all the conditions relating to the work would be different and its resumption would, in effect, be under a new contract; the parties could not have contracted on the footing that such an interruption might take place, and a condition must be implied in the contract that in such an event the contract would come to an end; and, therefore, the contract must be treated as having terminated on Feb. 21, 1916.

Decision of Court of Appeal, [1917] 2 K.B. 1, affirmed.

Horlock v. Beal (1), ante p. 81, and *F. A. Tamplin Steamship Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.* (2), ante p. 104, applied.

Per LORD FINLAY, L.C.: *Hadley v. Clarke* (3) (1799), 8 Term Rep. 259, cannot be relied on as an authority.

Notes. Considered: *Innholders' Co. v. Wainwright* (1917), 33 T.L.R. 356; *Blackburn Bobbin Co. v. Allen*, [1918] 1 K.B. 540. Followed: *Federal Steam Navigation Co. v. Dixon* (1919), 64 Sol. Jo. 67. Considered: *Cantiere Navale Triestina v. Russian Soviet Naphtha Export Agency*, [1925] All E.R. Rep. 530; *Morgan v. Manser*, [1947] 2 All E.R. 666; *Sir Lindsay Parkinson & Co. v. Works and Public Buildings Comrs.*, [1950] 1 All E.R. 208. Referred to: *Marshall v. Glanvill*, [1917] 2 K.B. 87; *Orconera Iron Ore Co. v. Fried. Krupp Akt.* (1917), 86 L.J.Ch. 613; *Ertel Bieber & Co. v. Rio Tinto Co., Ltd.*, [1918-19] All E.R. Rep. 127; *Naylor, Benzon & Co. v. Krainische Industrie Gesellschaft*, [1918] 1 K.B. 331; *Bank Line, Ltd. v. Arthur Capel & Co.*, [1918-19] All E.R. Rep. 504;

- A** *Woodfield Steam Shipping Co., Ltd. v. J. L. Thompson & Sons, Ltd.* (1919), 36 T.L.R. 43; *Re Comptoir Commercial Anversois and Power, Son & Co.*, [1918-19] All E.R. Rep. 661; *Ralli Bros. v. Compañía Naviera Sota y Aznar*, [1920] All E.R. Rep. 427; *Mertens v. Home Freeholds Co., Ltd.*, [1921] All E.R. Rep. 372; *Larrinaga & Co. v. Société Franco-Américaine des Phosphates de Médulla, Paris*, [1923] All E.R. Rep. 1; *Kursell v. Timber Operators and Contractors, Ltd.*, [1927] 1 K.B. 298; *The Penelope*, [1928] P. 180; *Hyman v. Hyman, Hughes v. Hughes*, [1920] P. 1; *May v. May* (1929), 98 L.J.K.B. 770; *Bell v. Lever Bros., Ltd.*, [1931] All E.R. Rep. 1; *Walton Harvey, Ltd. v. Walker and Homfrays, Ltd.*, [1931] 1 Ch. 274; *Fibrosa Société Anonyme v. Fairbairn Lawson Coombe Barbour, Ltd.*, [1941] 2 All E.R. 300; *Heyman v. Darwins, Ltd.*, [1942] 1 All E.R. 337; *Denny, Mott and Dickson, Ltd. v. James B. Fraser & Co.*, [1944] 1 All E.R. 678; *Cricklewood Property and Investment Trust, Ltd. v. Leighton's Investment Trust, Ltd.*, [1945] 1 All E.R. 252; *Re Sergeant* (1948), 29 Ry. & Can. Tr. Cas. 84; *Chandris v. Isbrandtsen-Moller Co. Inc.*, [1950] 1 All E.R. 768; *Davis Contractors, Ltd. v. Fareham U.D.C.*, [1955] 1 All E.R. 275; *Port Line, Ltd. v. Ben Line Steamers, Ltd.*, [1958] 1 All E.R. 787.

D As to the doctrine of frustration, see 8 HALSBURY'S LAWS (3rd Edn.) 185-194; and for cases see 12 DIGEST (Repl.) 436 et. seq. And see Law Reform (Frustrated Contracts) Act, 1943 (4 HALSBURY'S STATUTES (2nd Edn.) 662).

Cases referred to :

- (1) *Horlock v. Beal*, ante p. 81; [1916] 1 A.C. 486; 85 L.J.K.B. 602; 114 L.T. 193; 32 T.L.R. 251; 60 Sol. Jo. 236; 13 Asp. M.L.C. 250; 21 Com. Cas. 201, H.L.; 12 Digest (Repl.) 433, 3322.
- E** (2) *F. A. Tamplin Steamship Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.*, ante p. 104; [1916] 2 A.C. 397; 85 L.J.K.B. 1389; 115 L.T. 315; 32 T.L.R. 677; 21 Com. Cas. 299; 13 Asp. M.L.C. 467, H.L.; 12 Digest (Repl.) 442, 3361.
- (3) *Hadley v. Clarke* (1799), 8 Term Rep. 259; 101 E.R. 1377; 12 Digest (Repl.) 459, 3426.
- F** (4) *Bailey v. De Crespigny* (1869), L.R. 4 Q.B. 180; 10 B. & S. 1; 38 L.J.Q.B. 98; 19 L.T. 681; 33 J.P. 164; 17 W.R. 494; 12 Digest (Repl.) 420, 3249.
- (5) *Distington Hematite Iron Co., Ltd. v. Possehl & Co.*, [1916] 1 K.B. 811; 85 L.J.K.B. 919; 115 L.T. 412; 32 T.L.R. 349; 2 Digest (Repl.) 271, 621.
- (6) *Jackson v. Union Marine Insurance Co., Ltd.* (1874), L.R. 10 C.P. 125; 44 L.J.C.P. 27; 31 L.T. 789; 23 W.R. 169; 2 Asp. M.L.C. 435, Ex.Ch.; 12 Digest (Repl.) 438, 3339.
- G** (7) *Brewster v. Kitchel* (1698), Holt, K.B. 175; Carth. 438; Comb. 466; 1 Ld. Raym. 317; 12 Mod. Rep. 166; 1 Salk. 198; 90 E.R. 995; 12 Digest (Repl.) 334, 2582.

Also referred to in argument :

- H** *Andrew Millar & Co., Ltd. v. Taylor & Co., Ltd.*, [1916] 1 K.B. 402; 85 L.J.K.B. 346; 114 L.T. 216; 32 T.L.R. 161; 60 Sol. Jo. 140, C.A.; 12 Digest (Repl.) 445, 3371.
- Taylor v. Caldwell* (1863), 3 B. & S. 826; 2 New Rep. 198; 32 L.J.Q.B. 164; 8 L.T. 356; 27 J.P. 710; 11 W.R. 726; 122 E.R. 309; 12 Digest (Repl.) 696, 5333.
- I** *Tennants (Lancashire), Ltd. v. C. S. Wilson & Co., Ltd.*, [1917] A.C. 495; 86 L.J.K.B. 1191; 116 L.T. 780; 33 T.L.R. 454; 61 Sol. Jo. 575; 23 Com. Cas. 41, H.L.; 12 Digest (Repl.) 449, 3387.
- A.-G. v. Birmingham, Tame and Rea District Drainage Board*, [1912] A.C. 788; 82 L.J.Ch. 45; 107 L.T. 353; 76 J.P. 481; 11 L.G.R. 194, H.L.; 44 Digest 54, 387.

Appeal by the plaintiffs, the Metropolitan Water Board, from an order of the Court of Appeal reversing a decision of BRAY, J.

P. O. Lawrence, K.C., and Holman Gregory, K.C. (Joshua Goodland with them), for the appellants.

Upjohn, K.C., Frank Russell, K.C., Sir Ernest Pollock, K.C., and Douglas Hogg, K.C., for the respondents, were not called on to argue.

The House took time for consideration.

Nov. 26, 1917. The following opinions were read.

LORD FINLAY, L.C.—The question in this case is whether a contract for the construction of reservoirs and waterworks between the Metropolitan Water Board—the appellants—and Messrs. Dick, Kerr & Co., Ltd.—the respondents—can be treated by the respondents as at an end, in consequence of an order of the Minister of Munitions that work under the contract should cease.

The action was begun by the Metropolitan Water Board by writ, dated May 19, 1916, against the contractors, and the statement of claim asked for a declaration that the contract is still in existence as a binding contract, and had not been determined. The defence alleges that notice from the Ministry of Munitions, dated Feb. 21, 1916, was given in exercise of the powers conferred by the Defence of the Realm Acts and the regulations and orders made thereunder, that the notice required the contractors to cease work on their contract, and that they ceased work accordingly. The defence went on to allege that thereby the contract ceased to be binding. The case was tried by BRAY, J., who gave judgment for the Metropolitan Water Board, holding that the notice should have been dealt with under the terms of the contract by an extension of time for the completion of the contract, and that the contract was still in existence. On appeal, this decision was reversed by the Court of Appeal, consisting of LORD COZENS-HARDY, M.R., and WARRINGTON and SCRUTTON, L.JJ. The appellants by the present appeal asked that the decision of BRAY, J., should be restored.

The contract was one for the construction of extensive reservoirs and other works near Staines, the respondents' tender being accepted by the appellants on July 24, 1914. The decision of BRAY, J., in favour of the appellants was rested by him upon the thirty-second condition of the contract, which is in the following terms:

"The contractor shall complete and deliver up to the Board the whole of the works necessary to allow the western reservoir to be filled and brought into use and shall complete the removal of all temporary works, plant, and surplus material as may in the opinion of the engineer be necessary to enable this to be done within a period of four years from the date of the engineer's written order to commence the works, and the contractors shall complete and deliver up to the Board the whole of the works comprised in this contract and shall complete the removal of all temporary works, plant, and surplus material within a period of six years from the date of the engineer's written order to commence the works. The whole of the works to be delivered up complete in every respect, in a clean and perfect condition. Provided always that if by reason of any additional works or enlargements of the works (which additions or enlargements the engineer is hereby authorised to make), or for any other just cause arising with the Board or with the engineer, or in consequence of any unusual inclemency of the weather, or general or local strikes, or combination of workmen, or for want of deficiency of any orders, drawings, or directions, or by reason of any difficulties, impediments, obstructions, oppositions, doubts, disputes, or differences, whatsoever and howsoever occasioned, the contractor shall, in the opinion of the engineer (whose decision shall be final), have been unduly delayed or impeded in the completion of this contract, it shall be lawful for the engineer, if he shall so think fit, to grant from time to time, and at any time or times by writing under his hand, such extension of time either prospectively or retrospectively, and to assign such

A other day or days for or as for completion as to him may seem reasonable, without thereby prejudicing or in any manner affecting the validity of the contract, or the adequacy of the contract price, or the adequacy of the sums or prices mentioned in the third schedule; and any and every such extension of time shall be deemed to be in full compensation and satisfaction for, and in respect of, any and every actual or probable loss or injury sustained

B or sustainable by the contractor in the premises, and shall in like manner exonerate him from any claim or demand on the part of the Board, for and in respect of the delay occasioned by the cause or causes in respect of which any and every such extension of time shall have been granted, but no further or otherwise, nor for or in respect of any delay continued beyond the time mentioned in such writing or writings respectively."

C BRAY, J., held that this condition applied, and that the prohibition by the Minister of Munitions should have been dealt with by an extension of time under it. The Court of Appeal, on the other hand, held that the prohibition issued in consequence of the war rendered the prosecution of the works illegal for a period of indefinite duration, and must be treated as having put an end to the contract. The date of commencement of the works was fixed by the engineer as being Aug. 16, 1914.

D The war broke out on Aug. 4, 1914, but the works under the contract proceeded. On May 10, 1915, the nature of the works was varied and the amount of payment increased by a supplemental contract of that date. In spite of difficulties occasioned by scarcity of labour and the character of the ground on which the reservoir was to be constructed, the works went on and a substantial amount of work had been done, when, on Feb. 21, 1916, the work was stopped by the Minister of Munitions and the plant sold under his direction. The prohibition has not been withdrawn up to the present time.

E In my opinion the decision of the Court of Appeal was right. It is admitted that the prosecution of the works became illegal in consequence of the action of the Minister of Munitions. It became illegal on Feb. 21, 1916, and remains illegal

F at the present time. This is not a case of a short and temporary stoppage, but of a prohibition in consequence of a war, which has already been in force for the greater part of two years, and will, according to all appearances, last as long as the war itself, as it was the result of the necessity of preventing the diversion to civil purposes of labour, and material required for purposes immediately connected with the war. Condition 32 provides for cases in which the contractor has, in

G the opinion of the engineer, been unduly delayed or impeded in the completion of his contract by any of the causes therein enumerated or by any other causes, so that an extension of time was reasonable. Condition 32 does not cover the case in which the interruption is of such a character and duration as vitally and fundamentally to change the conditions of the contract, and which could not possibly have been in the contemplation of the parties to the contract when it was made.

H It was not disputed, as I understand the arguments for the appellants, that in the case of a commercial contract, as for the sale of goods or agency, such a prohibition would have brought it to an end. It was sought to distinguish the present case on the ground that the contract was for the construction of works of a permanent character, which would last for a very long time, and that a delay, even of years, might be disregarded. This contention ignores the fact that, though the works

I when constructed may last for centuries, the process of construction was to last for six years only. It is obvious that the whole character of such a contract for construction may be revolutionised by indefinite delay such as that which has occurred in the present case, in consequence of the prohibition.

The House is greatly obliged to leading counsel for the appellants [MR. P. O. LAWRENCE] for his very able and exhaustive analysis of the authorities. I do not think it necessary to examine these authorities in detail, as the principle applicable in such cases has been often laid down and is well established. I will only refer

to the judgment of the Queen's Bench delivered by HANNEN, J., in *Baily v. De Crespigny* (4), especially L.R. 4 Q.B. at pp. 185-186, and to the judgment of ROWLATT, J., in *Distington Hematite Iron Co., Ltd. v. Possehl & Co.* (5). The contract in the present case was for the completion and handing over of these works within six years from Aug. 16, 1914. The effect of the prohibition may be that the works cannot be resumed until, at all events, the greater part of the six years has expired, and by that time all conditions as regards labour and materials may be absolutely different. This, in the words of ROWLATT, J., would be "not to maintain the original contract, but to substitute a different contract for it." The difference of opinion in *Horlock v. Beal* (1) and *F. A. Tamplin Steamship Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.* (2) was not so much upon principle as in the application of the principle to the particular cases. *Hadley v. Clarke* (3) cannot be relied upon as an authority. In my opinion, this appeal should be dismissed with costs.

LORD DUNEDIN.—I concur. The general law on the subject of what supervening event will excuse the performance of a contract has been so recently dealt with in elaborate opinions in your Lordships' House, in *Horlock v. Beal* (1) and *F. A. Tamplin Steamship Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.* (2) that I think it would be useless again to review the past authorities in any detail. It is true that in *Tamplin's Case* (2) there was a narrow majority in favour of the judgment pronounced, but after a careful consideration of the opinions delivered I have come to the conclusion that there was no difference in the opinions of the majority and of the minority in the principles of law applicable to such cases, those principles having already been expressed in *Beal's Case* (1); but that the only difference lay in their application to the facts of the case then under consideration. I shall content myself with one quotation from the opinion of one of the majority. EARL LOREBURN points out that in all cases it must be said that there is an implied term of the contract which excuses the party, in the circumstances, from performing the contract, and then continues (ante p. 107):

"It is, in my opinion, the true principle, for no court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted."

He further points out that the particular ratio decidendi in various cases is sometimes put that performance has become impossible, and that the party concerned did not promise to perform an impossibility; sometimes it is put that the parties contemplated a certain state of things which fell out otherwise.

A subsequent law may be the cause of an impossibility, whether by actually forbidding an act undertaken in the contract—which is the direct meaning of illegality—or whether by means of taking away something from the control of the party, as to which thing he had contracted to do or not to do something else. An example of the latter class may be found in *Baily v. De Crespigny* (4). But to make what I may call a clean case of illegality the illegality must be permanent. The appellants here say that the illegality of working on the reservoir is only temporary, and will some day be withdrawn and they seek to liken it to the interruption of the contract of affreightment in *Tamplin's Case* (2), which they say was held by the majority to be only temporary, or at least not proved to be permanent. I shall revert to *Tamplin's Case* (2), but I should like first to point out that I think the appellants rather mistake the effect of the force of legislation in the present case. The order pronounced under the Defence of the Realm Act not only debarred the respondents from proceeding with the contract, but also compulsorily dispersed and sold the plant. It is admitted that an interruption may be so long as to destroy the identity of the work or service, when resumed, with the work or service when interrupted. But quite apart from mere delay it seems to me that the action as to the plant prevents this contract ever being the same

A as it was. Express the effect by a clause. If the Water Board had, when the contract was being settled, proposed a clause which allowed them at any time during the contract to take and sell off the whole plant, to interrupt the work for a period no longer than that for which the work has actually been interrupted, and then bound the contractor to furnish himself with new plant and recommence the work, does anyone suppose that Dick, Kerr & Co. or any other contractor
B would have accepted such a clause? And the reason why they would not have accepted it would have been that the contract, when resumed, would be a contract under different conditions from those which existed when the contract was begun. It may be said that it is possible that plant may be cheaper after the war. But no one knows, and the contractor is not bound to submit to an aleatory bargain, to which he has not agreed. It will also be kept in mind that the contract was a
C measure and value contract. The difference between the new contract and the old is quite as great as the difference between the two voyages in *Jackson v. Union Marine Insurance Co., Ltd.* (6).

I return to *Tamplin's Case* (2) to show that the views of the majority (for obviously I need not deal with those of the minority) were based upon circumstances which find no proper analogy in the circumstances here. In the first place
D the person who wanted the contract declared at an end was the owner. The charterer, notwithstanding what had happened, was content to go on paying the hire, and to refrain, during the period while the government were in possession of the ship, from demanding any services from the owners. Under the contract, as LORD PARKER put it (ante p. 120):

E "The owners are not concerned in the charterers doing any specific thing beyond the payment of freight as it becomes due."

That payment the charterers, as I have already said, were ready to make. The reason, no doubt, was that they had already got or thought they would get from the government a larger sum of money than they had to pay to the owners. So that one
F view that I think ran through the opinions of the majority was this. No one was hurt by the continuance of the charter, and if the government relinquished the ship there was no reason why the charter should not be effective for the remaining period of its duration, which might be considerable. But suppose the facts had been slightly different. Suppose the government had taken the ship and had said they would pay nothing—a proceeding within their powers—and then suppose that
G the owner had sued the charterer for the hire during the period while the government kept the ship. What then? I may be wrong, but it seems to me it would have fallen within the lines of *Horlock v. Beal* (1). There was another ground of judgment in *Tamplin's Case* (2), and as I read it this was the real ground of LORD PARKER's opinion, in which the Lord Chancellor concurred. There was a special exemption clause which contained, inter alia, "restraint of princes." The facts fell
H within that description, and then, said LORD PARKER, you cannot have an implied condition which will contradict an express condition. The same argument was attempted here. The appellants appealed to condition 32, which has been already quoted. It is enough for me to say that the words "or by reason of any difficulties, impediments, obstructions, oppositions, doubts, disputes or differences whatsoever and howsoever occasioned" only deal, in my view, with more or less temporary
I difficulties, and do not cover a set of occurrences which would make the contract when resumed a really different contract from the contract when broken off. The argument from *Tamplin's Case* (2), therefore, in my opinion fails in application.

On the whole matter I think that the action of the government, which is forced on the contractor as a vis major, has by its consequences made the contract, if resumed, a work under different conditions from those of the work when interrupted. I have already pointed out the effect as to the plant, and the contract, being a measure and value contract, the whole range of prices might be different. It would, in my judgment, amount, if resumed, to a new contract; and as the

respondents are only bound to carry out the old contract and cannot do so owing to supervient legislation, they are entitled to succeed in their defence to this action.

LORD ATKINSON.—I concur. The facts have already been fully stated, and I abstain from repeating them. Counsel, in opening the appeal, manfully struggled to bring this case within the decision, or supposed decision, of this House in the recent case of *F. A. Tamplin Steamship Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.* (2). Only two judgments were delivered in that case by the noble Lords who composed the majority, namely, that of LORD LOREBURN and that of LORD PARKER, with which latter LORD BUCKMASTER, L.C., concurred. It is, I think, desirable, having regard to the arguments addressed to the House on this appeal, to endeavour to ascertain what were the precise points decided in that case, and then to see how far the principles laid down are applicable to the present case.

LORD LOREBURN leaves one in no doubt as to what were the grounds of his decision. He says (ante p. 107) that an examination of the authorities confirmed him in the view that where the courts have held innocent contracting parties absolved from further performance of their promises it has been on the ground that there was an implied term in the contract which entitled them to be absolved; that sometimes it was put that the performance was impossible or impracticable; sometimes that the parties contemplated a certain state of things which fell out otherwise; that in most of the cases it was said that there was an implied condition in the contract which operated to release the parties from performing it; that in all of them this last-named was, he thought, the principle on which the courts proceeded; and that it was in his opinion the true principle, it being left to the court not to absolve, but to infer from the nature of the contract and the surrounding circumstances that a condition which was not expressed was the foundation upon which the parties contracted. LORD LOREBURN proceeded to say that where the question arose in regard to commercial contracts, as happened in the three cases he named, the principle was the same, and the language used as to "frustration of the adventure" merely adapted it to the cases in hand; that in these three cases it was held, to use the language of LORD BLACKBURN,

"that a delay in carrying out a charterparty, caused by something for which neither party was responsible, if so great and long as to make it unreasonable to require the parties to go on with the adventure, entitled them, at least while the contract was executory, to consider it at an end" (6 App. Cas. at p. 52);

that this, however, was only another way of saying that from the nature of the contract it could not be supposed the parties, as reasonable men, intended it to be binding on them under such unreasonable conditions. So far, I think, there is no substantial conflict between this judgment and the judgments of the minority as to the principle of law applicable to the case. LORD LOREBURN then examines the facts, and said that if the interruption could be pronounced, in the language of LORD BLACKBURN, so great and long as to make it unreasonable to require the parties to go on then it would be different. Both of them must have contracted on the footing that such an interruption as that would not take place, and that he would imply a condition to that effect; but that, taking into account all that had happened, he could not infer that the interruption either had been or would be in that case such as made it unreasonable to require the parties to go on. He added that there might be many months during which the ship would be available for commercial purposes before the five years expired. He says the question to be answered is (ante p. 108):

"Ought we to imply a condition in the contract that an interruption such as this shall excuse the parties from further performance of it? I think not. I think they took their chance of lesser interruptions, and the condition I should imply goes no further than that they should be excused if substantially.

- A the whole contract became impossible, or, in other words, impracticable, by some cause for which neither was responsible."

It will be observed that LORD LOREBURN does not say, or, I think, suggest, that there is any difficulty in applying the principle he lays down to a time charter, while the only reference he apparently makes to the clause in the charterparty in referring "to the restraint of princes" is contained in the expression: "I think they took their chance of lesser interruptions."

- B LORD PARKER does not, I think, in his judgment differ as to the general principle. He says (ante p. 118):

- C "the principle is one of contract law depending on some term or condition to be implied in the contract itself and not on something entirely dehors the contract which brings the contract to an end. It is, of course, impossible to imply in a contract any term or condition inconsistent with its express provisions or with the intention of the parties as gathered from those provisions."

- D However, he quotes the twentieth condition of the charterparty, referring to restraint of princes, and says that he has no doubt that the requisitioning of the steamship by His Majesty's government was "a restraint of princes" within the meaning of that condition, and proceeds (ante p. 120):

- E "The parties, therefore, have expressly contracted that during the period during which by reason of such restraint the owners are unable to keep the ship at the disposition of the charterers, the freight is to continue payable, and the owners are to be free from liability. This period may be long or short. It may be certain or indefinite. It may occur towards the beginning or towards the end of the term of the charterparty. The result is to be the same, unless indeed the circumstances are such that the ship could be said to be lost within the meaning of condition 19. Moreover (and this seems to me the vital point), the charterparty does not contemplate any definite adventure or object to be performed or carried out within reasonable limits of time so as to justify a distinction being drawn between delays which may render such adventure impossible and delays which may not."

- F LORD PARKER then proceeds to say that it was difficult, if not impossible, to frame any condition by virtue of which the contract of the parties would be at an end without contradicting the express provisions of the contract and defeating the intention of the parties as disclosed by those provisions. He said the nearest he could get to it would be by a proviso to condition 20, which he sketched, but that even this contradicted the provisions of condition 20. He then winds up by saying (ante p. 121):

- G "Having regard to the difficulty of framing any condition which can be implied without contradicting the express terms of the contract . . . which is a time charter only and does not contemplate any commercial adventure in which both parties are interested, or indeed any commercial adventure at all—and, finally, having regard to the fact that the condition which is sought to be implied is a condition defeating a contract already part performed and not a condition precedent to a contract which remains purely executory—
- I I have come to the conclusion that the decision of the Court of Appeal was right."

In reference to this last point, it is only right to point out that in *Horlock v. Beal* (1) and in several cases therein cited, the contract held to be at an end had been in part performed.

This is the only opinion pronounced in the case by which such vital effect is given to the provision of condition 20. The judgment of the Exchequer Chamber in *Jackson v. Union Marine Insurance Co., Ltd.* (6) would, it appears to me,

seem to point in a different direction. I hardly think, however great undoubtedly as is the weight which must always be attached to any opinion expressed by LORD PARKER, it cannot be assumed that this House decided that the provisions of the twentieth condition of the charterparty had the effect which he attributed to them. Even, however, if they had that effect, the question remains: Can the provisions of condition 32 of the agreement in the present case have a similar effect? Have the respondents contracted themselves out of all claim to be absolved from the performance of their promises, no matter how prolonged the enforced suspension of their work may be, or how absolute the deprivation of their freedom of action, and have they limited themselves to the relief the engineer may, under that condition, accord to them in the shape of extending the time for completion of the work. If so, LORD PARKER's judgment might possibly apply, as the express provisions of the contract would then be inconsistent with the terms of the implied condition under which they would be relieved from the further performance of their promise. As I understood counsel for the appellants, he contended that condition No. 32 did contain a provision covering the action of the Ministry of Munitions. It is to be found, he said, in the proviso following the clause requiring that the works are to be completed and delivered up in clean and perfect condition within six years from the date of the engineer's order to commence them. In this clause it is provided that if, in the opinion of the engineer (which is to be final), the respondents should be unduly delayed or impeded in the completion of the contract by any one of a great number of things previously enumerated, the engineer might at any time or times extend the time, and fix such other day or days for completion as to him should seem reasonable without thereby prejudicing or in any way affecting the validity of the contract or the adequacy of the contract prices, &c. The several things enumerated which may cause this undue delay are: additional or enlarged works, or any just cause arising with the Board or engineer, bad weather, strikes, want or deficiency of orders, drawings, or directions, or any difficulties, impediments, obstructions, oppositions, doubts, disputes, or differences whatsoever or howsoever caused. Counsel contended that the word "difficulties" used in this condition in a contract made on July 24, 1914, covered the action of the Ministry of Munitions. It is obvious that as the attempt to continue working in defiance of this order of the Ministry would be a crime for which the respondents and the members of their staff employed on the works could be imprisoned, the order did impose difficulties in the respondents' way, but it is only necessary to read the clause to see that difficulties arising from the exercise by the executive of their most unprecedented and arbitrary powers, not conferred on them till long after the date of the contract, could never have been within the contemplation of the parties at the time they entered into the contract. The difficulties they referred to must have been difficulties arising in the execution of the words somewhat analogous in kind and character to those things they had enumerated, or which at least the engineer might adjudge had unduly delayed or impeded the completion of the contract. It would be absurd to leave it in the power of the engineer to decide that the removal of all the plant, coupled with the making it a crime to proceed with the works, had not unduly delayed the completion of the contract. Yet if the argument be sound that would be in his power. I am clearly of opinion, therefore, that the provisions of this condition do not apply to the action of the Ministry of Munitions or its result, and that the case must be decided as if it did not form any part in the contract.

That being so, I have no doubt that it was the manifest intention of both parties to this contract that they should, without any default on their respective parts, be left substantially free to exercise the rights and discharge the obligations the contract conferred and imposed upon them; that the continued existence of that freedom of action till the contract was performed must have been in their contemplation as the very foundation of it at the time they entered into it; and that to give effect to that intention a condition should by implication be read into the

A contract to the effect that the obligation to perform it should cease if by vis major, such as the action of the executive government of this country, they should be deprived to a very substantial extent of their freedom of action. Well, the respondents have been for a considerable time deprived of all freedom of action. The executive government, acting no doubt legally and within their powers, have for objects of State made it illegal and impossible for the respondents to do that

B which, in the belief that their freedom of action would not be invaded, they promised to do. No one can tell how long it may continue to be invaded. In my opinion, they are entitled to be absolved from the further performance of that promise. In addition it may well be that in this case, just as in *Jackson v. Union Marine Insurance Co., Ltd.* (6), the delay may render the adventure the respondents embarked upon as different from what it would have been if completed without

C interruption as was the summer voyage which the parties contemplated in that case from the winter voyage which the delay would have necessitated. The conditions after the war may be entirely changed, and the work already done may be deteriorated by the delay. I think the decision of the Court of Appeal was right, therefore, and should be upheld, and this appeal be dismissed with costs here and below.

D **LORD PARMOOR** stated the facts and continued: The question of principle involved in the consideration of this appeal has been recently considered in your Lordships' House in *Horlock v. Beal* (1) and *F. A. Tamplin Steamship Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.* (2). The difficulty arises not so much in the statement of principle as in its application to particular cases. It is

E under this head that some difference of opinion has arisen. The question is one of contract law, and the decision in each case depends on the ascertainment of the true meaning of the bargain between the parties. If the parties have provided by apt words in the contract for their mutual rights or liabilities in the event of the contract works being stopped or indefinitely hindered by the operation of a subsequent law, and such provision is not contrary to public policy, then it would

F be the duty of any court to give effect to such provision. If, on the other hand, the contract contains no provision for such a contingency as the interference of the legislature, then the court must determine whether this contingency is of such a character that it can reasonably be implied to have been in the contemplation of the parties at the date when the contract was made. Care must always be taken not to imply a condition which would be inconsistent with the expressed intention

G of the parties.

In the present case the judgment of **BRAY, J.**, largely depends on his opinion that the parties expressly provided for the contingency which has occurred in condition 32 of the original contract. I am unable to assent to this construction. The contract is one substantially in common form where works of this character are to be carried out in a fixed time, subject to payment on the basis of measure

H and value. It is usual in such a contract to authorise the engineer, at his discretion, in certain events, to grant by writing under his hand such extension of time as to him may seem reasonable, without thereby prejudicing or in any way affecting the validity of the contract. In the present contract the engineer has authority to give extension of time if, in his opinion, the completion of the contract has been unduly delayed or impeded

I "by reason of any additional works or enlargements of the works (which additions or enlargements the engineer is hereby authorised to make), or for any other just cause arising with the Board or with the engineer, or in consequence of any unusual inclemency of the weather, or general or local strikes or combination of workmen, or for want or deficiency of any orders, drawings, or directions, or by reason of any difficulties, impediments, obstructions, oppositions, doubts, disputes, or differences, whatsoever or howsoever occasioned."

This language is no doubt wide, and the general words may be large enough to include the contingency of legislative interference stopping the works or postponing their erection for an indefinite time. I think, however, that the language was used *alio intuitu*, and that it is not reasonable to hold that it had any reference to such a contingency or that such a contingency was in the contemplation of the parties when framing the terms of the section. A mere extension of time at the discretion of the engineer is not in any sense an appropriate remedy for the contingency which has occurred. In my opinion, neither party intended to leave the decision as to what should be done in such a contingency to the discretion of the engineer, under an ordinary extension of time clause in a works contract.

It is necessary, therefore, for your Lordships to consider what is to be implied as the intention of the parties to the bargain, having regard to the terms of the contract and the nature of the work to which the contract applies. It is not necessary to go through the terms of the contract in any detail. No special provision was called to the attention of your Lordships which would in principle differentiate this contract from an ordinary measure and value contract, in which a definite time is fixed for completion, subject to a clause allowing extension of time in certain events at the discretion of the engineer. What is the real meaning and purport of such a contract? It is that works shall be carried out at prices fixed with reference to the then outlook for cost of labour, plant, and material, spread over a defined limit of time, which could not fail to affect materially the figures inserted by a contractor in sending in his tender. The same considerations would affect the appellants in coming to a determination whether a tender should or should not be accepted. During the execution of such a contract a contingency arises by the intervention of the legislature, or of a Department authorised by the legislature, which renders the further continuance of the execution of the works illegal for a substantial and indefinite time, and which causes the removal of a large portion of the plant employed to government works or for government purpose. I use the word "indefinite" since there is no certainty of the time of the duration of the war of which judicial cognisance can be taken. Can it be said that a risk of this kind was in the contemplation of either party at the date of the contracts? The necessary implication appears to me to be that it is a risk which no contractor would contemplate to be a risk under his contract, and which no public body controlling public funds could have regarded as a possibility affecting their liability in the absence of express provision. It is not necessary to say that the works are not physically possible or could not practically be carried out as a business adventure at a subsequent date. I agree that the probability of hardship to one side or the other is not a matter of material consideration, but it is quite a different matter when there is an indefinite and indeterminate liability which might impose on either party an unforeseen burden totally foreign to the ordinary incidents in a contract of this character, or which might not improbably eventuate in a loss to both parties without any compensating advantages. In my opinion, the original contracts have ceased to be operative. It may well be that at some future period the various works will be executed, but it will be under a different contract based on changed considerations. All the prices will have to be fixed in reference to different conditions, and the time over which the work will be carried on will be wholly different. It is no answer that the engineer has certain powers over prices and time. These powers are incident to the original contracts, and were never intended to give the engineer a power to make new contracts binding either on the respondents or the appellants. I would desire in this connection to quote a passage from the opinion of LORD ATKINSON in the *Tamplin Case* (2) (*ante* p. 117):

"... there is here involved such a substantial invasion of that freedom of both parties to exercise the rights and discharge the obligations secured to and imposed on them by the charter, the continued existence of which must, I think, we have necessarily been in their contemplation as the foundation of

A this contract when they entered into it, that, in the events which have happened, each of them is now entitled to treat it as at an end."

This passage is applicable to a case like the present, where the continued erection of the contract works has been rendered illegal and the freedom of both parties has been directly invaded by the operation of law.

B Many cases were called to the attention of your Lordships during the hearing of the appeal, but I think it is only necessary to refer to one of these in a case depending on illegality. I refer to *Baily v. De Crespigny* (4), a leading case on the principles applicable where land is taken for public purposes under a private Act of Parliament. In this case it was held that the defendant was discharged from a covenant by a subsequent Act of Parliament which compelled him to assign to a railway company, and so put it out of his power to perform the covenant

C on the principle that *lex non cogit ad impossibilia*. I think that the reasoning contained in the judgment of HANNEN, J., is applicable to the present case, and that the law will not enforce the fulfilment of a contract where the legislature has introduced substantial and indefinite limitations which the parties cannot be held to have contemplated when making the contract.

D "There can be no doubt that a man may, by an absolute contract, bind himself to perform things which subsequently become impossible, or to pay damages for the non-performance, and this construction is to be put upon an unqualified undertaking, where the event which causes the impossibility was or might have been anticipated and guarded against in the contract, or when the impossibility arises from the act or default of the promissor. But

E where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens."

F The learned judge later referred to *Brewster v. Kitchel* (7), and says (L.R. 4 Q.B. at p. 187):

"The rule laid down in *Brewster v. Kitchel* (7) rests upon this ground, that it is not reasonable to suppose that the legislature, while altering the condition of things with reference to which the covenantor contracted, intended that he should remain liable on a covenant which the legislature itself prevented his fulfilling."

In my opinion, the appeal fails and should be dismissed with costs.

Solicitors: Walter Moon; Linklater, Addison & Brown.

[Reported by W. E. REID, Esq., Barrister-at-Law.]

BRITISH AND FOREIGN MARINE INSURANCE CO., LTD. v.
SAMUEL SANDAY & CO.

[HOUSE OF LORDS (Earl Loreburn, Lord Atkinson, Lord Shaw, Lord Parmoor and Lord Wrenbury), November 30, December 2, 3, 1915, January 27, 1916]

[Reported [1916] 1 A.C. 650; 85 L.J.K.B. 550; 114 L.T. 521;
32 T.L.R. 266; 60 Sol. Jo. 253; 13 Asp. M.L.C. 289; 21 Com. Cas. 154]

Insurance—Marine insurance—Cargo—Insurance for voyage—Preservation of cargo, but loss of adventure—Right of assured to recover under policy—Proximate cause of loss—Proclamation of war—Loss of adventure—Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 60, Sched. I, r. 10.

By policies of insurance, dated in July, 1914, against the usual perils covered by a marine policy, and including a clause insuring the assured against loss arising from "takings at sea, arrests, restraints, and detentions of all kings, princes, and people of what nation, condition or quality soever," the assured insured two cargoes of grain on voyages from the Argentine to Hamburg. On Aug. 4 war was declared between Great Britain and Germany, and on Aug. 5 King George V issued a proclamation warning all persons not to permit any British ship to enter or communicate with any port or place in the German Empire and stating that any person acting in contravention of the proclamation would be liable to penalties. The ships carrying the insured cargoes were directed by the naval authorities to home ports, the assured warehoused the grain, and, on Sept. 7, gave to the insurers notices of abandonment. These notices were not accepted, and the assured began proceedings against the insurers, claiming under the policies as for a total loss of the cargoes.

Held: (i) the old rule that where goods were insured from one port to another the insurance was not confined to an indemnity to be paid in the event of the goods being lost, damaged, or destroyed, but extended to an indemnity to be paid in the event of the goods not reaching their destination, so that the subject-matter insured included the adventure and not merely the goods, had not been altered by the Marine Insurance Act, 1906; the proximate cause of the loss of the adventures in the present case was His Majesty's proclamation—an "executive act" within r. 10 of Sched. I to the Act which stated that the term "arrests, &c., of kings, princes, and people" referred to such acts—and not the legal prohibition against trading with the enemy which resulted from it; and, therefore, the adventure having been lost, the assured were entitled to recover under the policies although the goods had not been lost or damaged, but had remained safe and sound and in their possession.

Decision of Court of Appeal, [1915] 2 K.B. 781, affirmed.

Notes. Distinguished: *Becker, Gray & Co. v. London Assurance Corpn.*, post p. 146. Followed: *Fooks v. Smith*, [1924] 2 K.B. 508. Considered: *Forestal Land, Timber and Railways Co. v. Rickards, Middows, Ltd. v. Robertson, Howard Bros. & Co. v. Kahn*, [1941] 3 All E.R. 62. Referred to: *F. A. Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co.*, ante p. 104; *Furness, Withy & Co. v. Rederiakt. Banco.*, post p. 873; *Wilson Bobbin Co. v. Green*, [1917] 1 K.B. 860; *Associated Oil Carriers v. Union Insurance Society of Canton*, [1917] 2 K.B. 184; *Russian Bank of Foreign Trade v. Excess Insurance Co.*, [1918] 2 K.B. 123; *Ertel Bieber & Co. v. Rio Tinto Co.*, [1918-19] All E.R. Rep. 127; *Morrison Steamship Co. v. Greystoke Castle Steamship (Cargo Owners)*, [1946] 2 All E.R. 696; *Atlantic Maritime Co. Inc. v. Gibbon*, [1953] 1 All E.R. 893.

As to perils insured against under a marine policy and the proximate cause of loss, see 22 HALSBURY'S LAWS (3rd Edn.) 73 et seq., and for cases see 29 DIGEST 197 et seq. For Marine Insurance Act, 1906, see 13 HALSBURY'S STATUTES (2nd Edn.) 14.

A Cases referred to :

- (1) *Barker v. Blakes* (1808), 9 East 283; 103 E.R. 581; 29 Digest 284, 2315.
 (2) *Anderson v. Wallis* (1813), 2 M. & S. 240; 3 Camp. 440; 105 E.R. 372; 29 Digest 276, 2235.

B

- (3) *Rodoconachi v. Elliott* (1874), L.R. 9 C.P. 518; 43 L.J.C.P. 255; 31 L.T. 239; 2 Asp. M.L.C. 399, Ex.Ch.; 29 Digest 218, 1747.
 (4) *Rosetto v. Gurney* (1851), 11 C.B. 176; 20 L.J.C.P. 257; 17 L.T.O.S. 242; 15 Jur. 1177; 138 E.R. 438; 29 Digest 275, 2225.

C

- (5) *Esposito v. Bowden* (1857), 7 E. & B. 763; 8 State Tr. N.S. 807; 27 L.J.Q.B. 17; 29 L.T.O.S. 295; 3 Jur. N.S. 1209; 5 W.R. 732; 119 E.R. 1430, Ex.Ch.; 12 Digest (Repl.) 440, 3352.
 (6) *Miller v. Law Accident Insurance Co.*, [1903] 1 K.B. 712; 72 L.J.K.B. 428; 88 L.T. 370; 51 W.R. 420; 19 T.L.R. 331; 47 Sol. Jo. 382; 9 Asp. M.L.C. 386; 8 Com. Cas. 161, C.A.; 29 Digest 219, 1748.

D

- (7) *Hadkinson v. Robinson* (1803), 3 Bos. & P. 388; 127 E.R. 212; 29 Digest 208, 1671.

E

- (8) *Lubbock v. Rowcroft* (1803), 5 Esp. 50, N.P.; 29 Digest 208, 1670.

F

- (9) *Finlay v. Liverpool and Great Western Steamship Co., Ltd.* (1870), 23 L.T. 251; 3 Mar. L.C. 487; 41 Digest 410, 2553.

- (10) *The Hoop* (1799), 1 Ch. Rob. 196; 2 Digest (Repl.) 241, 435.

- (11) *Kacianoff v. China Traders Insurance Co., Ltd.*, [1914] 3 K.B. 1121; 83 L.J.K.B. 1393; 111 L.T. 404; 12 Asp. M.L.C. 524; 19 Com. Cas. 371, C.A.; 29 Digest 216, 1727.

E

Also referred to in argument :

Stephens v. Australasian Insurance Co. (1872), L.R. 8 C.P. 18; 42 L.J.C.P. 12; 27 L.T. 585; 21 W.R. 228; 1 Asp. M.L.C. 458; 29 Digest 104, 617.

Mackenzie v. Whitworth (1875), 1 Ex.D. 36; 45 L.J.Q.B. 233; 33 L.T. 655; 24 W.R. 287; 3 Asp. M.L.C. 81, C.A.; 29 Digest 93, 506.

F

Cologan v. London Assurance Co. (1816), 5 M. & S. 447, 105 E.R. 114; 29 Digest 254, 2058.

Roux v. Salvador (1836), 3 Bing. N.C. 266; 2 Hodg. 209; 4 Scott 1; 7 L.J.Ex. 328; 132 E.R. 413, Ex.Ch.; 29 Digest 263, 2129.

Angel v. Merchants Marine Insurance Co., [1903] 1 K.B. 811; 72 L.J.K.B. 498; 88 L.T. 717; 51 W.R. 530; 19 T.L.R. 395; 9 Asp. M.L.C. 406; 8 Com. Cas. 179, C.A.; 29 Digest 270, 2185.

G

Macbeth & Co., Ltd. v. Maritime Insurance Co., Ltd., [1908] A.C. 144; 77 L.J.K.B. 498; 98 L.T. 594; 24 T.L.R. 403; 11 Asp. M.L.C. 52; 13 Com. Cas. 222, H.L.; 29 Digest 269, 2167.

Hall v. Hayman, [1912] 2 K.B. 5; 81 L.J.K.B. 509; 106 L.T. 142; 28 T.L.R. 171; 56 Sol. Jo. 205; 12 Asp. M.L.C. 158; 17 Com. Cas. 81; 29 Digest 271, 2188.

H

East Asiatic Co., Ltd. v. Tronto Steamship Co., Ltd. (1915), 31 T.L.R. 543; 41 Digest 412, 2568.

Rotch v. Edie (1795), 6 Term Rep. 413; 101 E.R. 623; 29 Digest 277, 2241.

Inman Steamship Co. v. Bischoff (1882), 7 App. Cas. 670; 52 L.J.Q.B. 169; 47 L.T. 581; 31 W.R. 141; 5 Asp. M.L.C. 6, H.L.; 29 Digest 210, 1684.

I

Cory v. Burr (1883), 8 App. Cas. 393; 52 L.J.Q.B. 657; 49 L.T. 78; 31 W.R. 894; 5 Asp. M.L.C. 109, H.L.; 29 Digest 217, 1736.

Appeal by the defendants from an order of the Court of Appeal affirming an order made by BAILHACHE, J., sitting in the Commercial Court.

The plaintiffs claimed to recover the sum of £44,800 under policies of marine insurance, dated July 31, 1914, taken out with the appellants on cargoes of linseed and wheat per the steamships *St. Andrew* and *Orthia*. BAILHACHE, J.,

held that there was a constructive total loss of the goods and gave judgment for the amount claimed, and the Court of Appeal by a majority (LORD READING, C.J., and BRAY, J., SWINFEN EADY, L.J., dissenting) affirmed his decision.

Sir Robert Finlay, K.C., and Leslie Scott, K.C. (with them F. D. MacKinnon, K.C.), for the appellants.

Adair Roche, K.C., and Robertson Dunlop for the respondents.

The House took time for consideration.

Jan. 27, 1916. The following opinions were read.

EARL LOREBURN.—When the present war commenced the *St. Andrew* and the *Orthia*, both of them British ships, were on a voyage from the Argentine to Hamburg, a German port, laden with merchandise. On learning that war had broken out between Great Britain and Germany, whereby the taking of these goods to Hamburg had become unlawful, the masters properly desisted from the voyages, and the cargo owners warehoused their merchandise, and gave notice of abandonment to their underwriters, claiming on a constructive total loss. These notices were not accepted, and this action is brought to enforce the claim. There is no distinction between the two ships, and both policies are of a like tenor. Two questions have been argued before your Lordships. Other contentions, raised in the courts below, have not been raised here. The first question is whether the old rule still prevails, that upon an insurance on goods, substantially in the words of these policies, the frustration of the adventure by an insured peril is a loss recoverable against underwriters, though the goods themselves are safe and sound. The second question is whether, under the circumstances, there was here a loss by restraint of kings, princes, and peoples, which is one of the perils insured against in these policies.

In 1906 it was well settled that when goods are insured, in a policy worded as these policies are, at and from the port of loading to the port of destination, there is a loss if the adventure is frustrated by a peril insured. It is not merely an insurance of the actual merchandise from injury, but is also an insurance of its safe arrival. There is no doubt that this was the rule which had been acted upon for very many years. Was it altered by the Marine Insurance Act, 1906? SWINFEN EADY, L.J., thought it was, and he cited instances in which this Act, though a Consolidation Act, had, in his opinion, altered the law in other respects. I will not pursue that subject, because it has no bearing on the question whether or not there has been an alteration in this respect, but I do not think it will appear, on an examination of the cases to which he refers, that the Act has altered what, at the time of its passage, was the highest judicial interpretation of the law. Howbeit, I do not think the Act altered the law in the particular now under consideration, namely, in regard to the old rule I have mentioned.

Section 60 of the Act says:

"... there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable..."

Section 57 (1) says: "Where the... assured is irretrievably deprived" of the subject-matter insured, there is an actual total loss. Now here the subject-matter assured, as the law stood in 1906, included the adventure and not merely the goods, and the assured was irretrievably deprived of it because all prospect of safe arrival on the voyage to Germany was hopelessly frustrated by the outbreak of war. Therefore, the assured reasonably abandoned because an actual total loss appeared to be unavoidable. So far I see nothing in the Act to alter the law, but I do see that under the old decisions there is a constructive total loss. The argument, however, is that the "subject-matter insured" on such a policy no longer included the adventure. There is not a line in the Act which says so, and, if it were relevant, many reasons might be urged against the probability of so inconvenient a change being made. But it is conclusive to point out that s. 26 (1) provides:

A "The subject-matter insured must be designated in a marine policy with reasonable certainty," and, by sub-s. (4): "In the application of this section regard shall be had to any usage regulating the designation of the subject-matter assured." There are many things that may be at risk, and in respect of which insurance may be effected—ship, goods, freight, profits, and so on. There are also familiar, even antique, expressions constantly used from long ago in marine policies, and continued
B because they are well understood in the business, or have been interpreted by judges. This section says that regard is to be had to any usage regulating the designation of the subject-matter assured. The words of this policy have for generations been understood and held by judges to designate not merely the goods but also the adventure. So far from abrogating this designation of subject-matter I should have thought the Act took pains to preserve it and others like it. I will
C merely in a sentence refer to s. 91 (2) of the Act which preserves the rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act.

It seems to me that Parliament has triply guarded against the danger that the Act should be construed in the sense urged upon us by counsel for the appellants. It has refrained from saying that the old rule shall be altered, which of itself
D would suffice. It has twice warned us that we are to regard and preserve rules and usages in terms that are applicable to this rule. Accordingly, I take with me the conclusion that the adventure was a subject-matter insured, when I proceed to inquire whether or not the loss of it is to be compensated under the clause protecting the assured against restraint by kings or princes. We are told that this question has never been judicially determined. It is a difficult question, and I have been
E much struck by the cogent reasoning of SWINFEN EADY, L.J., but the argument has in the end satisfied me that the decision of the Court of Appeal ought to be affirmed. A declaration by His Majesty that there was a state of war was issued on Aug. 4, 1914, and thereupon a number of things theretofore lawful became unlawful. Among other things, trading to German ports became unlawful, and an instant duty arose for these two ships to discontinue their voyage to Hamburg.
F The adventure of carrying this merchandise to its destination became in law a serious offence, and, in fact, impracticable. That the declaration was an act of State cannot be doubted. The real point made by the underwriters was that the declaration of war did not directly restrain the ships from proceeding to Hamburg, or the owners of goods from taking them there. They argued that the declaration set up a state of war, and the general law applicable to that state thereupon came
G into force, and it was not the declaration but the consequence of it which destroyed their enterprise. To hold otherwise, they said, would be to throw upon underwriters an insurance against the consequences of war. In their contention, though the actual exercise of force might not be necessary, yet the fear of its being used must be present if there is to be a loss by restraint of princes, and here there was
H neither force nor the fear of it, for the voyage was abandoned simply because it had become unlawful, and the assured obeyed the law. The proximate or direct cause of the loss was, they said, simply the law of the land.

I am not pressed by the circumstances that force was neither exerted nor present, for force is in reserve behind every State command. And it would be a strange law which deprived the assured, if otherwise entitled to his indemnity, upon the ground that he had not resisted, till the hand of power was laid upon him, an order which it was his duty to obey. If it were an order which he was not bound to obey, and which he might have successfully resisted either by violence or by process of law, a question might arise whether or not there had been in fact a restraint. But that is outside the present case, and I say nothing of it. What has given me some anxiety is the argument that His Majesty's declaration was not the direct cause of these adventures being destroyed. The maxim *causa proxima non remota spectatur* has been strictly applied in marine insurance cases. And properly so, for there are a variety of perils that may lead to a loss either partial or total, some

of them, it may be, covered and others not covered by a policy, and a variety of events or causes that may contribute to a loss, so that without straining language it will be possible to treat it as due either to an insured or to an excepted peril. That, I take it, is the reason why this maxim is pushed to considerable lengths in marine insurance law. In view of that, ought we to say that His Majesty's declaration was the direct cause of these adventures being frustrated, or ought we to say that it merely created a state of war which brought into activity a new set of duties and prohibitions, and that one of them, the prohibition against trading with the enemy, necessitated the adventure being wholly given up. Did the interruption directly come from the declaration or from the law which it awakened? In a sense it came from both, but we must choose which was the proximate cause, for one is the subject of insurance and the other is not. I can see how far-reaching a decision in the former of these senses may prove, but I think it is the right decision. I do not see my way to separating the act of State from its sequel, and treating the advent of war conditions as a last distinct link in the chain of causes which brought these voyages to an end. No new law or ordinance was made after the risk commenced. No event occurred to impede the adventure except the declaration of war. In my opinion, the clause insuring these goods insures their safe arrival at Hamburg, and the destruction of that adventure was directly caused by His Majesty's declaration. It was, therefore, a loss within the clause which insures these goods at and from losses against restraint by kings, princes, or peoples. In my opinion, the order appealed from ought to be affirmed with costs.

LORD ATKINSON.—I concur. The question in this case is novel and important. It is, I think, in effect this: Whether British merchants who have insured goods with British underwriters against the usual perils in a marine policy (including restraints of princes) upon a British ship for a voyage to the port of Hamburg can, upon war being declared by His Majesty the King of England, whereby the further prosecution of the insured voyage to that port becomes illegal, give notice to the underwriters of abandonment, and recover as for a constructive total loss of the goods by restraint of princes, though the goods themselves remain unharmed and in the actual possession of the assured. The respondents were insured against loss arising from

“takings at sea, arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever.”

The appellants contend that the law as to the constructive loss of goods on a voyage, as distinguished from the ship which carried them, is entirely altered by the Marine Insurance Act, 1906, and that the ships and the cargo are, by that statute, impliedly placed upon the same level.

The first question I desire to deal with is whether this contention is right, but to determine it one must first consider what was the state of the law on the subject before the passing of this statute, and then examine how far, if at all, the provisions of the statute conflict with that law. It is only necessary to refer to three cases upon the point, namely, *Barker v. Blakes* (1), *Anderson v. Wallis* (2), and *Rodoconachi v. Elliott* (3). In the first, decided in 1808, LORD ELLENBOROUGH, in 9 East, at pp. 293-294, laid it down that the impossibility of prosecuting the voyage to the place of destination, which arose during and in consequence of the prolonged detention of the ship and cargo, may properly be considered a loss of the voyage, and such a loss of voyage, upon received principles of insurance law, as a total loss of the goods which were to have been transported in the course of that voyage, provided the loss be followed by a sufficiently prompt and immediate notice of abandonment. In the second case the same learned judge said (2 M. & S. at pp. 247, 248):

“I am well aware that an insurance upon a cargo for a particular voyage contemplates that the voyage shall be performed with that cargo, and any risk which renders the cargo permanently lost to the assured may be a cause of

A abandonment. In like manner, a total loss of cargo may be effected not merely by the destruction of that cargo, but by a total permanent incapacity of the ship to perform the voyage. That is a destruction of the contemplated adventure. But the case of an interruption of the voyage does not warrant the assured in totally disengaging himself from the adventure and throwing this burden on the underwriters. It is unnecessary to pursue the subject further, as there is not any case or principle which authorises an abandonment, unless where the loss has been actually a total loss or in the highest degree probable at the time of abandonment."

B In the third case *BRAMWELL, B.*, in delivering the judgment of the Exchequer Chamber, said (L.R. 9 C.P. at p. 522):

C "It is well established that there may be a loss of the goods by a loss of the voyage on which the goods are being transported, if it amounts, to use the words of LORD ELLENBOROUGH, to a destruction of the contemplated adventure."

For this he cites the two cases above mentioned.

D Counsel for the assured has suggested that this loss of voyage means a loss of market for the goods—not a loss of profit, but a loss of market—and that what the assured insures against is not merely the loss sustained by injury to or destruction of the goods, but in addition the loss resulting from a failure to transport the goods to their destination, that failure being established by a detention of them through one of the perils insured against, so prolonged as to amount to a destruction of the contemplated adventure. This may be so. It is a rational explanation. I think none other was given.

E The next matter to consider is whether there is any provision to be found in the statute of 1906, either express or implied, inconsistent with the law as settled by the above-mentioned authorities. First, the statute of 1906 purports to be an Act merely to codify the law relating to marine insurance, and s. 91 (2) provides that the rules of the common law, including the law merchant, save so far as they are inconsistent with the provisions of the Act, shall continue to apply to contracts of marine insurance. A comparison between sub-s. (2) and (3) of s. 60 shows that, in the case of the insurance of goods, the cost of bringing the goods to their destination is to be taken into account in estimating whether or not a constructive total loss of them has occurred. Thus the old rule of law has been preserved: *Rosetto v. Gurney* (4). Constructive total loss is, subject to any express provision in the policy, defined, by s. 60 (1) to occur when the subject-matter insured is reasonably abandoned on account of actual loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred. By s. 57 it is provided that actual total loss occurs where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof.

H Those provisions make it necessary to determine what is the subject-matter insured in these policies. There is no definition of the word subject-matter. Section 26 (1) provides that the subject-matter insured must be designated in a marine policy with reasonable certainty, and sub-s. (4) that in the application of the section regard shall be had to any usage regulating the designation of the subject-matter. By the word designation is, I think, meant identification or description. The subject-matter in the case of the *Orthia* is stated in the policy to be linseed, valued at £11,000. That, however, is only part of its description or designation or identification. Its full description, as shown by the policy itself, is, linseed, valued at £11,000, shipped on board this vessel to be transported on a voyage at or from a port on the River Plate to Hamburg. Such a description in such a policy connotes rights and characteristics attached by the insurance law to goods so placed, one of which is that they may be treated as constructively totally lost if by one of the perils insured against, as the proximate cause, the adventure of taking them to their destination be destroyed. If that be so, as I think it is,

then if the loss of the voyage, the loss of the chance of arriving at the port of destination, and the consequent loss of the market appears to be unavoidable, there would be a constructive total loss of the subject-matter. I am, therefore, of opinion that, in the insurance of goods, the law as it stood before the Act of 1906, in reference to the subject of constructive total loss, remains unchanged.

Two questions remain. First, were these vessels diverted from the contemplated voyage by "the restraint of kings or princes"? And, second, if they were, was this restraint in each case the proximate cause of the diversion within the meaning of s. 55? It was contended that the declaration of war merely altered the status of the inhabitants of the German Empire, changing them from friends to enemies, and that it was the common law acting on that condition of things, not anything done by the Sovereign, which prevented the voyages of the ships to their respective destinations, owing to the obligation felt by their masters, as good citizens, to obey the common law of the country. That the vessels were, therefore, not subject to any restraint of kings or princes, and that, even if they were, that restraint was not the proximate cause of the loss of the voyage. In *Rodoconachi v. Elliott* (8), BRAMWELL, B., said (L.R. 9 C.P. at p. 523) that the court considered that these words, "restraints and detainerments of all kings and princes and people of what nation, condition, or quality whatsoever," are wider and more comprehensive than the words which immediately precede them—i.e., the words "taking at sea, arrest"; that the word "restraint" as applied to goods must mean a restraint of those having the custody of the goods; that it was not necessary that there should be any specific action on the goods themselves, and that as the effect of the siege of Paris (at which city the goods had arrived) was to cut off all foreign connection and correspondence, the goods were restrained and prevented from leaving Paris by the operation of that siege, and therefore restrained and "detained by kings and princes" within the terms of the policy. It was, accordingly, held that the "contemplated venture" was destroyed, and that there was a constructive total loss of the goods. In the present case the trading with Germany was lawful up to Aug. 4, 1914. On that day, by the act of the Sovereign, it became unlawful. No executive, person, or body, no moral or physical agency, intervened between the act of the Sovereign, proclaimed in his declaration of war, and the abandonment of the intended voyage. As soon as information was conveyed to the captain of the *St. Andrew* he sailed for Liverpool. On Aug. 5 the owners of the *Orthia* telegraphed to her to St. Vincent to return. The common law which made it illegal to go to Hamburg was brought into immediate operation by the act of the Sovereign. By the warning he gave it must be taken that he meant to have that law enforced against those who neglected his warning. I do not think, therefore, that the operation of the common law can be separated from the act of the Sovereign which called it into action and treated as an intervention between that act and the abandonment of the voyage. The act of the Sovereign in declaring war and the calling of the common law into operation formed, I think, two parts of one act—one single exercise of the Royal prerogative. This was the proximate cause of the diversion of the respective courses of the two ships and their ultimate abandonment of the original voyage.

The question remains: Did the exercise by the Sovereign of his Royal prerogative in this respect impose upon each of these ships a restraint of a king and prince within the meaning of the policies? By the tenth rule of Sched. I to the Act of 1906 it is provided that the term "arrest, &c., of kings and princes," refers to political or executive acts, and does not include a loss caused by riot or ordinary judicial process. Well, the act of the Sovereign in making war and by his proclamation declaring it, and thus calling common law into operation, was clearly an executive act—an act of State done by virtue of the Royal prerogative. The declaration carries with it all the force of a law prohibiting intercourse with the enemy save with licence of the Sovereign. It has the executive forces of the Crown behind it to enforce obedience to it: *Esposito v. Bowden* (5), 7 E. & B. at p. 781.

A Every subject must be taken to be aware that if he attempts to send or bring a ship and cargo to an enemy port, the ship can be prevented from entering that port by His Majesty's ships of war, and he himself will be liable to be prosecuted for trading, or attempting to trade, with the enemy. If the possible infliction of those penalties deters him from making the attempt, is he not restrained from making it? And if not, must the restraint be physical either of the persons in possession of the goods, or of the goods themselves, by the taking of the custody of them? According to LORD BRAMWELL's judgment in *Rodoconachi v. Elliott* (3) this latter is not necessary. And *Miller v. Law Accident Insurance Co.* (6) is a direct authority that potential as distinguished from actual physical force is sufficient to constitute a "restraint." *Hadkinson v. Robinson* (7) and *Lubbock v. Rowcroft* (8) are distinguishable from the present. In each of these cases the only deterrent was the risk of ultimate capture if the ships proceeded to their destination. The vessel prudently resolved not to incur that risk. In the present case the deterrent were the penalties incurred by the violation of the criminal law. This was present and immediate, if the ship proceeded at all towards her destination with a view of trading with the enemy. Actual capture was in these cases the peril insured against. The apprehension of capture is an entirely different thing and was not insured against. It is clear that the war is of uncertain duration. Nobody could with any confidence conjecture when it would terminate. A long delay appeared most probable before the voyage could be resumed. On the whole, therefore, I am of opinion that the judgment appealed from was right, and that this appeal should be dismissed with costs.

E LORD SHAW (read by LORD WRENBURY).—So completely do I agree with the judgment of BAILHACHE, J., that I desire respectfully to adopt in its entirety the opinion delivered by that learned judge. I think the law laid down by him so plainly sound, and his statements and reasoning so unanswerably cogent, that, seeing that I also approach and view the case from the same standpoint, I gladly feel free to indorse and adopt his judgment. I think that the appeal should fail.

F LORD PARMOOR.—Two questions arise for decision in the present appeal. The first is, whether there has been a constructive total loss of the subject-matter insured. The second, whether the loss (if incurred) is proximately due to the restraints of kings, princes, and people, of what nation, condition, or quality soever, which is one of the perils insured against.

G The facts are agreed. The respondents are a British firm of corn merchants. They contracted to sell to German merchants at Hamburg certain linseed and wheat, shipped in July, 1914, on board the British steamship *St. Andrew*, at the ports of Rosario, St. Nicholas, and Buenos Ayres, to be carried to Hamburg. In the same month they contracted to sell to German merchants certain linseed, shipped at Rosario on the British steamship *Orthia*, to be carried to Hamburg. H For the purpose of this case there is no distinction between the two shipments. By a policy of marine insurance dated July 31, 1914, the respondents insured the said linseed and wheat shipped on the *St. Andrew* at and from port or ports, of the River Plate, and/or tributaries or Hamburg. On Aug. 4, 1914, a declaration was made that a state of war existed between this country and Germany. The effect of the outbreak of war was to interdict and render illegal all trading with the enemy without the permission of the Sovereign. On Aug. 5 a proclamation was issued warning all persons not to permit any British ship to leave for, enter, or communicate with any port or place in the German Empire without the permission of the Sovereign, and that any person acting in contravention of the proclamation would be liable to such penalties as the law allows. The penalty for trading with the enemy after the declaration of Aug. 4 and the proclamation of Aug. 5 would include the imprisonment of the master and the confiscation of goods and ship. I On Aug. 9, as the *St. Andrew* was approaching the Lizard, a French cruiser signalled her to stop and to go to Falmouth. The master at Falmouth received

orders through the examining officer at Falmouth from the chief naval transport officer at Devonport to go to Liverpool, and upon arrival the linseed and wheat were duly discharged. The policy, on which the claim is made, is in the common form of a Lloyd's policy, and the frustration of the contemplated adventure would constitute a total constructive loss of the goods insured in transit, unless an alteration of law has been introduced by the Marine Insurance Act, 1906. A notice of abandonment of the goods insured was made on Sept. 7, 1914, and the appellants do not raise any question that the notice was not valid or out of time. A

On the first question I think that the Act of 1906 has not introduced any alteration in the law, and that there has been a total constructive loss of the goods insured. The Act of 1906 is an Act to codify the law relating to marine insurance. There is, however, no difference in the canons of construction applicable to a codifying Act or to any other Act of Parliament. It is said that in certain respects the Act of 1906 has altered the law. I give no opinion upon this point, and it has no relevance whatever to the question before your Lordships in this appeal. By s. 60 (1) a constructive total loss is defined: B

"Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred." C

If the subject-matter insured in the present case includes the contemplated adventure, it was no doubt reasonably abandoned on account of its actual loss appearing to be unavoidable, and a case of constructive total loss arises. Section 26 deals with subject-matter and s. 26 (4) enacts that D

"In the application of this section regard should be had to any usage regulating the designation of the subject-matter insured." E

When the Act was passed the common form Lloyd's policy of marine insurance on goods in transit from one port to another designated by usage that the contemplated adventure was part of the subject-matter, so that if the contemplated adventure was frustrated by a peril insured against, the insurers became liable to pay the insured the amount due under the policy. This position is not altered, but was preserved by sub-s. (4). The usage of the law merchant that a policy in the present form did designate that the subject-matter included the contemplated adventure is applicable now in the same way as it was before the Act was passed. In addition to the sections above referred to, reference may be made to s. 91 (2), which provides that the rules of the common law, including the merchant law, saving so far as they are inconsistent with the express provisions of the Act, shall continue to apply to contracts of marine insurance. F

If there has been a constructive total loss, the second question arises whether the restraint of "kings, princes, &c.," was the proximate cause of such loss. The Marine Insurance Act, 1906, contains in the first schedule "rules for construction of policy," which apply, subject to the provisions of the Act, and where the context does not otherwise require. These rules are said to record the interpretation which by law or usage has been placed on some of the more important terms in a common Lloyd's policy. Rule 10 states that the term "arrest, &c., of kings, princes, and people" refers to political or executive acts, and does not include a loss caused by riot or by ordinary judicial process. It could not be suggested in the present case that the loss was caused by ordinary judicial process, and there is no question of riot. *Finlay v. Liverpool and Great Western Steamship Co., Ltd.* (9) sufficiently illustrates what is meant by the words "ordinary judicial process." It was adjudged a bad plea by way of answer to a claim for not delivering goods in accordance with the bill of lading that the defendants were prevented by acts or restraints of princes "that they had been sued in New York by the true owner of the goods and had been ordered by a court of competent jurisdiction to give up the goods to him." G

A It was argued that "restraint," coming in a context between the words "arrest" and "detainment," implied that this term in the policy did not attach and render the insurers liable unless force was either used or threatened. A similar argument was urged in *Miller v. Law Accident Insurance Co.* (6). In that case, in consequence of a decree of the president of Argentina stopping the discharge of all cattle from the United Kingdom until further notice, the captain took the vessel
B outside the port and transhipped the cattle. It was held in the Court of Appeal that there had been a restraint of princes, and STIRLING, L.J., says:

"It seems to me that there was an active intervention of the government of the Argentine Republic, which was none the less an exercise of superior force because no officer of the army or of the police force intervened."

C I agree in the opinion expressed by STIRLING, L.J. If the restraint in the present case has been imposed by political or executive acts, it is not the less a restraint, within the terms of the policy, because the master submits without opposition and without the presence of either actual or threatened force. I cannot doubt that the declaration of war on Aug. 4, 1914, and the proclamation "relating to trading with the enemy" on Aug. 5, 1914, are in the ordinary sense acts of the
D executive, or, in the words of the rule, executive acts. The declaration of war by the Sovereign has equal force to an Act of Parliament prohibiting intercourse with the enemy except with the King's licence: *Esposito v. Bowden* (5), 7 E. & B. at p. 781. The proclamation of Aug. 5 stands on the same footing and has the same authority.

It follows that all the conditions necessary to establish a restraint of kings,
E princes, &c., are operative in the present case, but the question has still to be determined whether the restraint was the proximate or immediate cause of the frustration of the contemplated adventure, and of the consequent constructive total loss. After the declaration of war, and in accordance with the terms of the subsequent proclamation, all trading of British ships with the enemy was interdicted, and it became illegal to prosecute the voyage to Hamburg unless with
F the permission of the Sovereign. When, therefore, the French cruiser signalled the *St. Andrew* to go to Falmouth, the master could not have proceeded to Hamburg without rendering himself liable to all the consequent penalties. On receiving the signal the master submitted to the restraint which the conditions had imposed upon him, and took his vessel to a home port. He did not deviate from his course in order to avoid a future peril to which he might become liable, but because the
G peril was actually present and operative at the time when he turned his vessel from Hamburg to the home port. I agree in the reasoning and conclusion of BAILLACHE, J. ([1915] 2 K.B. at p. 789):

"when once it is admitted that force is not necessary to constitute restraint of
H princes it is clear that, when a shipowner keeps his vessel at home or directs her to a home port in obedience to such a declaration, he is not taking steps to avoid that particular peril, but is submitting to its operation, and that in such a case restraint of princes is a proximate cause of loss."

I have not overlooked *Hadkinson v. Robinson* (7), and similar cases, but they appear to me to have no application. There is a clear distinction between a deviation to avoid a peril and a deviation due to its presence and immediate
I operation. In my opinion, the decision on appeal is right, and the appeal should be dismissed with costs.

LORD WRENBURY.—There arise here two questions for decision. The first is whether His Majesty's declaration of war against Germany operated as a restraint falling within the words in the policy "restraints of all kings, princes, and people." The second is whether the consequent detention for an indefinite time of the goods insured amounted to a constructive total loss. The two questions are wholly distinct, and each is, no doubt, of great importance.

On Aug. 4, 1914, His Majesty declared war against Germany. The insured goods were then at sea on voyages, the one from the River Plate and the other from Rosario, to be delivered at Hamburg. The one vessel, being off the Lizard, was signalled by a French cruiser to put into Falmouth, and obeyed. The other vessel, on calling at St. Vincent, was directed by her owner, at the suggestion of the Admiralty, to go to Glasgow, and did so. The order in each case was due to the existence of a state of war. The owners gave notice of abandonment. Was there "restraint of kings, princes, and people" within the meaning of the policy? In my opinion, there was. A declaration of war by the Sovereign is a political or executive act, done by virtue of his prerogative, which creates a state of war. A state of war is a lawful state, and is one in which every subject of His Majesty becomes an enemy of the nation against which war is declared. The declaration of war amounts to an order to every subject of the Crown to conduct himself in such way as he is bound to conduct himself in a state of war. It is an order to every militant subject to fight as he shall be directed, and an order to every civilian subject to cease to trade with the enemy. There is

"a general rule in the maritime jurisprudence of this country by which all subjects trading with the public enemy, unless with the permission of the Sovereign, is interdicted."

(*The Hoop* (10), 1 Ch. Rob. at p. 198).

"A declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and such intercourse, except with the licence of the Crown, is illegal."

(*Esposito v. Bowden* (5), 7 E. & B. at p. 779).

We have heard considerable argument to the effect that war is not unilateral—which, no doubt, is true—that you must have at least two nations engaged in hostilities, and so on. All this, to my mind, is beside the mark. Immediately the Royal prerogative is exercised and war is declared against another nation every subject of His Majesty is bound to regard every subject of that nation as an enemy, and the consequences ensue which I have mentioned. If I ask myself what stopped the voyage to Hamburg? What made the adventure illegal? What destroyed the venture? The answer is—the declaration of war. That executive act ipso facto made the venture illegal. If the master had continued his voyage in defiance of the law the ship and goods could have been confiscated, and the master himself prosecuted and sent to prison. It is argued that the illegality, and not the declaration of war, was the *causa proxima* of the destruction of the adventure. This is not so. The common law was not a new actor which came into action when war was declared. The law was always one and the same, namely, that in one state of circumstances (namely, peace) the adventure was, and in another state of circumstances (namely, war) the adventure was not, legal. *Hadkinson v. Robinson* (7) and *Kacianoff v. China Traders Insurance Co., Ltd.* (11) are not in point. The adventure there remained legal. All that happened was that, in pursuit of a lawful adventure, the master did not go into a position of peril. He never was restrained. His own country did not restrain him, and he took care not to put himself in danger of being restrained by another country. Illegality according to the law of another country does not affect the merchant. In the present case the adventure was illegal according to the law of the country of the owner of the goods. And it was the declaration of war that made it illegal. It is not necessary that force should be employed, or even that force should be immediately available for employment. Every State ultimately enforces obedience to its laws by force. Restraint is equally imposed when obedience is given by reason of the existence of force in reserve as when it is given by reason of force employed. Neither is it necessary that there should be any specific action upon the goods themselves. The master was restrained, and the adventure was

A restrained by the fact that illegality supervened as the immediate result of the declaration of war. In my opinion, there was in this case restraint falling within the words "restraint of kings, princes, and people."

B Upon the second question the matter stands thus. Before the Marine Insurance Act, 1906, authority is uniform that where goods are insured at or from one port to another port the insurance is not confined to an indemnity to be paid in case the goods are injured or destroyed, but extends to an indemnity to be paid in case the goods do not reach their destination. This may be variously described as an insurance of the venture, or an insurance of the voyage, or an insurance of the market, as distinguished from an insurance of the goods simply and solely. Goods delivered at the port of destination may be of value very different from their value at the port of loading. The underwriter's obligation is to pay money in the event of the goods failing to arrive at their destination uninjured by any of the perils insured against. BRAMWELL, B., in *Rodoconachi v. Elliott* says (L.R. 9 C.P. at p. 522):

"It is well established that there may be a loss of the goods by a loss of the voyage in which the goods are being transported if it amounts, in the words of LORD ELLENBOROUGH, 'to a destruction of the contemplated adventure'."

D The insurance is on the venture, and the loss of the venture is a constructive total loss of the goods. I cannot find that the Act of 1906 has in any way altered this. On the contrary, it seems to me to have preserved it. The Act is expressed by its title to be an Act to codify the law relating to marine insurance. Attention has been called to certain particulars in which nevertheless the Act alters the law. That is true. But it remains that the Act is a codifying Act. That being so, I should look more carefully in a codifying Act to see whether any existing law is altered by express words, and should not hold that the Act is going beyond codification unless it puts the matter beyond dispute. I can find nothing which upon this matter has any such effect. On the contrary, ss. 5, 26, 60, and 91 seems to me plain the other way. Section 5 (2) contemplates that an assured "may benefit by the safety or due arrival of insurable property." Section 26 (1), which relates to subject-matter, enacts that the subject-matter insured must be designated with reasonable certainty. "Designated" must here plainly mean described or identified. Sub-section (4) then enacts: "In the application of this section regard shall be had to any usage regulating the designation of the subject-matter insured." By usage regulating the designation must be meant a customary nomenclature of identification. Such, for instance, as that in the trade of a livery-stable keeper the word "carriage" by usage means "carriage and horses." If, then, in marine insurance, a policy on goods means by usage a policy on the safe arrival of goods, that meaning is by s. 26 preserved. Section 60 is as to constructive total loss, and sub-s. (2) (iii) provides that in the case of damage to goods there is a constructive total loss when the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival. Lastly, s. 91 (2) enacts that the rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of the Act, shall continue to apply to contracts of marine insurance. These provisions seem to me ample to support the conclusion at which I have arrived, that the Act of 1906 has not altered but has preserved the law upon this point as it stood before 1906, and that law was that under a policy on goods at and from a port to a port, the venture and not the goods merely was the subject-matter insured. For the foregoing reasons the decision under appeal is, in my judgment, right on both points. It follows that this appeal should, in my opinion, be dismissed with costs.

Appeal dismissed.

Solicitors: *Waltons & Co.; Pritchard & Sons, for Andrew M. Jackson & Co., Hull.*

[Reported by W. E. REID, Esq., Barrister-at-Law.]

BECKER, GRAY & CO. v. LONDON ASSURANCE CORPORATION

[HOUSE OF LORDS (Earl Loreburn, Lord Dunedin, Lord Atkinson, Lord Sumner and Lord Wrenbury), March 19, 20, 22, 23, 26, July 12, October 29, 1917]

[Reported [1918] A.C. 101; 87 L.J.K.B. 69; 117 L.T. 609; 34 T.L.R. 36; 62 Sol. Jo. 35; 14 Asp. M.L.C. 156; 23 Com. Cas. 205]

Insurance—Marine insurance—Cargo—Right of assured to recover under policy—Insurance against war risks—Abandonment of voyage to avoid not actual peril but only possibility of capture—Proximate cause of loss—Strict construction.

On a claim for the constructive total loss of goods insured under a marine policy containing a war risks clause in the usual form insuring against "men of war, enemies and surprisals, takings at sea, arrests, restraints, and detentions of all kings, princes and people" the question to be asked in accordance with the rule of English law is: Was the frustration of the adventure due to a peril insured against or to something done to avoid such a peril?, the assured being entitled to succeed only if the answer to the first alternative is in the affirmative and the onus of proving that the loss was due to an actual peril being on the assured.

By a policy of marine insurance dated June 28, 1914, the assured, English merchants, insured cargo on a voyage from Calcutta to Hamburg in the German steamship, the *K.*, against perils which included those covered by a war risks clause in the terms stated above. The *K.* left Calcutta in July. On Aug. 4 war was declared between Great Britain and Germany. On Aug. 5 or 6 the master of the *K.* put into Messina, later moving to Syracuse where the vessel remained from Sept. 4 onwards. The master put into Messina because he knew that British and French warships were likely to be in the Mediterranean and felt that if he proceeded on his voyage the ship, being a German vessel, would be in danger of being captured. On Sept. 1 and Dec. 16 the assured gave the insurers notice of abandonment, which the insurers refused to accept, and on Dec. 17 they issued a writ claiming for a constructive total loss of the cargo insured.

Held: the assured having failed to discharge the burden which was on them of proving that the master put into Messina because of the existence and under the stress of a present and actual peril, he appearing voluntarily to have taken the action he did merely to avoid a peril, their claim failed.

Observations of LORD SUMNER regarding the strict construction applied in English law to causation in policies of marine insurance.

British and Foreign Marine Insurance Co., Ltd. v. Samuel Sanday & Co. (1), ante p. 134, distinguished.

Decision of Court of Appeal, [1916] 2 K.B. 156, affirmed.

Notes. Considered: *Rickards v. Forestal Land Timber and Railways Co.*, [1941] 3 All E.R. 62. Referred to: *British and Foreign Steamship Co. v. R.*, [1918-19] All E.R. Rep. 676; *Russian Bank for Foreign Trade v. Excess Insurance Co.* (1918), 87 L.J.K.B. 872; *British Steamship Co., Ltd. v. R.*, *Green v. British India Steam Navigation Co., Ltd.*, *British India Steam Navigation Co., Ltd. v. Liverpool and London War Risks Insurance Association, Ltd.*, [1920] All E.R. Rep. 296; *Harrisons v. Shipping Controller*, [1921] 1 K.B. 122; *Forestal Land, Timber and Railways Co. v. Rickards*, *Middows, Ltd. v. Robertson*, *Howard Bros. & Co. v. Kahn* [1940] 4 All E.R. 96; *Canada Rice Mills, Ltd. v. Union Marine and General Insurance Co.*, [1940] 4 All E.R. 169; *Czarnikow, Ltd. v. Java Sea and Fire Insurance Co.*, *Leslie and Anderson, Ltd. v. Java Sea and Fire Insurance Co.*, [1941] 3 All E.R. 256; *Atlantic Maritime Co. Inc. v. Gibbon*, [1953] 1 All E.R.

- A 893; *W. Young & Son (Wholesale Fish Merchants) v. British Transport Commission*, [1955] 2 All E.R. 98.

As to insurance against war risks see 22 HALSBURY'S LAWS (3rd Edn.) 76 et seq., and for cases see 29 DIGEST 216-219, 226-230. For Marine Insurance Act, 1906, see 13 HALSBURY'S STATUTES (2nd Edn.) 14.

B Cases referred to :

- (1) *Sanday & Co. v. British and Foreign Marine Insurance Co.*, [1915] 2 K.B. 781; 84 L.J.K.B. 1625; 113 L.T. 407; 31 T.L.R. 194, 374; 59 Sol. Jo. 456; 13 Asp. M.L.C. 116; 20 Com. Cas. 305, C.A. affirmed sub nom. *British and Foreign Marine Insurance Co., Ltd. v. Samuel Sanday & Co.*, ante p. 134; [1916] 1 A.C. 650; 85 L.J.K.B. 550; 114 L.T. 521; 32 T.L.R. 266; 60 Sol. Jo. 253; 13 Asp. M.L.C. 289; 21 Com. Cas. 154, H.L.; 29 Digest 276, 2236.

- (2) *Butler v. Wildman* (1820), 3 B. & Ald. 398; 106 E.R. 708; 29 Digest 224, 1817.

- (3) *Hadkinson v. Robinson* (1803), 3 Bos. & P. 388; 127 E.R. 212; 29 Digest 208, 1671.

- (4) *Kacianoff v. Ching Traders Insurance Co., Ltd.*, [1914] 3 K.B. 1121; 83 L.J.K.B. 1393; 111 L.T. 404; 12 Asp. M.L.C. 524; 19 Com. Cas. 371, C.A.; 29 Digest 216, 1727.

- (5) *Nickels & Co. v. London and Provincial Marine and General Insurance Co.* (1900), 70 L.J.Q.B. 29; 17 T.L.R. 54; 6 Com. Cas. 15; 29 Digest 208, 1676.

- (6) *Miller v. Law Accident Insurance Co.*, [1903] 1 K.B. 712; 72 L.J.K.B. 428; 88 L.T. 370; 51 W.R. 420; 19 T.L.R. 331; 47 Sol. Jo. 382; 9 Asp. M.L.C. 386; 8 Com. Cas. 161, C.A.; 29 Digest 219, 1748.

- (7) *De Vaux v. Salvador* (1836), 4 Ad. & El. 420; 1 Har. & W. 751; 6 Nev. & M.K.B. 713; 5 L.J.K.B. 134; 111 E.R. 845; 29 Digest 212, 1695.

- (8) *Reischer v. Borwick*, [1894] 2 Q.B. 548; 63 L.J.Q.B. 753; 71 L.T. 238; 10 T.L.R. 568; 7 Asp. M.L.C. 493; 9 R. 558, C.A.; 29 Digest 206, 1650.

- (9) *Leyland Shipping Co., Ltd. v. Norwich Union Fire Insurance Society, Ltd.*, [1917] 1 K.B. 873; 86 L.J.K.B. 905; 116 L.T. 327; 33 T.L.R. 228; 14 Asp. M.L.C. 4, C.A.; affirmed [1918-19] All E.R. Rep. 443; [1918] A.C. 350; 87 L.J.K.B. 395; 118 L.T. 120; 34 T.L.R. 221; 62 Sol. Jo. 307; 14 Asp. M.L.C. 258, H.L.; 29 Digest 229, 1858.

- (10) *Grill v. General Iron Screw Collier Co.* (1866), L.R. 1 C.P. 600; Har. & Ruth. 654; 35 L.J.C.P. 321; 14 L.T. 711; 12 Jur. N.S. 727; 14 W.R. 893; 2 Mar. L.C. 362; on appeal (1868), L.R. 3 C.P. 476; 37 L.J.C.P. 205; 18 L.T. 485; 16 W.R. 796, Ex.Ch.; 41 Digest 771, 6260.

- (11) *Hamilton, Fraser & Co. v. Pandorf & Co.* (1887), 12 App. Cas. 518; 57 L.J.Q.B. 24; 57 L.T. 726; 52 J.P. 196; 36 W.R. 369; 3 T.L.R. 768; 6 Asp. M.L.C. 212, H.L.; 29 Digest 203, 1624.

- (12) *Gordon v. Rimmington* (1807), 1 Camp. 123, N.P.; 29 Digest 215, 1717.

- (13) *Walker v. Maintland* (1821), 5 B. & Ald. 171; 106 E.R. 1155; 29 Digest 206, 1654.

- (14) *Cory v. Burr* (1883), 8 App. Cas. 393; 52 L.J.Q.B. 657; 49 L.T. 78; 31 W.R. 894; 5 Asp. M.L.C. 109, H.L.; 29 Digest 217, 1736.

- (15) *Nobel's Explosives Co. v. Jenkins & Co.*, [1896] 2 Q.B. 326; 65 L.J.Q.B. 638; 75 L.T. 163; 12 T.L.R. 522; 8 Asp. M.L.C. 181; 1 Com. Cas. 436; 41 Digest 521, 3501.

- (16) *Rodoconachi v. Elliott* (1874), L.R. 9 C.P. 518; 43 L.J.C.P. 255; 31 L.T. 239; 2 Asp. M.L.C. 399, Ex.Ch.; 29 Digest 218, 1747.

- (17) *Jones v. Schmoll* (1785), 1 Term Rep. 130, n.; 99 E.R. 1012, N.P.; 29 Digest 199, 1588.

- (18) *The Knight of St. Michael*, [1898] P. 30; 67 L.J.P. 19; 78 L.T. 90; 46 W.R. 396; 14 T.L.R. 191; 8 Asp. M.L.C. 360; 3 Com. Cas. 62; 29 Digest 215, 1718.

Also referred to in argument :

Esposito v. Bowden (1857), 7 E. & B. 763; 8 State Tr. N.S. 807; 27 L.J.Q.B. 17; 29 L.T.O.S. 295; 3 Jur. N.S. 1209; 5 W.R. 732; 119 E.R. 1430, Ex. Ch.; 12 Digest (Repl.) 440, 3352.

Arnhold Karberg & Co. v. Blythe, Green, Jourdain & Co., [1916] 1 K.B. 495; 85 L.J.K.B. 665; 114 L.T. 152; 32 T.L.R. 186; 60 Sol. Jo. 156; 13 Asp. M.L.C. 235; 21 Com. Cas. 174, C.A.; 12 Digest (Repl.) 446, 3376.

Smith v. Universal Insurance Co. (1821), 6 Wheat. 176.

Lubbock v. Rowcraft (1803), 5 Esp. 50, N.P.; 29 Digest 208, 1670.

Roux v. Salvador (1836), 3 Bing. N.C. 266; 2 Hodg. 209; 4 Scott, 1; 7 L.J.Ex. 328; 132 E.R. 413, Ex.Ch.; 29 Digest 263, 2129.

Appeal by the plaintiffs from an order of the Court of Appeal, reported [1916] 2 K.B. 156, affirming a judgment of BAILHACHE, J., [1915] 3 K.B. 410, in an action in the Commercial List tried by him without a jury.

The following statement of the facts is taken from the judgment of BAILHACHE, J. This is an action against underwriters on goods, the goods being a part cargo of jute under a policy which is dated June 28, 1914, and on a voyage from Calcutta to Hamburg in a German steamer, the *Kattenturm*. The part of the cargo with which I am concerned, was sold on June 11, 1914, to a German firm, but it is conceded that on the material dates the property in the goods remained in the plaintiffs, the sellers. The *Kattenturm* left Calcutta in July. Finding that war had broken out, the master, on Aug. 5 or 6, put into the Italian port of Messina, and afterwards shifted from Messina to Syracuse, and was in Syracuse from Sept. 4 onwards. The shifting from Messina to Syracuse is of no importance so far as the point which I have to decide in this case is concerned. When the ship put into Messina, and afterwards again while she was at Syracuse, the plaintiffs gave notice of abandonment. They gave their first notice on Sept. 1 and they gave the second notice on Dec. 16 and they issued their writ on Dec. 17. The underwriters declined to accept either notice of abandonment, but in both cases stated that they would treat the matter as though a writ had been issued. I have to consider, therefore, what the state of affairs between these parties was at the beginning of September, 1914. The master of the *Kattenturm* had put into Messina because he thought that was a prudent thing to do. His was a German ship; the French and English fleets were watching the seas, and he felt, and quite rightly felt, that if he had proceeded on his voyage the ship was in grievous danger of capture. A letter has been put in, and is to be treated by me as evidence in this case, from the Admiralty, in which the writer says :

"I am commanded to inform you that any German steamer proceeding on or after Aug. 5 last through the Mediterranean on a voyage to Hamburg would, in their Lordships' opinion, have been in peril of capture by British or allied warships when outside neutral territorial waters."

I have no doubt that the master, from his point of view, did a very prudent, the most prudent, thing that he could do when he put into Messina. The plaintiffs made many attempts to get possession of the portion of the cargo which belonged to them. The master was willing to give it up, but only on certain terms, the most material of which was that he demanded the payment of his freight in full. In the result, and after many efforts and threats of legal proceedings, the master was induced to give the cargo up, and the cargo was ultimately sold by the plaintiffs to an Italian buyer, for a sum of a little over £1,000. I am not concerned with that matter very much, because the question which I have to determine is not what happened to the cargo afterwards, but what was the position of affairs in

A September; and, moreover, it was agreed, and quite rightly agreed, between the cargo owners and underwriters that the efforts which the cargo owners made to secure possession of the cargo and to realise it for the best price that they could obtain for it should not in any way prejudice their rights if they had any under the notice of abandonment which they had long before that given. It is, of course, abundantly clear that the voyage from Messina to Hamburg could not in fact be continued. A letter has been read to me in which the agents of the Hansa Line, the owners of the steamer, say that the master had not given up all thoughts of prosecuting the voyage, but I have no doubt myself that the master had no thought of prosecuting the voyage at all until the termination of the war. When the termination of the war will be nobody knows, and at any rate it is certain to be so long and indefinite a period that the voyage was taken to be abandoned, and was no doubt for all practical purposes abandoned, when the master put into Messina.

C Having stated the facts BAILHACHE, J., continued: the policy contained the usual restraints of rulers and princes clause, and counsel for the plaintiffs has argued that the loss of the venture—not the loss of the goods, because the goods were not themselves lost; they were sold for a considerable sum of money, but the loss on the venture—which, as the law now stands, constitutes a constructive total loss of the goods, is due to one of the risks insured against; and he refers more particularly to the words “men-of-war.” He refers, of course, to the whole of the clause, but the words which he most particularly relies on are the words “men-of-war.” The plaintiffs put their case in two alternative ways. They say in addition that after the vessel put into Messina to have allowed this cargo to go on would have been trading with the enemy contrary to English law and contrary to the proclamations which were in force at the time; and then they say that the goods were further lost because they were in possession and the control of alien enemies, namely, the master and owners of the *Kattenturm*, and that the alien enemies declined to give the goods up. So far as the last alternative is concerned, it is sufficient to say that that was not pressed; it was not withdrawn, but so far as I can see there is nothing at all in that point. As to the trading with the enemy point, I do not think that arises because, if there was any loss at all, it must be put that there was a loss of the venture, and a complete loss and destruction of the venture, when the *Kattenturm* put into Messina. I find as a fact that the master, notwithstanding his owners’ letters or his agent’s letters, had no intention of prosecuting the voyage further than Messina within a time which would have been commercially practicable at all, and that the voyage was there and then abandoned. The loss of goods, so far as they were lost, was due to the fact that the voyage was abandoned at Messina, and that there was a destruction of the commercial adventure there. I do not think, therefore, that the second alternative on which the plaintiffs relied, but not strongly, is a matter which I need seriously consider. What I have seriously to consider is whether the goods were lost within any of the words of the restraints of princes clause in the policy, and in particular whether they were lost owing to men-of-war. The position was that, if the master had prosecuted the voyage he would have been in serious danger of capture; it is quite likely, and I anticipate, that if he had in fact prosecuted the voyage and gone much further he would have been captured by either the French or the British fleet. He put into Messina because he was afraid of that event happening. Does that bring him within the words of the policy? Whether the avoidance of a peril, or an attempt to avoid a peril, is in substance the same thing as a loss by the peril depends very much on what the nature of the peril is, and it seems to me quite clear upon the cases that an attempt to avoid capture is not the same as a loss by capture. I do not think it is absolutely necessary that there should be a de facto capture; I think that appears from *Butler v. Wildman* (2), the case of the Spanish dollars. On the other hand, it is quite clear that the avoidance of a peril under most circumstances is not the same as loss by the peril itself. That appears from a number of cases—*Hadkinson v. Robinson* (3) and *Kacianoff v. China Traders*

Insurance Co., Ltd. (4), and also from an intermediate case between those two, *Nickels & Co. v. London and Provincial Marine and General Insurance Co.* (5), a decision of MATHEW, J. A

That being the state of the authorities, and bearing in mind that actual capture or actual seizure by men-of-war is not necessary, and that the peril must have begun to operate, to use the expression in the *Kacianoff Case* (4), and, to use another expression which is in *Hadkinson v. Robinson* (3), that the peril must be operating directly and not circuitously, what one has to consider is: What is the true view to be taken upon the facts in this case? It is quite obvious to me that is a question of degree, and, that being so, the dividing line between one case and another must often be very thin and very subtle. It appears from the *Kacianoff Case* (4) that, if the *Kattenburm* had been chased into Messina, the peril of capture would have begun to operate, and I think in that case it might be said that the abandonment of the voyage, the constructive total loss of the goods by the destruction of the venture, was caused by a peril within the policy. If one looks at *Butler v. Wildman* (2) precisely the same thing happened there, only in an accentuated degree. Not only was the ship chased by a hostile man-of-war, but the chase was so hot that the master of the ship preferred to throw the valuable cargo that he had, the Spanish dollars, into the sea rather than that they should fall into the hands of the enemy. Therefore, the dollars were not actually captured by the enemy, but there was clearly a loss by capture and the courts so held. In this case there was no chasing by a hostile man-of-war at all. There was no sighting of a hostile man-of-war. The *Kattenburm* was not driven by either the chasing or the sighting or the intelligence of a particular man-of-war into Messina. The master went into Messina because he feared, and rightly feared, that if he prosecuted his voyage the ship would be captured. The truth of the matter is that he went into Messina to avoid the peril of capture. To use the words upon which counsel most relied, he went into Messina to avoid the peril from "men-of-war" which he would have incurred if he had proceeded upon his voyage. B C D E

Those being the consideration on one side or the other, which was it? Had the peril of capture, the peril of "men-of-war," begun to operate, or was this a case where the master had in time gone into a port to avoid the commencement of the operation of that peril? Obviously, that is a point about which different people will have different views. My own view, and I entertain quite a clear view, is that the master went into Messina to avoid the peril of men-of-war and to avoid the peril of capture. He went in in time to avoid the beginning of the peril of capture. The peril of "men-of-war," to use the words of the lords justices in the *Kaciano Case* (4), had not begun to operate, and the master very prudently went into Messina. It may very well be that the plaintiffs would have desired to insure themselves against that very event. Except that they got considerable salvage, the goods were lost to them, equally lost as they would have been if the ship had been captured. I am reminded that the goods were English goods, and that, if the ship had been captured by a British or French ship, there would have been no loss of the goods, but in the ordinary case except for salvage the goods would be just as much lost where a ship puts into port to avoid the commencement of the peril as if they are lost by the peril itself. I have to construe the words in this policy and say whether the risks which are mentioned in the policy were risks which in fact caused the loss. In view of the decisions in the cases I have mentioned I am unable to say that the goods were lost—that the venture was destroyed, by any risk insured against. There was a case of very considerable importance which came before me and afterwards before the Court of Appeal. The name of it is *Sanday & Co. v. British and Foreign Marine Insurance Co.* (1). There was a division of opinion in the Court of Appeal, but my judgment was affirmed by a majority. [The decision of the Court of Appeal was affirmed by the House of Lords: ante p. 134.] I discussed this very point in that case, and, although I am reluctant to refer to any decision of my own, yet it does express the view that I F G H I

A entertained at that time, and the view which I still entertain, of the law applicable to this case. I say ([1915] 2 K.B. at p. 788):

B "One last point remains: Was the restraint of princes the proximate cause of the loss? The defendants say no, and refer me to a line of cases of which *Hadkinson v. Robinson* (3) is an early example, and *Kacianoff v. China Traders Insurance Co., Ltd.* (4) is, I think, the latest. The plaintiffs, on the other hand, refer me to *Miller v. Law Accident Insurance Co.* (6). It is, I think, correct to say that the *Hadkinson v. Robinson* (3) line of cases proceeds upon the principle that a loss which arises from steps taken to avoid a peril cannot be said to be due to the peril so avoided. In deciding within which set of authorities a given case falls it must always be borne in mind that much depends upon the character and description of the particular peril which has to be alleged and relied upon as the cause of the loss."

C Notwithstanding that it is my own expression of the law, I think that is sound, and being of the same opinion, and applying the same test to the facts of this case, I have come to the conclusion that this case is not like, but is the opposite of, *Sanday's Case* (1), and that these goods were not lost by a peril insured against.

D The result must be that my judgment is for the defendants with costs. The plaintiffs appealed to the Court of Appeal who affirmed the decision of BAILHACHE, J., and the plaintiffs now appealed to the House of Lords.

Sir John Simon, K.C., and R. A. Wright for the appellants.

Leslie Scott, K.C., Adair Roche, K.C., and T. Mathew for the respondents.

The House took time for consideration.

E Oct. 29, 1917. The following opinions were read.

F **EARL LOREBURN.**—I agree with the order appealed from, because it seems to me that both parties have accepted as sufficient the Admiralty statement that a German steamer would have been "in peril of capture" if she proceeded on or after Aug. 5 on a voyage to Hamburg. They have left that evidence there without more. It is therefore the measure of the danger which the ship would have to run in proceeding on this voyage. That will not be enough for the plaintiffs' case. I should have thought that capture would have been a certainty, but I have no right to act upon my own beliefs or conjectures upon a question of fact when there is evidence on which the parties rely. And there may be very good reasons of which I am unaware for being content with the Admiralty view.

G **LORD DUNEDIN.**—I think that the facts of the case, and the law applicable thereto, were so clearly and accurately stated by BAILHACHE, J., the trial judge, that in truth there is little left to add. His judgment was confirmed unanimously by the learned judges of the Court of Appeal.

H If there were no decisions on the point, and the expression "men-of-war, enemies, and restraints of princes," as used in a policy of insurance, had to be considered for the first time, it might not be difficult to say that the adventure in this case was frustrated by the outbreak of war, and, that being so, to hold that it fell within the words as above. This, indeed, is the result at which the jurists of the continent and of America have arrived. Thus PHILLIPS ON INSURANCE (5th Edn.), vol. 1, c. 13, s. 10, para. 1115, after stating the question "whether a loss consequent upon imminency of a capture, arrest, restraint, or detention is within the risk assured by insurance against such perils," cites EMERIGON and other foreign jurists, and pronounces the correct rule to be as follows:

I "When after the risk has begun the voyage is inevitably defeated by blockade or interdiction at the port of departure or destination or by a hostile fleet being in the way, rendering the proceeding upon it utterly impracticable, or capture or seizure so extremely probable that proceeding would be inexcusable, the risk continues till the vessel has arrived at another port of discharge

adopted instead of that originally intended; and also that an assured on the cargo has a right to abandon."

The English authorities have not adopted this rule. They have followed the view of LORD ALVANLEY expressed in *Hadkinson v. Robinson* (3) in 1803. The current of authority is unbroken, and *Kacianoff v. China Traders Insurance Co., Ltd.* (4) may be taken as a modern example. We are asked to construe an expression in a mercantile document of ancient origin, interpreted by decisions that have stood for more than a century. In such a case the only safe rule for a court is stare decisis. I do not cite the cases because that has been done in the courts below. In accordance with the English rule the question to be asked is: Was the frustration of the adventure due to a peril, or to something done in order to avoid a peril? The onus to show that the loss was due to a peril is on the appellants. How do they seek to show it? What they really urge may be reduced to two things. First, the fact of the master putting into Messina instead of going on. Second, the statement by the Admiralty that, in their opinion, a German vessel proceeding on or after Aug. 5, 1914, through the Mediterranean on a voyage to Hamburg would have been in peril of capture by the allied fleets. The first fact is equally consistent with conduct to avoid a peril as with the existence of a present and actual peril, and the second is far short of proof of actual peril to the ship. The Admiralty statement is entirely vague—indeed, it could not be otherwise—as to when the peril would begin or become imminent. I am of opinion, therefore, that the appellants fail to discharge the burden upon them, and that is enough, though if I had to decide positively I should decide as BAILLACHE, J., did, that the captain went into Messina to avoid a peril and not under the stress of an actual peril.

There remains the argument founded on the decision of this House in *Sanday's Case* (1). The direct application of that case fails for the simple reason that this was a German ship, and that there was no illegality in the master continuing the voyage if he thought fit. He did not think fit, and his action it was that terminated the adventure. *Sanday's Case* (1) was not intended to decide and did not decide that by the mere declaration of war all goods in transitu to a German port or town were constructively totally lost. It was urged that in this case in terms of the policy the risk continued till the goods were delivered to the consignee, and as the consignee could not get delivery without paying freight to the German captain—which would be trading with the enemy—that constituted a loss of the adventure of the same character as in *Sanday's Case* (1). The answer lies in the facts. It was not the impossibility of paying freight, but the conduct of the captain that actually put an end to the adventure. The same doctrine of causa proxima which decides the first point decides this also. I think the appeal should be dismissed.

LORD ATKINSON.—I agree.

LORD SUMNER.—The *Kattenburn* left Malta, westward bound, on Aug. 3, 1914. The next that is known of her is that the captain took her into Messina on the 6th, saying that he did so to avoid capture. Between the 3rd and the 6th he had found out that Germany was at war. How or when he learned this; why he chose Messina as his port of refuge; whether he so much as saw a hostile vessel or was seen by one, we do not know. To sail direct from Malta to Messina need not have taken three days. No doubt, after proceeding some substantial distance on his course, he turned back, but anything beyond that is guesswork. He may have counted on a short war and expected to go on again soon, but I think he abandoned the voyage to Hamburg when he bore up for Messina. No point, however, has been made that, with the abandonment of the voyage, the voyage policy also determined, so as to discharge underwriters from a loss only caused thereafter, and I will not pursue the subject. There is evidence of the existence of peril of capture

A from Aug. 5 onwards, but it is carefully limited. The Admiralty's reply to an inquiry made on the plaintiffs' behalf, which is not before us, has been accepted as admissible evidence. It states that "any German steamer proceeding on or after Aug. 5 through the Mediterranean on a voyage to Hamburg would have been in peril of capture . . . when outside neutral territorial waters." That is all. We know nothing of the actual numbers of the possible captors or of their particular positions; we do not know if the presence of the *Kattenturm* was known to any of them. Memory may tell us that some of them at any rate had other things to think of just then, but I suppose we must act as if we knew nothing about it. I lay no stress on the words "on a voyage to Hamburg," although during some part or possibly the whole of Aug. 5 the *Kattenturm* was on a voyage to Messina, and was no longer on a voyage to Hamburg. That she would have been "in peril of capture" conveys by implication that she would have had a chance of escape, but here again the plaintiffs give us no information. At any rate, there is no evidence of any peril of capture before Aug. 5. As to the subsequent period, we know nothing of the ship's speed or equipment, or of the state of her bunkers. I have no doubt that the opinion of the Admiralty was sound, and I should have been a good deal surprised (and, may I say? disappointed) if she had gone on her way and had escaped capture, but when or where that fate would have overtaken her no one can tell. Certainly, no one who realises the vast size of the ocean and its multitudinous vicissitudes can doubt that she might well have evaded capture for many days, and for all that we know she might have been lost by fire or stranding or some cause unconnected with hostilities before ever any enemy hove in sight.

E In these circumstances the plaintiffs' argument was rested mainly on (i) loss by capture or some consequence of hostilities or (ii) alternatively, by restraints of princes. The sequence of events under the first head was as follows. Peril of capture outside neutral territorial waters led the captain to the reasonable conclusion that having got safely into Messina he had better stay there. This involved the frustration of the commercial adventure of carrying the cargo to Hamburg and there delivering it under the bills of lading, whereby, in law, the cargo became a loss. F On the second head, the point was that from the outbreak of war the plaintiffs were by English law restrained from trading with the enemy or doing any acts in furtherance of such trading. Hence as they could not, *durante bello*, lawfully pay freight against delivery of the goods in Hamburg, their adventure came to a sudden and untimely end on the outbreak of war, and their cargo was forthwith constructively a loss. In neither case does the argument avail, if the loss was one G "which is not proximately caused by a peril insured against": Marine Insurance Act, 1906, s. 55 (1).

H If there is any real distinction to be drawn between a loss by perils insured against and a loss by successfully avoiding them, between a loss by capture and a loss by the fear of it, one might think that it arises in this case. It was self-restraint, not restraint of princes, that hindered the captain from putting to sea. I do not say that he ought to have done otherwise, but the plain fact is that he could do as he liked. On both contentions, if the captain had chosen to go on, the plaintiffs could not have prevented him. He might have picked his own time; he might have weighed his chances at leisure; reasonable delay would not amount to abandonment of the voyage. Even an early peace was not wholly beyond the bounds of possibility. Accordingly, the plaintiffs further argued that the captain's election was not the proximate cause of the loss, because to have done otherwise would have been mere folly; that he had no real choice at all; and that British subjects, when the law forbade to trade with the enemy in futuro by paying freight to this German ship in Hamburg, if ever she arrived, were in law restrained in praesenti, so that a loss of their cargo proximately resulted. The possibility that in the meantime events might occur which might legalise the act and avert a loss, such as the conclusion of peace or the grant of the Royal licence to pay the freight in order to get the goods, was, they said, of no significance.

These contentions have involved some criticisms of the rule of proximate cause, or rather of its true application in insurance cases, which, I venture to think, proceeded from a misapprehension of what this rule really is. There is no mystery about it. Cause and effect are the same for underwriters as for other people. Proximate cause is not a device to avoid the trouble of discovering the real cause or the "common sense cause," and, though it has been and always should be rigorously applied in insurance cases, it helps the one side no oftener than it helps the other. I believe it to be nothing more nor less than the real meaning of the parties to a contract of insurance. I venture to say so because eminent judges have sometimes seemed to differ on the point. LORD DENMAN, speaking of this rule in *De Vaux v. Salvador* (7), says (4 Ad. & El. at p. 431): "Such must be understood to be the mutual intention of the parties to such contracts." In *Reischer v. Borwick* (8) ([1894] 2 Q.B. at p. 550) LINDLEY, L.J., says the same thing. In *Leyland Shipping Co., Ltd. v. Norwich Union Fire Insurance Society, Ltd.* (9) ([1917] 1 K.B. at p. 892), on the other hand, SCRUTTON, L.J., doubts this and considers the rule to be a judge-made rule. I daresay few assured have any distinct view of their own on the point, and might not even see it if it were explained to them, but what they intend contractually does not depend on what they understand individually. If it is implicit in the nature of the bargain, then they intend it in law just as much as if they said it in words. I think that it is so implied. Indemnity involves it apart from decisions. In effect it is the act of the parties. I am not aware that any branch of the law of contract attaches importance to remote causes as such, though, where human responsibility is material, it may be necessary to go beyond and behind the mere event which caused the loss or damage. This is why a carrier is liable for losses by perils excepted from his contract to carry and deliver, where the previous default of those for whom he is responsible has brought that peril into injurious operation. His express stipulation for exemption has to be reconciled with his implied undertaking to have the carriage performed with care: *Grill v. General Iron Screw Collier Co.* (10), per WILLES, J. (L.R. 1 C.P. at p. 612); *Hamilton, Fraser & Co. v. Pandorf & Co.* (11), per LORD HALSBURY, L.C. (12 App. Cas. at p. 524). So in marine insurance, where "the loss is attributable to the wilful conduct of the assured": Marine Insurance Act, 1906, s. 55 (2) (a); after the loss by perils insured against has been proved the question still remains whether the assured's wilful conduct caused them to operate. In other cases the insurer "is liable for any loss proximately caused by a peril insured against even though the loss would not have happened but for the misconduct or negligence of the master or crew": s. 55 (1) (a). In a contract of sale or carriage or service the contractor promises to do something for a price, a freight, or a wage, and his liability depends not simply on the question whether something has happened or failed to happen, but whether more remotely it happened or failed to happen owing to his breach of his obligation. In a contract of indemnity (and a contract of suretyship is very analogous) the insurer promises to pay in a certain event and in no other, namely, in case of loss caused in a certain way, and the question is whether the loss was caused in that way, and whether the event occurred, and the remoter causes of this state of things do not become material. If contracts of marine insurance were still regarded, as once they were, as aleatory bargains this would be plain on the face of them. One need only ask, has the event, on which I put my premium, actually occurred? This is a matter of the meaning of the contract, and not, as seems sometimes to be supposed, of doing the liberal and reasonable thing by a reasonable assured. This is why, as it seems to me, the *causa proxima* rule is not merely a rule of statute law, but is the meaning of the contract writ large. This is also why the reasonableness of the conduct of the *Kattenturm's* captain, and the unreasonableness of suggesting that he might have done otherwise are alike off the point. So long as his action was voluntary it was his action and not that of the captain of a British man-of-war, and the policy insures against the second, but against the first only when it amounts

A to barratry. There is no case here of duress nor opportunity for saying that his will was not free, except upon grounds too theological to be worth pursuing.

It must be admitted that the terminology of causation in English law is by no means ideal. It would be the better for a little plain English. I think "direct cause" would be a better expression than *causa proxima*. Logically, the antithesis of proximate cause is not real cause, but remote cause. LORD ELLENBOROUGH uses *causa causans* as its equivalent in *Gordon v. Rimmington* (12). ABBOTT, C.J., speaks of "immediate" cause in *Walker v. Maitland* (13); LORD FITZGERALD of "direct and immediate" cause in *Cory v. Burr* (14) (8 App. Cas. at p. 406), and my noble and learned friend, LORD LOREBURN, of "direct" cause in *Sanday's Case* (1) (ante at p. 134). Many similar expressions might be quoted. Again, it is important that the same word should mean the same thing when used in a mercantile contract, whether that contract be of one description or another. Perils of the seas do not mean one thing in a bill of lading and something else in a policy; restraints of princes do not bear a different interpretation in the one or in the other, but this is not the question. Restraints of princes may excuse non-delivery of cargo under a contract of carriage, and yet not cause a loss of cargo recoverable under a contract of insurance. It is settled now that mere apprehension that a restraint of princes will come into operation is not the same thing as its existence or available for either purpose. There is also authority for saying (*Nobel's Explosives Co. v. Jenkins & Co.* (15)) that if restraint of princes is in being and reasonably likely in the long run to prevent performance of a contract, if its further performance is proceeded with, any further performance is forthwith excused, although the direct operation of the restraint has not yet occurred. This is because the contract of carriage, truly construed, so stipulates. It has no bearing upon the question whether a refusal of further performance, though excusable, is the effect of the carrier's exercise of judgment or the effect of the restraint of princes.

Many cases have been cited to your Lordships, but none to the contrary of this. In *Rodoconachi v. Elliott* (16) (L.R. 9 C.P. at p. 522) the Germans had prevented all communication between Paris and other places from Sept. 19, 1870, down to the date of the writ. Events before Sept. 19, it was held, might give rise to some claim against carriers, but could afford no defence to underwriters, if, as was the case, a loss by restraint of princes then occurred and thenceforward continued. The contention that some direct action on the goods was necessary was rejected. There was no question of election or volition on the part of those in charge of the goods. How this case helps the appellants I cannot see. That in *Rodoconachi's Case* (16) the goods were ashore and here were afloat makes no difference. It is said that regard must be had to changes in the mechanism of war, and that cruisers at Gibraltar as truly shut up this jute in Messina in 1914 as the German besiegers shut in the silk at Bercy in 1870. I do not suppose that any rule can be laid down to fix the distance from which an encircling force may be said to besiege a beleagured city, or from which a hostile force may be said to restrain its enemies. I doubt if changes in the speed of ships or the possibility of signalling by wireless telegraphy or otherwise affect the matter. They help the hunter no more than the quarry. *Miller v. Law Accident Insurance Co.* (6) was a case in which a f.c.s. clause warranted the policy free of certain perils and their consequences. It was held that beyond doubt there was a loss by restraint of princes under the policy apart from the warranty, the only question being whether it was also caused by perils included in the f.c.s. clause, so as to be taken out of the insurance. STIRLING, L.J., expressly says ([1903] 1 K.B. at p. 721) that the captain did not act voluntarily. The frustration of the adventure was caused by the direct operation of an order, which was an act of State and was backed by the existence of available force though its employment proved to be unnecessary.

I will not review the cases generally or discuss the differences between the English and the United States authorities, but I will refer to a decision of LORD MANSFIELD, which shows at how early a date a strict construction was applied to causation in

policies of insurance. It is *Jones v. Schmoll* (17). The policy was on prime slaves, male and female, to pay for mortality by mutiny exceeding ten per cent. A mutiny occurred and was suppressed; much blood was shed. LORD MANSFIELD allowed the value of those slaves who died of wounds or jumped overboard when fired on as being losses by mutiny, but not the value of "such as being baffled in their attempts chose a mode of death by fasting and died through despondency," because "this is not a mortality by mutiny, but the reverse, for it is by failure of mutiny." The cases down to that of *Kacianoff v. China Traders Insurance Co., Ltd.* (4) all follow one uniform and logical line. If any is illogical it is *Butler v. Wildman* (2), for there the dollars went to the bottom, and that by the prompt decision of the master. The adventure of which they formed part was captured, and so they may be said to have been lost to their owners by capture, though the Spanish captors never got them. The immediate and actual control, which the captors possessed by armed force over the whole adventure, was equally a capture of the part, and perhaps it is the best way of putting it to say that the captors captured the whole adventure, but the captain baulked their profiting by a part of it, though as the owners did not get their dollars back their loss by capture was not adeemed.

I think *British and Foreign Marine Insurance Co., Ltd. v. Samuel Sanday & Co.* (1) is distinguishable. There both ships and goods were British, and your Lordships' judgments were based on the fact that the ship abandoned the voyage as the proximate result of the outbreak of war. It was held that no distinction could be drawn for the purpose of causation between the event which called the subject's duty into existence and the subject's obedience to that duty. So high was the obligation that an act done in performance of that obligation did not causally bear the character of a voluntary act or of a new intervening cause. Such a decision does not support the contention that the abandonment of the voyage by a ship, which was under no such obligation, is other than the captain's voluntary act, or that the obligations of a purely passive cargo-owner can divest that voluntary act of the character of a new intervening cause, which it would otherwise bear. If it were otherwise, some remarkable consequences would follow. At 11 p.m. on Aug. 4, 1914, all the world over, every parcel of goods owned by His Majesty's subjects and laden on board of German vessels or of neutral vessels bound for German ports, for freight not prepaid, suddenly became a total loss. Both ships and goods might be safe and sound and likely to remain so; cargo-owners and shipowners, captains and crews, might all be ignorant of the outbreak of war. The assured, for want of advice that their goods were afloat, might have made no declarations to underwriters under floating policies, and the underwriters might be quite unaware that they were at risk. None the less on that day and at that hour the ocean became suddenly full of constructive total losses securely laden in uninjured ships. British underwriters are entitled to sue and labour for the defence, safeguard, and recovery of the goods insured or to endeavour to save them for the benefit of whom it may concern, but they, equally with British cargo-owners, would be forbidden to pay freight to German shipowners for that purpose. Indeed, unless by British capture they could come by their own again, the cargo-owners would have to let their goods remain in enemy hands, and that at the expense of British underwriters. Where the ships belong to His Majesty's subjects such is the law—your Lordships have so decided; but I should be loth to carry that decision beyond its true ratio decidendi. The language of my noble learned friends, LORD LOREBURN (ante p. 136); LORD ATKINSON (ante p. 138); LORD PARMOOR (ante p. 141); and LORD WRENBURY (ante p. 143), shows that the illegality of any further prosecution of the voyage, both ship and master being British, was the ground of the decision. In truth, in the present case the outbreak of war imposed no practical disability on the British cargo-owners then and there beyond what already existed. Their obligations as British subjects had nothing to do with the actual termination of this adventure. The declaration of war, at the time when it was made, only prohibited acts which

A the plaintiffs were in any case already powerless to perform. If it frustrated the adventure, it did so eventually, but at the same time, though for different reasons and in a different way, the captain of the *Kattenturm* frustrated it forthwith. If he had continued the adventure and had proceeded, the cargo-owners might have sustained a recoverable loss by other perils insured against without any illegality on their part.

B The appellants' other contentions may be shortly disposed of. This is not a case in which the subject-matter of the insurance was abandoned "on account of its initial total loss appearing to be unavoidable" within s. 60 of the Marine Insurance Act, 1906. Neither is it a case of loss by any other peril "that may come to the hurt" of the cargo similar to enemies, as in *The Knight of St. Michael* (18). It is said that there was a direct loss by "enemies" when the German captain refused to deliver to the plaintiffs' representative at Messina, except on payment of freight, which he had not earned, and of charges which were not due. To be sure he said that he did so by order of his government, but I do not see why we should believe him. BAILHACHE, J., did not, and it does not appear what motive he had for speaking the truth. Committed in neutral waters his act was a mere civil wrong, and not one falling within the cause of loss called "enemies" in the policy. For these reasons I think that the appeal fails and should be dismissed with costs.

LORD WRENBURY agreed in the appeal being dismissed.

Solicitors: *Rehder & Higgs; Waltons.*

[*Reported by W. E. REID, Esq., Barrister-at-Law.*]

E

F

ADAM v. WARD

[HOUSE OF LORDS (Lord Finlay, L.C., Earl Loreburn, Lord Dunedin, Lord Atkinson and Lord Shaw), February 19, 20, 22, 23, 26, March 22, 1917]

G

[*Reported* [1917] A.C. 309; 86 L.J.K.B. 849; 117 L.T. 34; 33 T.L.R. 277]

Libel—Privilege—Qualified privilege—Privileged occasion—Publication in pursuance of interest or duty—Extent of privilege—Express malice—Proof—Questions for judge.

H

A privileged occasion for the purpose of the defence of qualified privilege to an action for libel occurs where the words complained of as defamatory were published in pursuance of an interest or of a duty, legal, social, or moral, to publish them to the person to whom they were published and the person to whom they were published had a corresponding interest or duty to receive them. The reciprocity is essential. The bonâ fide belief of the defendant that there existed such an interest or that he was under such a duty to make the communication is immaterial, for the thing which is relevant to the question whether or not the occasion was privileged is the existence in fact of the duty or interest and not merely the defendant's belief in the existence of the one or the other.

I

It is for the judge alone, and not for the jury, to determine as a matter of law whether an occasion is privileged, unless the circumstances attending it are in dispute, in which case the facts necessary to raise the question of law should be found by the jury.

Qualified privilege can be rebutted by proof of express malice, i.e., malice other than that to be implied from the defamatory words themselves. It is for the judge to decide whether there is any evidence of express malice fit to be left to the jury, i.e., whether there is any evidence on which a reasonable man could find malice. Malice may be inferred either from the terms of the communication itself—e.g., where the language is unnecessarily strong—or from any facts which show that the defendant in publishing the words complained of was actuated by spite or some indirect motive.

The privilege extends only to a communication on the subject with respect to which privilege exists. It does not extend to a communication on any extraneous matter which the defendant may have made at the same time, for the existence of privilege on one matter gives no protection to irrelevant libels introduced into the same communication. Anything that is not relevant and pertinent to the discharge of the duty or the exercise of the right or the safeguarding of the interest which creates the privilege will not be protected. The judge must consider the nature of the duty, right, or interest, and rule whether or not the defendant has published something beyond what was germane and reasonably appropriate to the occasion, or has given to it a publicity incommensurate to the occasion. The introduction of extraneous matter may afford evidence of malice which will take away protection on the subject to which privilege attaches.

Libel—Agent—Publication by—Principal entitled to plead privileged occasion—Liability of agent.

Per LORD ATKINSON: It is true that one cannot defend himself for publishing a libel simply by saying that another person whom he was bound to obey ordered him to publish it, but it is equally true that when an agent, in obedience to the command of his principal, merely does the mechanical act of publishing the libel handed to him complete, the privilege of the principal becomes his privilege, and, if the principal has caused the communication to be made to protect an interest or discharge a duty which would have made the occasion privileged if he had published the libel with his own hand, the agent can equally rely on the publication having been made on a privileged occasion. For this purpose he stands in the shoes of his principal, has the same rights, and the same liabilities.

Notes. Considered: *Watt v. Longsdon*, [1929] All E.R. Rep. 284. Referred to: *Gerhold v. Baker* (1918), 35 T.L.R. 102; *Tournier v. National Provincial and Union Bank of England*, [1923] All E.R. Rep. 550; *Tolley v. J. S. Fry & Sons, Ltd.*, [1930] 1 K.B. 467; *Minter v. Priest*, [1930] All E.R. Rep. 481; *Chapman v. Ellesmere* [1932] All E.R. Rep. 221; *Standen v. South Essex Recorders, Ltd.* (1934), 50 T.L.R. 365; *Ley v. Hamilton* (1934), 151 L.T. 360; *White v. Stone, Ltd.*, [1939] 3 All E.R. 507; *De Buse v. McCarthy and Stepney Borough Council*, [1942] 1 All E.R. 19; *Phelps v. Kemsley* (1943), 168 L.T. 18; *Winstanley v. Bampton*, [1943] 1 All E.R. 661; *Braddock v. Bevins*, [1948] 1 All E.R. 450; *Russell v. Duke of Norfolk*, [1948] 1 All E.R. 488.

As to the defence of qualified privilege, see 24 HALSBURY'S LAWS (3rd Edn.) 54-70, and for cases see 32 DIGEST 112.

Cases referred to:

- (1) *Toogood v. Spyring* (1834), 1 Cr. M. & R. 181; 4 Tyr. 582; 3 L.J.Ex. 347; 149 E.R. 1044; 32 Digest 117, 1489.
- (2) *E. Hulton & Co. v. Jones*, [1910] A.C. 20; 79 L.J.K.B. 198; 101 L.T. 831; 26 T.L.R. 128; sub nom. *Jones v. E. Hulton & Co., Ltd.*, 54 Sol. Jo. 116, H.L.; 32 Digest 17, 77.
- (3) *Spill v. Maule* (1869), L.R. 4 Exch. 232; 38 L.J.Ex. 138; 20 L.T. 675; 17 W.R. 805, Ex.Ch.; 32 Digest 161, 1946.

- A (4) *Laughton v. Bishop of Sodor and Man* (1872), L.R. 4 P.C. 495; 9 Moo. P.C.C.N.S. 318; 42 L.J.P.C. 11; 28 L.T. 377; 37 J.P. 244; 21 W.R. 204; 17 E.R. 534, P.C.; 32 Digest 113, 1451.
- (5) *Nevill v. Fine Art and General Insurance Co., Ltd.*, [1895] 2 Q.B. 156; 64 L.J.Q.B. 681; 72 L.T. 525; 59 J.P. 371; 11 T.L.R. 332; 14 R. 587, C.A.; affirmed, [1897] A.C. 68; 66 L.J.Q.B. 195; 75 L.T. 606; 61 J.P. 500; 13 T.L.R. 97, H.L.; 32 Digest 154, 1868.
- B (6) *Warren v. Warren* (1834), 1 Cr. M. & R. 250; 4 Tyr. 850; 3 L.J.Ex. 294; 149 E.R. 1073; 32 Digest 84, 1150.
- (7) *Henwood v. Harrison* (1872), L.R. 7 C.P. 606; 41 L.J.C.P. 206; 26 L.T. 938; 20 W.R. 1000; 32 Digest 142, 1735.
- (8) *Wright v. Woodgate* (1835), 2 Cr. M. & R. 573; 1 Gale, 329; Tyr. & Gr. 12; 150 E.R. 244; 32 Digest 132, 1635.
- C (9) *Jenoure v. Delmege*, [1891] A.C. 73; 60 L.J.P.C. 11; 63 L.T. 814; 55 J.P. 500; 39 W.R. 388, P.C.; 32 Digest 156, 1887.
- (10) *Clark v. Molyneux* (1877), 3 Q.B.D. 237; 47 L.J.Q.B. 230; 37 L.T. 694; 42 J.P. 277; 26 W.R. 104; 14 Cox, C.C. 10, C.A.; 32 Digest 159, 1922.
- (11) *Stuart v. Bell*, [1891] 2 Q.B. 341; 60 L.J.Q.B. 577; 64 L.T. 633; 39 W.R. 612; 7 T.L.R. 502, C.A.; 32 Digest 122, 1545.
- D (12) *London Association for Protection of Trade v. Greenlands, Ltd.*, post p. 452; [1916] 2 A.C. 15; 85 L.J.K.B. 698; 114 L.T. 434; 32 T.L.R. 281; 60 Sol. Jo. 272, H.L.; 32 Digest 120, 1521.
- (13) *Harrison v. Bush* (1856), 5 E. & B. 344; 3 C.L.R. 1240; 25 L.J.Q.B. 25, 99; 25 L.T.O.S. 194; 26 L.T.O.S. 196; 20 J.P. 147; 1 Jur. N.S. 846; 2 Jur. N.S. 90; 3 W.R. 474; 4 W.R. 199; 119 E.R. 509; 32 Digest 123, 1550.
- E (14) *Whiteley v. Adams* (1863), 15 C.B.N.S. 392; 3 New Rep. 126; 33 L.J.C.P. 89; 9 L.T. 483; 10 Jur. N.S. 470; 12 W.R. 153; 143 E.R. 838; 32 Digest 130, 1615.

Also referred to in argument:

- F *Purcell v. Sowler* (1877), 2 C.P.D. 215; 46 L.J.Q.B. 308; 36 L.T. 416; 41 J.P. 789; 25 W.R. 362, C.A.; 32 Digest 146, 1764.
- Brown v. Croome* (1817), 2 Stark. 297; 171 E.R. 652; Digest Supp.
- Lay v. Lawson* (1836), 4 Ad. & El. 795; 111 E.R. 982; 32 Digest 95, 1265.
- Hebditch v. MacIlwaine*, [1894] 2 Q.B. 54; 63 L.J.Q.B. 587; 70 L.T. 826; 58 J.P. 620; 42 W.R. 422; 10 T.L.R. 387; 9 R. 452, C.A.; 32 Digest 114, 1460.
- G *Ede v. Scott* (1858), 7 I.O.L.R. 607.
- O'Hea v. Cork Union* (1892), 32 L.R.Ir. 629.
- Lynam v. Gowing* (1880), 6 L.R.Ir. 259.
- Capital and Counties Bank v. Henty* (1882), 7 App. Cas. 741; 52 L.J.Q.B. 232; 47 L.T. 662; 47 J.P. 214; 31 W.R. 157, H.L.; 32 Digest 21, 121.
- Smith v. Streatfield*, [1913] 3 K.B. 764; 82 L.J.K.B. 1237; 109 L.T. 173; 29 T.L.R. 707; 32 Digest 155, 1876.
- H *Pullman v. Hill & Co.*, [1891] 1 Q.B. 524; 60 L.J.Q.B. 299; 64 L.T. 691; 39 W.R. 263; 7 T.L.R. 173, C.A.; 32 Digest 76, 1069.
- Boxsius v. Goblet Frères*, [1894] 1 Q.B. 842; 63 L.J.Q.B. 401; 70 L.T. 368; 58 J.P. 670; 42 W.R. 392; 10 T.L.R. 324; 38 Sol. Jo. 311; 9 R. 224, C.A.; 32 Digest 116, 1485.
- I *Edmondson v. Birch & Co., Ltd. and Horner*, [1907] 1 K.B. 371; 76 L.J.K.B. 346; 96 L.T. 415; 23 T.L.R. 234; 51 Sol. Jo. 207, C.A.; 32 Digest 117, 1486.
- Huntley v. Ward* (1859), 6 C.B.N.S. 514; 33 L.T.O.S. 137; 6 Jur. N.S. 18; 141 E.R. 557; 32 Digest 134, 1644.
- Simmonds v. Dunne* (1871), I.R. 5 C.L. 358; 32 Digest 122, 1538 iii.
- Fryer v. Kinnersley* (1863), 15 C.B.N.S. 422; 3 New Rep. 125; 33 L.J.C.P. 96; 9 L.T. 415; 10 Jur. N.S. 441; 12 W.R. 155; 143 E.R. 849; 32 Digest 122, 1537.

Appeal from an order of the Court of Appeal (BUCKLEY, PICKFORD and BANKES, L.JJ.), reported (1915), 31 T.L.R. 299, reversing a judgment of DARLING, J.

The facts appear in their Lordships' opinions.

Sir Hugh Fraser for the appellant.

Sir John Simon, K.C. (the *Attorney-General*, *Sir Frederick Smith, K.C.*), and *Branson* with him, for the respondent.

Their Lordships took time for consideration.

Mar. 22, 1917. The following opinions were read.

LORD FINLAY, L.C.—This is an action for libel, and the questions that arise in this appeal are whether the occasion was privileged, and if so whether there was evidence of express malice.

The facts so far as they are material lie in very short compass. Major Adam, the plaintiff and appellant, was an officer in the 5th Royal Irish Lancers, in 1906, stationed at Aldershot. The commanding officer of his regiment was Colonel Graham, who in the autumn of 1906 made a confidential report with regard to Major Adam. This report was submitted to Major-General Scobell, and was by him transmitted, together with notes of his own upon it, to General Sir John French, who was general officer commanding-in-chief at Aldershot. This report, with the notes upon it, is in the evidence called the "Combined Report." It was not shown to Major Adam before being sent in, as it ought to have been by the King's Regulations, but it was shown to him some weeks later—about Dec. 6, 1906. On Nov. 3, 1906, Sir John French sent in a confidential report of his own with regard to Major Adam. Neither of these reports was produced at the trial, as the Secretary of State stated that it was contrary to the public interest that they should be put in evidence. A letter dated Dec. 1, 1906, was sent from the Army Council to Sir John French, stating, with reference to a letter of his of Nov. 3, reporting the unsuitability of Major Adam as a cavalry leader in the field, that after full consideration of the circumstances of the case it had been decided that he should be called upon to forward an application to retire from the service, failing which it would be necessary to submit for His Majesty's approval his removal from the army, and that Sir John French was requested to communicate this decision to Major Adam. Major Adam wrote begging for a re-consideration of this decision, or, failing that, for the longest possible grace before sending in his papers, in order that he might get something to do, and in the result, owing to the good offices of Major-General Scobell, Major Adam was given a post in the office of the Chief of the General Staff. He remained at this post until January, 1910. On Oct. 18, 1907, it was announced that he and four other officers were to be placed on half-pay, and on Nov. 30 of the same year a communiqué appeared stating that this action was not due to any cause detrimental to the character of these officers, and that though they were not considered suitable to retain their positions as officers in the 5th Lancers, their services could be, and in three cases were being, utilised in other appointments, and that the regiment was not inefficient to take the field. In October, 1909, Major Adam asked that the circumstances under which he was placed on half-pay should be re-considered with a view to his reinstatement on full pay, but he was informed by a letter of Nov. 3 that his case had been carefully considered and that the Army Council saw no reason to re-open the question. In January, 1910, Major Adam was returned as member of the House of Commons for Woolwich, and vacated his staff appointment. On June 27, 1910, he made a speech in the House of Commons in which he referred to the case of Captain Bryce-Wilson, one of the five officers who had been placed on half-pay, and read out in the House the following statement:

"That Major-General H. J. Scobell, Royal Irish Lancers, did render to the supreme authority a confidential report or confidential reports on an officer or officers under his command, which report or reports contained wilful and

A deliberate misstatements of fact, thereby deceiving those in authority to whom the report or reports were rendered, and causing injustice to be done to one of the regiments under his command."

Major Adam then went on to say, according to the report in HANSARD, which was in evidence :

"Major-General Scobell is on his way home at the present time from South Africa. He arrives in England at the end of this week, and I hope when he sees the report of this in the papers—as I intend he shall do—he will appreciate the meaning of the words, 'wilful and deliberate misstatement of fact.' I have tried to make it clear, and I hope he will turn up the paragraph in the King's Regulations which compels an officer in a case like this to refer the matter to his superior authority—the superior authority in this case being the Army Council. I hope sincerely that the Army Council will see that justice is done to Captain Wilson and that penalties are meted out to those officers who deserve it."

This speech must have conveyed to everyone who heard it or read the report the impression that Major-General Scobell was charged with conduct unworthy of an officer and a gentleman within the meaning of the King's Regulations. It is impossible to suppose that Major Adam did not intend to convey this impression. At the trial, however, he stated that he did not impute such unworthy conduct to Major-General Scobell, and that he said what he did merely in order that Major-General Scobell might demand an inquiry to clear himself, in the course of which Major Adam believed information might be obtained with regard to the attack upon him which he believed to be contained in the Combined Report. I abstain from comment upon Major Adam's conduct in making, for such an indirect purpose, an unfounded attack upon General Scobell, who had rendered Major Adam great service at the time of his removal.

Major-General Scobell brought the matter before the Army Council, who, after investigating it, issued through the Press the letter which is complained of as a libel upon Major Adam, and which forms the subject of this action. It was addressed to Major-General Scobell, and is as follows :

"In reply to your letter of July 8, 1910, asking that an inquiry should be instituted in regard to a statement made by Major W. A. Adam, M.P., in the House of Commons on June 27 to the effect that while in the command of the 1st Cavalry Brigade you rendered confidential reports on certain officers which reports contained wilful and deliberate mis-statements of facts, I am commanded by the Army Council to inform you that a thorough investigation has been made of the reports made by you at that time on certain officers of the 5th Lancers, who were afterwards removed from the regiment, and to whom it is believed that Major Adam's statement bore reference. Major Adam is himself one of these officers. The council also thought it proper to address a letter to Major Adam on the 23rd ult., inquiring whether he desired to forward for their consideration any statement in amplification or substantiation of his charge against you. On the 29th idem a reply was received from Major Adam to the effect that he had written to the Secretary of State for War on the subject, but his letter of the same date to the Secretary of State is found to contain nothing pertinent to the present investigation. The council are satisfied that not only did your reports contain the unbiassed and conscientious opinion you had formed on the officers in question, but that the conclusion at which you arrived were correct, as they were afterwards borne out not only by the opinion of your successor in command of the 1st Cavalry Brigade, but also by a special report on the 5th Lancers made by H.R.H. the then inspector-general of the forces, and confirmed by the general officer then commanding-in-chief the Aldershot command. Further, as showing the absence of hostile bias, the Army Council note that in the case of Major

Adam, who in 1906 was called upon to retire from the service in consequence of adverse reports, which were duly communicated to him, you intervened on his behalf and urged the council to give him another chance in an extra-regimental appointment. In the result it was decided to give Major Adam this chance. I am to add that the council are of opinion that the charge brought against you by Major Adam is without foundation."

The action was brought on Nov. 14, 1912, against Sir E. Ward, by whom, as secretary to the Army Council, the letter complained of had been signed and issued to the Press in obedience to the orders of the Army Council. The defendant did not dispute that the letter was defamatory of the plaintiff, but pleaded privilege. The case was tried before DARLING, J., and a special jury. Four questions were left by the learned judge to the jury. These questions, with the answers of the jury, are as follows: 1. Was the publication a matter of a public nature?—No. 2. Was the publication made by the defendant in discharge of his duty as secretary to the Army Council and for the purpose of affording information to the public?—Answer to both branches of this question: Yes. 3. Was the subject-matter of such publication by the defendant matter about which it was proper for the public to know?—No. 4. Was the matter contained in the letter appropriate for the public to know?—No. The jury assessed the damages at £2,000, and, on application being made for judgment, the learned judge said:

"On those findings I hold that the publication was not a privileged publication, nor a publication on a privileged occasion, and therefore I should enter judgment for the plaintiff."

The defendant appealed to the Court of Appeal, which held that the occasion was privileged and that there was no evidence of malice, and directed judgment to be entered for the defendant. The plaintiff, Major Adam, appealed from this judgment to your Lordships' House and asked that judgment should be entered for him, or, alternatively, that the case should be sent down for a new trial.

The law of privilege is well settled. Malice is a necessary element in an action for libel, but from the mere publication of defamatory matter malice is implied, unless the publication were on what is called a privileged occasion. If the communication were made in pursuance of a duty or on a matter in which there was a common interest in the party making and the party receiving it, the occasion is said to be privileged. This privilege is only qualified, and may be rebutted by proof of express malice. It is for the judge, and the judge alone, to determine as a matter of law whether the occasion is privileged, unless the circumstances attending it are in dispute, in which case the facts necessary to raise the question of law should be found by the jury. It is further for the judge to decide whether there is any evidence of express malice fit to be left to the jury—that is, whether there is any evidence on which a reasonable man could find malice. Such malice may be inferred either from the terms of the communication itself, as if the language be unnecessarily strong, or from any facts which show that the defendant in publishing the libel was actuated by spite or some indirect motive. The privilege extends only to a communication upon the subject with respect to which privilege exists, and it does not extend to a communication upon any other extraneous matter which the defendant may have made at the same time. The introduction of such extraneous matter may afford evidence of malice which will take away protection on the subject to which privilege attaches. The communication on the extraneous matter is not made upon a privileged occasion at all, inasmuch as the existence of privilege on one matter gives no protection to irrelevant libels introduced into the same communication.

That the occasion of this letter was privileged seems to me to be clear beyond all controversy. Major Adam had made a violent attack upon the character of Major-General Scobell, who appealed to the Army Council for inquiry. It was the duty of the Army Council to inquiry into the truth of this charge and to make

A the result of that inquiry known as widely as possible. It is said that there was unnecessary publicity given to their findings, but it must be remembered that Major Adam's speech in the House of Commons had been extensively reported, as he obviously intended it should be when he made his attack upon Major-General Scobell, and the Army Council did no more than their duty in giving a wide publicity to their finding that the charge was unfounded. It had been said that
B their observations as to the plaintiff, Major Adam, were not relevant to their vindication of Major-General Scobell, and that privilege does not extend to this portion of the letter. These observations appear to me to be directly relevant. The plaintiff did not mention in his speech in the House of Commons that he was himself interested in the matter, and anyone who heard or read his speech would have been left under the impression that he was a perfectly disinterested person
C who had taken up the case of a brother officer. The vindication by the Army Council of Major-General Scobell would have been incomplete if the true relation of Major Adam to these proceedings had been left out. The two passages especially impugned were—first, the statement that the plaintiff was one of the officers who had been removed from the regiment, and second, the following instance:

D "Further, as showing the absence of hostile bias, the Army Council note that in the case of Major Adam, who in 1906 was called upon to retire from the service in consequence of adverse reports, which were duly communicated to him, you intervened on his behalf and urged the council to give him another chance in an extra-regimental appointment. In the result it was decided to give Major Adam this chance."

E So far from being alien to the investigation of the charge made by the plaintiff against Major-General Scobell both these passages appear to me to be directly relevant to it. It was essential to show that Major-General Scobell had been actuated by a friendly feeling towards the plaintiff, and it was as incidental to this that the fact that the plaintiff had been called on to retire should be introduced. The privilege extended to the whole letter, and there is nothing either in the letter
F itself or in the surrounding circumstances to supply any evidence of express malice. I agree with the Court of Appeal in thinking that the judge ought to have ruled that the occasion was privileged. The learned judge ruled that there was no evidence of malice against the defendant personally, as he had acted for the Army Council and under their orders. The question was really not one of personal malice on the part of the defendant. He was the agent and servant of the Army Council, and must stand or fall with them. If the letter was published on a
G privileged occasion as regards the Army Council and without malice on their part, their secretary, through whom the communication was made by them, has the benefit of the privilege which attached to the council itself. If, on the other hand, the occasion had not been privileged, or there was express malice, their secretary would be liable, although he personally had no ill-will towards the plaintiff. In my
H opinion, this appeal should be dismissed with costs.

EARL LOREBURN.—In this case counsel has put forward all that could possibly be urged on behalf of the appellant with a fairness which added to the weight of his argument. But he has failed to show that there is any evidence of malice either in the defendant or in the Army Council. The document charged
I as a libel admittedly contains matter which admits of a defamatory sense, and the defendant's counsel did not dispute that it in fact had a defamatory meaning. Accordingly, that issue was not left to the jury. There is no plea of justification, and, therefore, the one remaining question is that raised by the plea of privilege.

I understand the law to be as follows. It is for the judge alone to rule whether or not there is an occasion of privilege, and the rule on that subject was laid down many years ago in *Toogood v. Spyring* (1). Subsequent decisions have illustrated that rule. But the fact that an occasion is privileged does not necessarily protect all that is said or written on that occasion. Anything that is not relevant and

pertinent to the discharge of the duty or the exercise of the right or the safeguarding of the interest which creates the privilege will not be protected. To say that foreign matter will not be protected is another way of saying the same thing. The facts of different cases vary infinitely, and I do not think the principle can be put more definitely than by saying that the judge has to consider the nature of the duty or right or interest and to rule whether or not the defendant has published something beyond what was germane and reasonably appropriate to the occasion, or has given to it a publicity incommensurate to the occasion. For a man ought not to be protected if he publishes what is in fact untrue of someone else when there is no occasion for his doing so or when there is no occasion for his publishing it to the persons to whom he in fact publishes it. All this is for the judge alone, and the question of malice, which is for the jury, cannot arise till the judge has ruled on the whole question of privilege. Language has been used in some cases which seems somewhat to confuse the two separate points—namely, whether the defendant has gone beyond the privilege which the occasion creates, and whether the defendant has forfeited the privilege by malice. Excess of privilege in part of a defamatory publication may, of course, be evidence of malice as to the whole of it, but the two things are different. The one is a matter for the judge, the other is matter for the jury. And observations made by judges in directing juries as to what is evidence of malice are not necessarily applicable when they have to rule as to excess of privilege. But I agree that in ruling upon that subject a judge may well think that a man is justified in inculpating his accuser in order more effectively to exculpate himself, and also may well think that the defendant has not exceeded the privilege when he has expressed himself with some warmth under real provocation, though no one can be justified in using such an occasion beyond the reasonable limits of self-defence. I will only add that when one part of a libel is held to be protected by privilege and the other part not protected the jury ought to be told that they cannot give damages in respect of the first part at all, unless they are satisfied that it was malicious, which may be proved by the character of the unprotected part or by other evidence.

Applying this view of the law to the present case, I am quite sure that the attack made on General Scobell by the appellant in the House of Commons not only permitted but required the Army Council to vindicate the conduct of that officer, and that both that council and the defendant, who acted by their direction, were in the fullest sense within the privilege recognised by the law when they published to the country at large a defence of General Scobell. I have had more doubt upon the question whether or not all that is contained in the letter which forms the subject of this action was covered by the privilege, and am disposed to take on that point the same view of the facts that appears from his summing-up to have been taken by DARLING, J. But in view of the speech of the appellant made in the House of Commons, where he used an absolute privilege to attack another officer who had done him no wrong, but, on the contrary, had befriended him, I could not possibly approve of the heavy damages awarded by the jury, and I shall not dissent from the order which commends itself to your Lordships.

LORD DUNEDIN.—The pleadings and evidence in this case are voluminous and the issue of importance to those concerned. Yet, notwithstanding the elaborate and painstaking address of the counsel for the appellant, I cannot say that I have any doubt or hesitation in thinking that the judgment of the Court of Appeal was right. The reasons given for that judgment by LORD WRENBURY, then BUCKLEY, L.J., are entirely satisfactory to my mind. I only venture to add some remarks of my own, because some of the leading principles of the law of libel and privilege have been freely discussed and this case will take rank in the future as an authoritative pronouncement on these matters. I do not propose to enter in detail into the facts of the case as that has already been done by the Lord Chancellor, and I shall

A only mention those which are necessary to make intelligible the conclusions at which I have arrived.

The primary fact is the speech made by the plaintiff in the House of Commons on June 27, 1910, and in particular the paragraph he read from a type-written sheet in order, as he said, "that there may be no mistake and that I may not be led away by rhetorical exaggeration." I need not quote it, as that has already been done. To my mind these words could, to the audience which heard them or to the ordinary man who read them in HANSARD or in a newspaper report, only convey one meaning—that General Scobell had inserted, with deliberate purpose, false statements of fact in a report or reports as to officers under his command, and had thereby deceived those in authority, with the consequence that a certain regiment had been unjustly treated. It is true that on a critical analysis of the words "rendered" and "containing" it is possible to make the sentence fit with the idea that the false statements in the report were not of General Scobell's own fabrication, but were merely forwarded by him. But neither is that the natural meaning of the words nor is it what the plaintiff intended should be understood by them, for he admits in cross-examination that he phrased the passage as he did in order to compel General Scobell to take up the matter under the King's Regulations; and the only part of the King's Regulations which impose such a duty is the paragraph which compels an officer whose "character or conduct as an officer or a gentleman has been impugned" to ask for an inquiry. He seeks to excuse himself by saying that the inquiry, if held, would have shown that the real culprit as to the false statements was Colonel Graham and not General Scobell. That the words used contained an imputation on General Scobell's honour no one can doubt. Under the King's Regulations, the general could not deal with the matter himself, but was bound to do what he did—bring the matter before the Army Council and ask them to inquire as to the truth of the accusation made against him. On this it appears to me clear that there arose on the part of the Army Council a duty, not only moral, but actually legal, under military law to make the inquiry demanded. In what particular way or form the inquiry should be held was, I think, a matter for them and no one else to determine. The Army Council proceeded to institute an inquiry, but before doing so they called on the plaintiff to furnish them with any statement he might wish to make "in amplification or substantiation" of the charge that he had made. To this the plaintiff replied that as the inquiry was to be conducted by themselves, and as the Army Council "had forfeited the confidence of the army and the public," he did not propose to do anything more. The Army Council, accordingly, held the inquiry within, so to speak, their own walls. They came to the conclusion that the charge made was unfounded. They wrote a letter to General Scobell telling him so, and they published that letter.

If the matter is thus baldly stated, can it for a moment be supposed that this publication is not a performance of a moral if not even of a legal duty, and as such privileged? Let us look at the situation. General Scobell is grossly attacked in a speech in the House of Commons, a speech which in that place, from motives of high public policy, is protected by absolute privilege. Under the King's Regulations he may not take up the matter himself and defend himself in the public Press. He is bound to refer the matter to the Army Council and await their verdict. The verdict is in his favour. What would that avail him unless there was a right in the Army Council to publish the result at which they had arrived? If it were not so, then the absolute privilege of the House of Commons, intended to safeguard the liberty of discussion, would be really turned into an abominable instrument of oppression.

Two replies are, however, made to this, which I shall take in their order. It is said, first, that the publication here was to an unduly wide public—that there was no duty to publish to every one, but only to those who were likely to have become aware of the accusation, and that to make such a wide publication as was here made was in accordance with no duty or right. I think that a man who makes

a statement on the floor of the House of Commons makes it to the world. True it never reaches every person in the world. In some cases, if the orator is unknown to fame, and the statement intrinsically unexciting, it may not reach very many. But no one knows whom it may reach, and it was only, I think, plain justice to General Scobell that the ambit of the contradiction should be spread so wide as if possible to meet the false accusation wherever it went. Do what you will the stern chase after a lie that has got the start is apt to be a long one. As a matter of fact the Army Council instructed their secretary, the defendant, to send the communication to the channels to which they ordinarily send all official communications. The list is a long one and the ambit of influence is wide; but, in my judgment, the list was not longer or the ambit wider than was demanded by justice to General Scobell.

The second reply raises what is, I think, the real and only point in the case. I have hitherto dealt with the communication as if it was a bald statement of the unfoundedness of the charge against General Scobell. But the letter was a long one, and it is urged that in so far as it went beyond the mere statement of General Scobell's innocence and proceeds to say things defamatory of the plaintiff, it was not in the exercise of any duty or right, and that for these statements there is no privilege. In discussing this question a controversy was raised at the Bar as to what is the accurate way of expressing the legal doctrine. It has to be kept in view that the learned counsel for the defendant did not put forward the contention that the language used was not defamatory of the plaintiff. At first sight this is rather startling in view of the expressions used and in the light of the facts of the case. I should have thought that what may be called the moral effect of this attitude on the jury would be rather disastrous. I do not doubt that the words used—upon which I shall comment shortly—were such that the judge could not, if asked, have removed them entirely from the cognisance of the jury by ruling that they were incapable of a defamatory interpretation. But they were equally capable of an innocent interpretation, and an interpretation which squared with the underlying facts of the case. Now, it is one thing, so far as moral effect is concerned, to say: "I meant what I wrote innocently, and I contend that is the true meaning of the words used"—even although it may eventually be decided against you that the true interpretation is otherwise—and another to say from the first, "I cannot deny that the words I used were defamatory." That words intended innocently may yet be held to be defamatory is quite certain. No better illustration can be given than *E. Hulton & Co. v. Jones* (2). In that case, in which there was difference of opinion between the learned judges, and where certainly the high water mark of the doctrine was reached, but which, as a decision of your Lordships' House, is certainly the law, no one for a moment supposed that the writer of the article was using words which he thought were defamatory of the plaintiff, Artemus Jones. He did not even know of his existence. Yet none the less the words were held to be defamatory, because they could be read by the ordinary reader as so applying. [But see now Defamation Act, 1952, s. 4, especially s. 4 (5) (a).] Notwithstanding, however, that the admission thus made is startling, I have come to the conclusion that it makes no difference to the matter in hand. In other words, the admission of the defendant through his counsel that the words used were in themselves defamatory puts the case in precisely the same position as if the judge had left the true meaning of the words to the jury—as I think he would, if there had been no admission, have been bound to do—and the jury had found that were defamatory.

What now is the situation? You have a communication issued on a privileged occasion; and in gremio of that communication are used words which are in themselves defamatory. What test is to be applied? On the one hand, it is said that, the occasion being privileged, the whole document is privileged, but that if in the document you find parts which are not really necessary to the fulfilment of the particular duty or right which is the foundation of the privilege on the occasion,

A then that these parts may be used as evidence of express malice. In other words, it stands thus. Malice, which is of the essence of libel, is presumed from defamatory words. Privilege destroys that presumption. But the place of the implied malice which is gone may be taken by express malice which may be proved. It may be proved either extrinsically or intrinsically of the document, and such words in the document are apt as evidence. Thus BUCKLEY, L.J., states as to the whole
B matter :

“There are two questions. The first whether the occasion was a privileged occasion, and if it was, then, secondly, whether there was any evidence of malice.”

C On the other hand, it is said that it is not necessarily a question of malice at all : that privilege applies to what is written and published in response to a duty or right; and that if anything is found in the thing published which is not reasonably appropriate to that duty or right then privilege cannot extend to that. I think it will be found that in most cases these are merely two ways of expressing the same point. But there is this to be said in favour of the former method, that it is a formula which as a test will fit most if not all cases, whereas the second would
D necessarily break down in a good many. For it could always be said with apparent force that it never can be necessary to incorporate in a statement made in response to a duty or right any defamatory statements which is not logically necessary to fulfil that duty or right. Thus cases like *Spill v. Maule* (3), “most disgraceful and dishonest,” and *Laughton v. Bishop of Sodor and Man* (4), “bring false witness against a neighbour,” would, if tried by this latter test alone, be wrongly decided, though as a matter of fact I do not think it is suggested that they were anything
E but right, and, in my opinion, they were right, as, indeed, becomes evident if they are tried by the first test.

I have not said that the first test is universally applicable, and for this reason. If the defamatory statement is quite unconnected with and irrelevant to the main statement which is ex hypothesi privileged then I think it is more accurate to say
F that the privilege does not extend thereto than to say, though the result may be the same, that the defamatory statement is evidence of malice. But when the defamatory statement is, so to speak, part and parcel of the privileged statement and relevant to the discussion, then I think the first way is the true way to put it, and under it will also range all the cases where the express malice is arguable
G from the too great severity or redundancy of the expressions used in the privileged document itself. In short, I adopt the law as laid down by ESHER, M.R., in *Neville v. Fine Art and General Insurance Co., Ltd.* (5). The learned judge there says ([1895] 2 Q.B. at p. 170) :

“... in this case there was no evidence of such malice. That being so, the
H defendants have proved that the occasion was privileged, and there was no evidence of malice in the mind of anybody to rebut that privilege, and the defence stands good. But, then, the jury were asked to find, and have found, that the privilege was exceeded. There may be an excess of the privilege in the sense that something has been published which is not within the privileged occasion at all, because it can have no reference to it. Instances have been put during the argument of cases where a defendant, on an occasion
I which is privileged as between himself and some other person, makes some defamatory statement affecting a third person which has nothing to do with the privileged occasion, in which case, of course, that third person would have a right of action against the defendant, and as between him and the defendant there would be no privileged occasion. But when there is only an excessive statement having reference to the privileged occasion, and which, therefore, comes within it, then the only way in which the excess is material is as being evidence of malice.”

A good illustration of a statement outside the privileged occasion will be found in *Warren v. Warren* (6). A

This question is of necessity closely connected with the question of the respective functions of the judge and of the jury. I do not think it necessary to analyse the very numerous decided cases which were cited to us in the course of the argument. I have studied them all, and what I am about to say is, I believe, the true doctrine to be drawn from them. But it may be as well to make this remark, that certainly some confusion has resulted from the use of the convenient phrases "privileged statement" and "extension of the privilege." Strictly speaking, it is the occasion on which a statement is made that is privileged, and the phrase that such and such a statement is privileged, would be more accurately, though perhaps more clumsily expressed by saying that the statement, having been made on a privileged occasion, malice cannot be implied from defamatory expressions therein, but must be proved as a real fact. The malice to be proved must be real malice, and is generally called express malice to distinguish it from the malice which is implied from the defamatory words themselves. The duty of deciding whether the occasion is privileged is cast upon the judge alone, and the jury has no hand in it. The criterion whether the occasion is privileged or not is most tersely stated in the well-known passage of PARKE, B.'s, judgment in *Toogood v. Spyring* (1 Cr. M. & R. at p. 193): B C D

"... fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned."

Again: E

"If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits."

The judge must put the question suggested by that definition to himself. If the statement is, so to speak, divisible into parts, it may be that the judge may come to the conclusion that certain parts are not truly referable to the particular right or duty which in the case in hand is the foundation of the privilege. If so, he will so find—that is to say, he will find that para. 1 is referable and appropriate to a privileged occasion, para. 2 is not so. Then if para. 2 contains defamatory words, malice will be implied as to them. If, however, he finds that both paragraphs are referable and appropriate to the privileged occasion, then, as it is more commonly, but less accurately, expressed, he finds that the privilege extends to the whole statement. In that case the next question he has to put to himself is whether the defamatory words complained of are capable of affording, from their own nature alone, evidence of express malice. If he holds them incapable, and there is no other evidence extrinsic of the document, then the plaintiff's case is gone, and the jury has not to be called upon at all. But if the judge thinks that the words are so capable, then he must leave it to the jury to say whether from the words alone, or in conjunction with extrinsic evidence, if there be any such, express malice has been proved. It might thus occur, though the case will probably be rare, that, as above imagined, defamatory words in the non-privileged para. 2 could afford evidence of express malice in connection with the expressions used in privileged para. 1. I need scarcely add, but it makes the statement complete to do so, that if there is controversy whether the words used are defamatory or not, it is for the judge to determine whether they are capable of a defamatory meaning, and that being resolved in the affirmative, it is for the jury to find whether they are actually defamatory or not. F G H I

I now return to the facts of this case, and here I am of opinion, concurring with the Lord Chancellor, that the present is a case where the defamatory statement was

A part and parcel of the privileged statement and relevant to it. [His LORDSHIP discussed the facts.] I am accordingly of opinion that privilege attaches to the statement here complained of: that no malice can be implied: and that to succeed the plaintiff must prove express malice. As to express malice, all the learned judges, including the trial judge, are agreed that there is absolutely no evidence, either extrinsic or intrinsic, of malice on the part of the defendant, Sir Edward Ward. For my own part, I fail to see how, if it was once shown that Sir Edward Ward was merely obeying orders when he signed a statement drawn up by the Army Council and sent it for publication, and was relying, as he was entitled to do, on the privilege which attached to the action of his superior and principal, the Army Council, any evidence as to malice on his part could be relevant. It is not necessary, however, to decide that question. It is only necessary to add that there is not a shred of evidence of malice on the part of the Army Council. Their malice, in my view, would be relevant. But as it does not exist it is unnecessary to consider that question either.

There are two other matters which, although not affecting the judgment to be pronounced, ought, in my opinion, to be mentioned. The learned judge who tried the cause took what I believe is a very unusual course in two particulars. He disposed of the question of malice while the question of privilege was still unsettled. I do not know if this can be said to be wrong, but at least it is highly inconvenient. The second matter is more serious. In order to dispose of the question of privilege he put to the jury certain questions, of which three were as follows: "Was the publication [the document published] a matter of a public nature?" "Was the subject-matter of such publication by the defendant matter about which it was proper for the public to know?" "Was the matter contained in the letter proper for the public to know?" To all of which the jury returned a negative answer, and upon that the learned judge said: "Upon these findings I hold that the publication was not a privileged publication nor a publication on a privileged occasion." It is clear that so far as the questions go they assume that the foundation of the duty or right which was invoked to support the privilege was that the matter discussed was one of public importance; whereas the true foundation in this case was the duty of the Army Council to make publicly known their vindication of General Scobell's honour. But apart from that, and in view of what I have already stated as to the provinces of judge and jury, I entirely agree with the learned judges of the Court of Appeal, who held that these questions were for the judge and not for the jury. If there is some fact left in controversy which must necessarily be determined one way or the other, to allow the judge to view the complete situation and thus enable him to decide whether the occasion was privileged or not, it would be right for the judge to ask the jury to determine that fact. But to put to them questions such as these and then on the findings to find privilege or the reverse is simply to ask the jury to decide for him the question which it is his duty and not theirs to determine.

LORD ATKINSON said that DARLING, J., might possibly have ruled on the question of law whether or not the occasion on which the alleged libel was published was a privileged occasion, but for the answers he had received from the jury in reply to questions as to certain things the existence of which went to make the occasion of the publication privileged. He did not leave the question of privilege or no privilege to the jury, but he did leave to the jury the question as to the presence or absence of the elements which went to create privilege. For instance, the question: "Was the subject-matter of the publication by the defendant matter about which it was proper for the public to know?" And the question: "Was the matter contained in the letter appropriate for the public to know?" It was to be regretted that the remarks of WILLES, J., in *Henwood v. Harrison* (7) were not brought to DARLING, J.'s, notice. WILLES, J., a most learned, laborious, and accurate judge, after stating that since the declaratory Libel Act, 1792, the jury

were the proper tribunal in civil as in criminal cases to decide the question of libel or no libel, said (L.R. 7 C.P. at p. 628) :

"But it is not competent for the jury to find that upon a privileged occasion relevant remarks made bonâ fide without malice are libellous. . . . It would be abolishing the law of privileged discussion and deserting the duty of the court to decide upon this as upon any other question of law, if we were to hand over the decision of privilege or no privilege to the jury. A jury according to their individual views of religion or policy might hold the Church, the Army, the Navy, Parliament itself, to be of no national or general importance, or the liberty of the Press to be of less consequence than the feelings of a thin-skinned disputant."

HIS LORDSHIP continued: It was not disputed in this case on either side that a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential. Nor is it disputed that a privileged communication, a phrase often used loosely to describe a privileged occasion, and vice versâ, is a communication made upon an occasion which rebuts the primâ facie presumption of malice arising from a statement prejudicial to the character of the plaintiff, and puts the latter on proof that there was malice in fact: per PARKE, B., in *Wright v. Woodgate* (8) (2 Cr. M. & R. at p. 577). Nor that the question whether the occasion is a privileged occasion or not is, if the facts be not in dispute, or if in dispute have been found by the jury, a question of law to be decided by the judge at the trial. Nor yet that a person making a communication on a privileged occasion has not, in the first instance and as a condition of immunity, to prove affirmatively that he honestly believes the statement made to be true, his bonâ fides being in such a case always presumed: *Jenoure v. Delmege* (9); *Clark v. Molyneux* (10). All these matters were not questioned. They could not be questioned. Nor was it suggested that, while on the question of malice the bonâ fide belief of the defendant that he was under a moral or social duty to make the communication is relevant and important, the existence in fact of this duty or interest, not merely the defendant's belief in its existence, is the thing which is relevant to the question whether the occasion was or was not privileged: per LINDLEY, L.J., in *Stuart v. Bell* (11) ([1891] 2 Q.B. at p. 349).

It was, however, strenuously contended on the part of the appellant, as I understood, that the language used in a communication made on a privileged occasion must, if it is to be protected, merely be such as is reasonable necessary to enable the party making it to protect the interest or discharge the duty upon which the qualified privileges is founded. It has long been established by unquestioned and unquestionable authority, I think, that this is not the law. This point is of such importance that one may be excused for referring at length to three authorities, to show what the law on the subject really is, and in what light the language used in privileged communications is in a court of law to be regarded.

In *Spill v. Maule* (3) the libel sued upon was contained in a letter written by the defendant, a creditor of a firm who had been engaged by the firm to wind-up its affairs, to another creditor of the same firm. The plaintiff had had disputes with his partner before and during the winding-up, and he, suspecting that his partner, a member of the firm, was drawing out the money of the firm on his own account, took from the cash-box of the firm a parcel of bills, directing the clerk to take an account of them, and to tell his partner to debit his, the plaintiff's, account with them. The defendant dealt with this transaction in the above-mentioned letter, and stated that the plaintiff's conduct in reference to it "had been disgraceful and dishonest, and that its result had been to diminish the amount of the available assets of the estate." The plaintiff at the trial proved these facts. They con-

A stituted his case. Thereupon the presiding judge, MARTIN, B., directed a verdict for the defendant. A bill of exceptions was tendered to this ruling, on the ground that though the communication was privileged, yet the violent and abusive terms used in the letter were evidence of actual malice. The judgment of the Exchequer Chamber was delivered by COCKBURN, C.J., KEATING, LUSH, HANNEN, HAYES, and BRETT, JJ., concurring. The case is, therefore, one of high authority. After
B stating the facts, the Chief Justice said (L.R. 4 Exch. at p. 236):

“The question then arises whether the language is too strong for the occasion, the terms applied to the plaintiff’s conduct being ‘most disgraceful and dishonest.’ Now, the communication being privileged, the presumption is in favour of absence of malice in the defendant, and, in order to rebut that presumption, the plaintiff must show actual malice and he may, no doubt, show this by reference to the terms of the libel as being utterly beyond and
C disproportionate to the facts.”

He then proceeds to refer to the plaintiff’s act in taking away the bills, and says (ibid. at pp. 236, 237):

“This act was capable of a twofold construction. It might have taken place under such circumstances that the plaintiff could not properly be exposed to any moral censure; as, for instance, if he only intended to keep the assets in security for the benefit of creditors. Or the circumstances might have been such that in taking the bills he acted dishonestly and disgracefully. Now, the presumption of the law being in favour of the absence of malice in the defendant, and the only evidence of malice being his description of
E acts done by the plaintiff which were capable of a twofold construction, that presumption of innocence which attaches to the writer must also, where his act is capable of a double aspect, still attend him. . . . We have not to deal with the question whether the plaintiff did or did not act dishonestly and disgracefully. All we have to examine is whether the defendant stated no more than what he believed and what he might reasonably believe. If he stated
F no more than this, he is not liable, and, unless proof to the contrary be produced, we must take it that he did state no more.”

The direction of MARTIN, B., was accordingly upheld.

I cannot find that the authority of this case has ever been questioned. It was cited with approval in *Laughton v. Bishop of Sodor and Man* (4), to which I am about to refer. It will be observed that the Chief Justice says that the terms of
G the libel which are evidence of malice are not merely such as are beyond the necessities of the occasion, but such as are utterly beyond and disproportioned to the facts. *Laughton’s Case* (4) has, I think, a direct bearing upon the present case. The appellant Laughton, a barrister, having been retained to oppose at the Bar of the House of Keys a Bill in which the respondent was interested, in the
H course of his remarks very severely criticised the respondent and his mode of discharging his duties. The bishop, in an address which he read to his clergy assembled in convocation, and subsequently had printed and published in a local newspaper, the “Manx Sun,” did not confine his observations merely to a defence of himself against the charges made against him. He, in addition, violently assailed and denounced his critic, Laughton. He accused him (L.R. 4 P.C. at p. 498) of making
I slanderous statements and uncharitable imputations under the apparent sanction of well-informed persons; of making statements with an entire disregard of truth; of being a wicked man; of making calumnious assertions; and of being guilty of the sin of bearing false witness against his neighbour. The Deemster before whom the case was tried ruled that the occasion on which the libel was published was a privileged occasion, but left to the jury the question of actual malice, of which the excessive nature of the bishop’s language he apparently regarded as evidence. The jury found a verdict for the plaintiff for £400. The Appeal Court of the Isle of Man set aside this verdict, on the ground that there was in the case no such

evidence of express malice as justified the Deemster in leaving the question of malice to the jury. This decision was upheld by the Privy Council, on the ground that, having regard to the circumstances, and the nature of the attack upon him, the bishop might have honestly believed that everything he said was true and proper for his own vindication, although in fact some of his expressions exceeded what was necessary for it, and that the language of his charge was more consistent with such an honest belief and with the purpose of self-vindication than of injuring the plaintiff, but that had the bishop referred to the conduct of the plaintiff on any other occasion than that of his addressing the House of Keys, or made any general attack upon his private or professional character, the case would have been different. In delivering the judgment of the board SIR ROBERT COLLIER said (*ibid.* at p. 508):

"Some expressions here used [i.e., used by the respondent in his defence] undoubtedly go beyond what was necessary for self-defence; but it does not, therefore, follow that they afford evidence of malice for a jury. To submit the language of privileged communications to a strict scrutiny and to hold excess beyond the absolute exigency of the occasion to be evidence of malice would, in effect, greatly limit, if not altogether defeat, the protection which the law throws over the privileged communications."

That decision has been approved of many times. It was relied upon by LORD MACNAGHTEN when delivering judgment in *Jenoure v. Delmege* (9). Its soundness has not, I think, ever been questioned. In *Nevill v. Fine Art and General Insurance Co., Ltd.* (5) the appellant, Lord William Neville, in the year 1892 became agent to the respondents, and conducted the agency at his own office, No. 27, Charles Street, St. James's. The appellant, after some months had passed, desired better terms, and a correspondence passed on this subject. In December, 1893, the secretary of the respondents wrote to the appellant informing him that the board of directors of the respondent company had decided to terminate the agreements with him. An alteration of terms was made, and the appellant continued to act as agent for the respondents. In answer to a question as to the appellant's intentions, his solicitor wrote on Mar. 13, 1894, that his client wished to sever all connection with the company, owing to the insufficiency of his terms. On Mar. 15, 1894, the secretary of the respondents sent to certain persons who had transacted business with them through the appellant's office stating that the agency of Lord William Neville at No. 27, Charles Street, had been closed by the directors, and requesting them to direct all communications to the West End secretary at No. 19, St. James's Street. The innuendo put upon these words was that the agency of the appellant had been closed by the directors and that they meant the plaintiff had been dismissed by the defendants from his employment as their agent for some reason discreditable to him. POLLOCK, B., tried the case. He stated that he ruled that the occasion which required the writing of some such letter was privileged, that it was contended for the plaintiff that although the occasion was privileged that part of the letter which stated falsely that the agency had been closed by the directors was not called for by the requirements of the occasion, and was, therefore, in excess of the privilege. He accordingly left to the jury the question whether the defendants in making the statement that the plaintiff's agency was closed by the directors had exceeded the privileged occasion. The jury having first found that it was untrue that the directors had closed the agency, answered this question in the affirmative, and found a verdict in favour of the plaintiff for £400 damages, for which, after consideration, POLLOCK, B., entered judgment. There was no finding of actual malice. On appeal to the Court of Appeal it was decided, the occasion being privileged, that in the absence of a finding of actual malice, the defence of privilege was not rebutted, and that, it appearing on the facts of the case that there was no evidence of actual malice in the publication of the statement complained of, the action was not maintainable.

A LORD ESHER in his judgment deals with the question of this excess of privilege in the words which have been already quoted by my noble friend who has preceded me. LOPES, L.J., concurred, and in his judgment relied upon the passage I have already quoted from the judgment in *Laughton v. Bishop of Sodor and Man* (4). On appeal to the House of Lords all the noble Lords who took part in the decision were of opinion that the statement that the agency had been closed was true in
B fact in the only sense relevant to the context in which it was found, and that there was no evidence of malice. They upheld the judgment of the Court of Appeal, and LORD HALSBURY, referring to this statement, said ([1897] A.C. at p. 75):

C “But suppose it was not true, suppose it was not accurate in the sense in which people would have understood it, . . . suppose the persons who wrote that document intended to tell the truth and believed in the truth of what they were writing, even though in the mind of some other person it should be inaccurate in form, it seems to me that it would be impossible to contend that there would have been evidence of malice.”

D These authorities, in my view, clearly establish that a person making a communication on a privileged occasion is not restricted to the use of such language merely as is reasonably necessary to protect the interest or discharge the duty which is the foundation of his privilege; but that, on the contrary, he will be protected, even though his language should be violent or excessively strong, if, having regard to all the circumstances of the case, he might have honestly and on reasonable grounds believed that what he wrote or said was true and necessary for the purpose of his vindication, though in fact it was not so.

E It was next urged on behalf of the appellant that the Army Council should have confined themselves to stating that the charges made against Major-General Scobell were on investigation found to be unfounded, and that he had been fully exonerated, and, therefore, that all the references contained in the libel to the appellant himself, his conduct, career, or the treatment he received, were foreign and irrelevant subjects, not pertinent to the discharge of the duty, or to the protection of the interest which form the basis of the privilege claimed, but were separable
F from the relevant parts of the libel, and, to use the words of LORD ESHER, were outside the privileged occasion and had nothing to do with it; and that since to afford a defence the whole communication should be within the protection of the privileged occasion, if part only were so, the entire communication ceased to be
G a privileged communication or to be protected. Some question was raised whether the presiding judge was the person to decide whether any foreign and irrelevant matter had been introduced into the libel, and whether it was separable. I think it must be the judge who is to do so. He it is who must decide whether the occasion is privileged or not, and, if that be so, he must necessarily decide in respect of what portion of the libel the occasion would be privileged if it stood by
H itself. A more difficult question, however, remains upon which the authorities cited give little, if any, assistance. It is this: What would be the effect of embodying separable foreign and irrelevant defamatory matter in a libel? Would it make the occasion of the publication of the libel no longer to any extent privileged, or would those portions of the libel, which would have been within the protection of the privileged occasion if they stood alone and constituted the entire libel, still
I continue to be protected, the irrelevant matter furnishing possible evidence that the relevant portion was published with actual malice. In the absence of all guiding authority the latter would, in my opinion, be more consistent with justice and legal principle, and I think it is in law the true result. Owing, however, to the view I take of the contents of the libel this question is, to my mind, a purely academic one. I do not think any foreign or irrelevant matter has been introduced into the libel; but as the point has been raised and fully argued, and is itself of importance, it is, I think, desirable to decide it. I have accordingly expressed my

own opinion upon it.

Some argument was directed to the defendant's precise position in relation to this libel, his right duties and privileges, his feelings towards the appellant and his express or implied malice. I think his position is plain. He was the mere agent of the Army Council, bound to obey their orders or resign his post—the mere instrument through whose hands the libel passed for publication. His own personal feelings or privileges are, I think, not involved in the case at all. He had nothing whatever to do with the composition of the libel or the approval of its contents. In the mere routine of the work of the office he signed his name to it and passed it on for publication in the way and over the area usual in such cases. To suppose that it was his duty to attempt to dissuade his principals from publishing the libel, to criticise their language, or, save at their request, to alter it, is, in my view, quite absurd. It is no doubt true that one cannot defend himself for publishing a libel simply by saying that another person whom he was bound to obey ordered him to publish it; but it is equally true that when an agent, in obedience to the command of his principal, merely does the mechanical act of publishing the libel handed to him complete, the privilege of the principal becomes, as it were, his privilege, and if the principal has caused the communication to be made to protect an interest or discharge a duty which would have made the occasion privileged if he had published the libel with his own hand, the agent can equally rely on the publication having been made on a privileged occasion. For this purpose he stands, in my view, in the shoes of his principal, has the same rights, and the same liabilities. I think this follows from the reasoning of the judgments in *London Association for Protection of Trade v. Greenlands, Ltd.* (12).

[His LORDSHIP said that, in his opinion, everything in the libel was pertinent and relevant to the central facts that the appellant had made charges against General Scobell and had failed to substantiate them, and that they had been investigated by the Army Council and found to be untrue. The next point urged on behalf of the appellant was that the publication of the libel was unnecessarily wide; that it extended over too vast an area; that neither the Army Council nor the appellant had any interest or duty to publish it to people inhabiting the remote parts of the Empire which the libel might reach; that the latter had no corresponding interest or duty in receiving the communication; and that either the occasion of the publication was, therefore, not a privileged occasion, or that the wide publication was evidence of actual malice. He (His LORDSHIP) could not agree. It might be laid down as a general proposition that where a man through the medium of HANSARD's reports of the proceedings in Parliament, published to the world vile slanders of a civil, naval, or military servant of the Crown in relation to the discharge by that servant of the duties of his office, he selected the world as his audience, and that it was the duty of the heads of the service to which the servant belonged, if on investigation they found the imputation against him groundless, to publish his vindication to the same audience to which his traducer addressed himself. The Army Council would have failed in their duty to General Scobell personally, and to the great service which they in a certain sense governed and controlled if they had not given the widest circulation to the announcement of the general's vindication. For those reasons he was clearly of opinion that the occasion on which the alleged libel was published was a privileged occasion, and that there was no evidence of express malice either against the defendant or against the Army Council. The decision of the Court of Appeal was right and should be upheld; and the appeal be dismissed with costs here and below.]

LORD SHAW considered the facts and continued: The case, I humbly think, becomes, or should have become, a very ordinary one both in principle and in procedure. The occasion was clearly privileged, the communication dealt with matter germane to the occasion and was protected. Everything else was familiar

A ground, namely, that in such circumstances the inference that might otherwise have arisen from a statement prejudicial to the plaintiff is rebutted, and it is put upon him (the plaintiff) to establish affirmatively, in the words of PARKE, B., that there was "malice in fact—that the defendant was actuated by motives of personal spite or ill-will independent of the occasion on which the communication is made": *Wright v. Woodgate* (8) (2 Cr. M. & R. at p. 577). The leading place
B in authority is still held by *Toogood v. Spyring* (1). The most valuable judgment of WILLES, J., in *Henwood v. Harrison* (7) gathers the decisions together, including, especially, *Harrison v. Bush* (13) and *Whiteley v. Adams* (14), and sums them up in these terms (L.R. 7 C.P. at p. 622):

C "The principle upon which these cases are founded is a universal one, that the public convenience is to be preferred to private interests, and that communications which the interests of society require to be unfettered may freely be made by persons acting honestly without actual malice, notwithstanding that they involve relevant comments condemnatory of individuals."

In actions for defamation, it is the province and duty of the judge to settle the question of privilege, and that without reference of it, or of what goes to establish
D it, to the jury. The entire mass of authority is, in my opinion, in support of this view, and it is the view adopted in everyday practice. It is not the province or duty of the jury to adjudicate upon or to settle the question of privilege. To use the language of WILLES, J. (*Henwood v. Harrison* (7), *ibid.* at p. 628):

E "It would be abolishing the law of privileged discussion and deserting the duty of the court to decide upon this as upon any other question of law if we were to hand over the decision of privilege or no privilege to the jury."

How far this rule was departed from in this case will be presently seen. I am of opinion, that this case is one in which privilege should have been affirmed by the judge and the jury directed accordingly to proceed to what was the one and only remaining question—a question of fact within their province, namely, whether
F express malice on the part of the defendant had been affirmatively established by the plaintiff.

It might well have been considered that there was nothing in the communiqué to which a libellous meaning could by any reasonable person be attached. This was not the course adopted by the learned counsel for the respondent; they not only admitted that there was matter which was open to a libellous construction,
G but they, as I read the proceedings, also admitted that the matter was in fact libellous. I fear that this caused much confusion. If it referred to the expression "removed from the regiment" when the plaintiff was put upon half-pay, it put briefly what the plaintiff himself spoke to when, being asked the effect of putting an officer on half-pay, he said, "It takes him off the regimental list," and what the defendant said, in answer to the court, an officer "put on half-pay is no longer
H an officer in the regiment." The admission made appears accordingly to run counter to the facts; and confusion might have ensued from a verdict of malice in such circumstances. Fortunately this situation was saved by the learned judge, who closed the whole matter by ruling

I "that there is no evidence of malice—not only no evidence of malice in the publication, but no evidence of malice on the part of the defendant in the publication of this document which would make it necessary for me to leave the case to the jury, if the occasion of its publication were a privileged occasion."

With this ruling it was not open to the jury to find malice as a fact, and, again quite properly, there is no such finding. The case, however, went on for days after this intimation; the inquiry ranged very wide, so wide that I feel convinced that the jury may very well have come to the conclusion that the case they were

trying was a case, not of libel, but truly of wrongful dismissal; and I do not for myself see how the verdict obtained in such circumstances could have stood. It is certainly unusual to find a verdict of a jury taken, not upon the question: "Was there malice?" not even upon elements which lead up to that as a fact, but upon the question of privilege and the elements which might be supposed to bear upon that question of law. I am humbly of opinion that the whole of that procedure was contrary to law. What happened was that the learned judge asked from the jury answers to certain questions, and the jury found (i) that the document was not of a public nature; (ii) that the defendant made the publication in the discharge of his duty as secretary to the Army Council; (iii) and for the purpose of affording information to the public, but that (iv) it was not proper for the public to know the subject-matter of the publication; (v) they gave a verdict for £2,000 damages. It is not necessary to consider whether these findings are supported by evidence. For it is clear beyond all question that the whole of them are in the region of the case relating to the purely and exclusively legal question of privilege. I respectfully agree with the submission made at the trial by the learned counsel for the respondent that "there is no issue of fact proper to be submitted to a jury in order to determine the privileged occasion." The learned judge did not accede. On the contrary, he relied in determining the question of privilege on the jury's findings, his language being: "On these findings I hold that the publication was not a privileged publication nor a publication on a privileged occasion."

For the reasons already given I am of opinion that this procedure was erroneous. The respective provinces of judge and jury were confounded. I think the verdict so obtained cannot stand, and this quite apart from the large admission of irrelevant and misleading matter to which I have adverted. But, further, being of opinion that the occasion was privileged, that the communication did not go beyond it, and that no malice was proved in making it, it appears to me that judgment should be entered for the defendant and that the course taken by the Court of Appeal was correct.

Appeal dismissed.

Solicitors: J. D. Langton & Passmore; Treasury Solicitor.

[Reported by W. E. REID, ESQ., Barrister-at-Law.]

A ADMIRALTY COMMISSIONERS v. STEAMSHIP AMERIKA (OWNERS). THE AMERIKA

[HOUSE OF LORDS (Earl Loreburn, Lord Parker of Waddington and Lord Sumner),
July 20, 21, December 19, 1916]

[Reported [1917] A.C. 38; 86 L.J.P. 58; 116 L.T. 34; 33 T.L.R. 135;
61 Sol. Jo. 158; 13 Asp. M.L.C. 558]

Judgment—Judicial decision as authority—Long established rule of law—Right of court to review.

When a rule of law, e.g., the common law rule that in civil proceedings the death of a human being could not be complained of as an injury (see *Baker v. Bolton* (1) (1808), 1 Camp. 493), has been inveterate from the earliest time it is for the legislature and not for the courts to declare it to be wrong and to reject or amend it, unless it is clear that it was introduced by erroneous judicial decision (per EARL LOREBURN: not even where the court is of opinion that the common law ought originally to have been differently interpreted).

D Damages—Duty to minimise loss—Seamen's lives lost through negligence—Claim respecting voluntary grants to dependants—Competency.

A submarine having been sunk through the negligent navigation of the respondents' steamship and all but one of her crew drowned, the Commissioners of the Admiralty brought an action against the steamship owners to recover the damage they had sustained, and they included in their claim a sum representing the capitalised amount of pensions and grants paid or payable by them to the relatives of the crew who were drowned. In Admiralty regulations it was stated that these were compassionate payments, granted of grace and not of right both in kind and in degree.

Held: a person aggrieved by an injury is not by common law entitled to increase his claim for damage by any voluntary act; the pensions and grants in question were always in fact made, but that was by the voluntary act of the naval authorities which, accordingly, and not the respondents' negligence, was the cause of the loss of the money to the Exchequer; and, therefore, the commissioners were not entitled to recover from the respondents in respect of these sums.

G Master and Servant—Loss of service—Damages—Measure—Inclusion of grants paid to dependents of deceased servant in accordance with contract of service.

Per LORD SUMNER: Even if the action had been brought on a contract of employment providing for the payment of sums to the relatives of deceased employees those sums would not have been recoverable in an action for negligence, for the employer's damage must be measured by the value of the employee's services which were lost and the payments to the relatives would not be the natural consequences of the tort sued for.

Decision of Court of Appeal, [1914] P. 167, affirmed.

Notes. For modifications of the common law rule mentioned in the headnote see the Fatal Accidents Acts, 1846 to 1959, and the Law Reform (Miscellaneous Provisions) Act, 1934.

Considered: *Baker v. Dagleish Steamship Co.*, [1922] 1 K.B. 361; *Flint v. Lovall*, [1934] All E.R. Rep. 200; *Rose v. Ford*, [1937] 3 All E.R. 359; *The Aizkarai Mendi*, [1938] 3 All E.R. 483; *I.R. Comrs. v. Hambrook*, [1956] 1 All E.R. 807. Referred to: *Berry v. Humm*, [1915] 1 K.B. 627; *Bradford Corp'n. v. Webster*, [1920] 2 K.B. 135; *The Moliere*, [1925] P. 27; *The Edison*, [1932] P. 52; *A.-G. v. Valle-Jones*, [1935] All E.R. Rep. 175; *Grein v. Imperial Airways, Ltd.*, [1936] 2 All E.R. 1258. *Davies v. Powell Duffryn Association Collieries, Ltd.*, [1942] 1 All E.R. 657; *The Oropesa*, [1943] 1 All E.R. 211; *Best v. Samuel Fox*

& Co., [1952] 2 All E.R. 394; *R. v. Disputes Committee of the National Joint Council for the Craft of Dental Technicians, Ex parte Neate*, [1953] 1 Q.B. 704; *A.-G. for New South Wales v. Perpetual Trustee Co.*, [1955] 1 All E.R. 846.

As to judicial decisions as authorities see 22 HALSBURY'S LAWS (3rd Edn.) 796 et seq., and as to remoteness of damage see *ibid.*, vol. 11, 268 et seq. For cases see 30 DIGEST (Repl.) 211 et seq., and 17 DIGEST (Repl.) 145-148.

Cases referred to :

- (1) *Baker v. Bolton* (1808), 1 Camp. 493; 1 Digest (Repl.) 39, 286.
- (2) *Osborn (Osborne) v. Gillett* (1873), L.R. 8 Exch. 88; 42 L.J.Ex. 53; 28 L.T. 197; 21 W.R. 409; 1 Digest (Repl.) 39, 287.
- (3) *Clark v. London General Omnibus Co., Ltd.*, [1906] 2 K.B. 648; 75 L.J.K.B. 907; 95 L.T. 435; 22 T.L.R. 691; 50 Sol. Jo. 631, C.A.; 1 Digest (Repl.) 39, 288.
- (4) *Jackson v. Watson & Sons*, [1909] 2 K.B. 193; 78 L.J.K.B. 587; 100 L.T. 799; 25 T.L.R. 454; 53 Sol. Jo. 447, C.A.; 1 Digest (Repl.) 40, 291.
- (5) *Huggins v. Butcher* (1606), 1 Brownl. 205; sub nom. *Higgins v. Butcher*, Yelv. 89; 80 E.R. 61; sub nom. *Higgins' Case*, Noy, 18; 74 E.R. 989; 34 Digest 182, 1479.
- (6) *Lutterell v. Reynell* (1670), 1 Mod. Rep. 282; 86 E.R. 887; 1 Digest (Repl.) 76, 567.
- (7) *Holmes v. Mather* (1875), L.R. 10 Exch. 261; 44 L.J.Ex. 176; 33 L.T. 361; 39 J.P. 567; 23 W.R. 869; 34 Digest 133, 1020.
- (8) *Markham v. Cobb* (1625), Lat. 144; W. Jo. 147; Noy, 82; 82 E.R. 316; 1 Digest (Repl.) 74, 553.
- (9) *Dawkes v. Coveleigh* (1652), Sty. 346; 82 E.R. 765; 1 Digest (Repl.) 74, 554.
- (10) *Crosby v. Leng* (1810), 12 East 409; 104 E.R. 160; 1 Digest (Repl.) 78, 583.
- (11) *Gimson v. Woodfull* (1825), 2 C. & P. 41; 1 Digest (Repl.) 74, 558.
- (12) *Stone v. Marsh, Stracey and Graham* (1827), 6 B. & C. 551; 9 Dow. & Ry. K.B. 643; Ry. & M. 364; 5 L.J.O.S.K.B. 201; 108 E.R. 554; 1 Digest (Repl.) 73, 552.
- (13) *White v. Spettigue* (1845), 1 Car. & Kir. 673; 13 M. & W. 603; 14 L.J.Ex. 99; 4 L.T.O.S. 317; 9 J.P. 761; 9 Jur. 70; 153 E.R. 252; 1 Digest (Repl.) 74, 557.
- (14) *Wellock v. Constantine* (1863), 2 H. & C. 146; 2 F. & F. 791; 32 L.J.Ex. 285; 7 L.T. 751; 9 Jur. N.S. 232; 159 E.R. 61; 1 Digest (Repl.) 76, 571.
- (15) *Wells v. Abrahams* (1872), L.R. 7 Q.B. 554; 41 L.J.Q.B. 306; 26 L.T. 433; 36 J.P. 710; 20 W.R. 659; 36 J.P. Jo. 260; 1 Digest (Repl.) 76, 565.
- (16) *Re Shepherd, Ex parte Ball* (1879), 10 Ch.D. 667; 48 L.J. Bey. 57; 40 L.T. 141; 27 W.R. 563; 14 Cox, C.C. 237, C.A.; 1 Digest (Repl.) 76, 566.
- (17) *Midland Insurance Co. v. Smith* (1881), 6 Q.B.D. 561; 50 L.J.Q.B. 329; 45 L.T. 411; 45 J.P. 699; 29 W.R. 850; 1 Digest (Repl.) 73, 547.
- (18) *Smith v. Selwyn*, [1914] 3 K.B. 98; 83 L.J.K.B. 1339; 111 L.T. 195, C.A.; 1 Digest (Repl.) 77, 575.
- (19) *Clarke v. Carfin Coal Co.*, [1891] A.C. 412; 18 R. (Ct. of Sess.) 63; 28 Sc.L.R. 950, H.L.; 3 Digest (Repl.) 427, *113.
- (20) *The Vera Cruz (No. 2)* (1884), 9 P.D. 96; 53 L.J.P. 33; 51 L.T. 104; 32 W.R. 783; 5 Asp. M.L.C. 270, C.A.; 41 Digest 768, 6230.
- (21) *Re The Garland, Monaghan v. Horn* (1881), 7 S.C.R. 409; 1 Digest (Repl.) 170, *130.
- (22) *The Corsair* (1892), 145 U.S. 335.
- (23) *Wood v. Gray & Sons*, [1892] A.C. 576; 67 L.T. 628; 34 Digest 236, q.
- (24) *Glaholm v. Barker* (1866), 1 Ch. App. 223; 35 L.J.Ch. 259; 13 L.T. 653; 12 Jur. N.S. 82; 14 W.R. 296; 2 Mar. L.C. 298, L.J.J.; 42 Digest 710, 1272.
- (25) *Mobile Life Insurance v. Brame* (1877), 95 U.S. 754.

- A (26) *Hubgh v. New Orleans and Carrollton Railroad Co.* (1851), 6 Louisiana Annual 495.
- (27) *Grinnell v. Wells* (1844), 7 Man. & G. 1033; 2 Dow. & L. 610; 8 Scott, N.R. 741; 14 L.J.C.P. 19; 4 L.T.O.S. 173; 8 Jur. 1101; 135 E.R. 419; 34 Digest 178, 1439.
- (28) *Woodward v. Walton* (1807), 2 Bos. & P.N.R. 476.
- B (29) *Guy v. Livesey* (1618), Cro. Jac. 501; 79 E.R. 428; 27 Digest (Repl.) 88, 665.
- (30) *Marys's Case* (1612), 9 Co. Rep. 111b.; 77 E.R. 895; 34 Digest 181, 1468.
- (31) *Hall v. Hollander* (1825), 4 B. & C. 660; 7 Dow. & Ry. K.B. 133; 4 L.J.O.S.K.B. 39; 107 E.R. 1206; 34 Digest 181, 1470.
- (32) *Lucas v. New York Central Railroad Co.* (1855), 21 Barb. 245.
- C (33) *Mills v. Armstrong, The Bernina* (1888), 13 App. Cas. 1; 57 L.J.P. 65; 58 L.T. 423; 52 J.P. 212; 36 W.R. 870; 4 T.L.R. 360; 6 Asp. M.L.C. 257, H.L.; 1 Digest (Repl.) 170, 560.
- (34) *Thorogood v. Bryan* (1849), 8 C.B. 115; 18 L.J.C.P. 336; 13 L.T.O.S. 284; 137 E.R. 452; 36 Digest (Repl.) 193, 1020.
- (35) *Armstrong v. South Eastern Rail. Co.* (1847), 11 Jur. 758; 36 Digest (Repl.) 222, 1188.
- D (36) *Shackborough v. Biggins* (1599), Cro. Eliz. 632; sub nom. *Biggin's Case*, 5 Co. Rep. 50a.; 77 E.R. 130; sub nom. *Philladay Stroughborough v. Biggin*, Moore K.B. 571; sub nom. *Shuckborough v. Biggen*, Cro. Eliz. 682; 11 Digest (Repl.) 585, 211.
- (37) *Bigby v. Kennedy* (1770), 5 Burr. 2643.
- (38) *Ashford v. Thornton* (1818), 1 B. & Ald. 405.
- E (39) *Finlay v. Chirney* (1888), 20 Q.B.D. 494; 57 L.J.Q.B. 247; 58 L.T. 664; 52 J.P. 324; 36 W.R. 534; 4 T.L.R. 322, C.A.; 27 Digest (Repl.) 26, 39.
- (40) *Bradburn v. Great Western Rail. Co.* (1874), L.R. 10 Exch. 1; 44 L.J.Ex. 9; 31 L.T. 464; 23 W.R. 48; 36 Digest (Repl.) 205, 1071.

Appeal by the commissioners for executing the office of Lord High Admiral of the United Kingdom from an order of the Court of Appeal, affirming a decision of SIR SAMUEL EVANS, P., which confirmed a report of the assistant registrar disallowing a claim made by the commissioners as plaintiffs in an action for damage by collision in respect of the loss of life of the crew of His Majesty's submarine B2. The Court of Appeal decided that the effect of the decisions in *Osborn (Osborne) v. Gillett* (2), *Clark v. London General Omnibus Co., Ltd.* (3), and *Jackson v. Watson & Sons* (4) was to render binding upon the Court of Appeal the ruling of LORD ELLENBOROUGH in *Baker v. Bolton* (1) that "in a civil court the death of a human being could not be complained of as an injury." The court, therefore, decided that the commissioners' claim in respect of loss or damage suffered by them through the loss of life of the crew of the submarine was recoverable in law. The commissioners appealed.

H *The Solicitor-General* (Sir George Cave, K.C.), *Sir John Simon*, K.C., *Laing*, K.C., and *Dunlop* for the appellants.

Inskip, K.C., and *Arthur Pritchard* for the respondents.

The House took time for consideration.

Dec. 19, 1916. The following opinions were read.

I **EARL LOREBURN.**—In my opinion, this appeal fails. It is far too late for this House to disturb the rule expressed by LORD ELLENBOROUGH in *Baker v. Bolton* (1), even were we of opinion that the common law ought originally to have been differently interpreted, of which I am by no means persuaded. When a rule has become inveterate from the earliest time, as this rule appears to have been, it would be legislation pure and simple were we to disturb it. I also think that the damages sought are not in any way recoverable, because they represent sums of money which the appellants were not legally required to pay. Your Lordships

have been interested in ascertaining the origin of LORD ELLENBOROUGH's decision. I share in that interest, but I cannot throw any light on the subject beyond what may be derived from the opinions of LORD PARKER and LORD SUMNER, both of which I have had the advantage and pleasure of reading.

LORD PARKER OF WADDINGTON.—I agree. There are, in my opinion, two sufficient reasons why this appeal cannot succeed. The first is that the items of damage which the appellants desire to be allowed are too remote. The second is that no sufficient case has been made for overruling LORD ELLENBOROUGH's decision in *Baker v. Bolton* (1) to the effect that in a civil court the death of a human being cannot be complained of as an injury. I will deal with each of these reasons separately.

The items of damage which the appellants desire to have allowed consist of certain pensions and allowances. These pensions and allowances are granted under statutory authority, but it does not appear that their grant formed any part of the contract between the Admiralty and the seamen whose lives have been lost through the respondents' negligence. They are, it seems, compassionate pensions and allowances only, which, from a legal standpoint, the Admiralty might have granted or withheld at its discretion. Under these circumstances they cannot constitute an item of damage. No person aggrieved by an injury is by common law entitled to increase his claim for damage by any voluntary act; on the contrary, it is his duty, if he reasonably can, to abstain from any act by which the damage could be in any way increased. But further, even if the pensions and allowances in question were granted pursuant to contracts between the Admiralty and the deceased seamen, I should still be of opinion that they could not properly constitute an item of damage for loss of service. They would in this case constitute deferred payment for service already rendered, and have no possible connection with the future services of which the Admiralty had been deprived.

Passing to the second of the reasons above mentioned, I may point out that the correctness of the ruling in *Baker v. Bolton* (1) has since been accepted, not only by all courts in this country, but by the Supreme Court of the United States, nor can anything be found in the earlier authorities inconsistent with it. It was, it is true, severely criticised by LORD BRAMWELL in *Osborn (Osborne) v. Gillett* (2). It was, he considered, anomalous that a master should be entitled to recover for loss of service if his servant were wrongfully injured, but should be without any remedy if his servant were wrongfully killed. If it were any part of the functions of this House to consider what rules ought to prevail in a logical and scientific system of jurisprudence, much might no doubt be said for this criticism; though it is not, in my opinion, by any means clear that the anomaly does not in reality consist rather in granting the remedy in the former case than in refusing it in the latter. In a society based so largely as our own is at the present day upon contractual obligations, it does not appear why the wrongful injury of A., whereby he is prevented from fulfilling his contractual obligations to B., should confer on B. a right of action only where these obligations are those arising out of the relationship of master and servant, or, indeed, why the right should not be extended so as to cover all loss, whether arising out of inability to perform a contract or otherwise. This House, however, is bound to administer the law as it finds it. The mere fact that the law involves some anomaly is immaterial unless it be clear that the anomaly has been introduced by erroneous judicial decision. The appellants have, accordingly, attempted to show that LORD ELLENBOROUGH's ruling was erroneous, as being based either (i) upon a misconception of the limits within which the maxim *actio personalis cum personâ moritur* is applicable, or (ii) upon the mistaken notion that the rule of public policy which, in cases of felony, admittedly requires the person aggrieved to institute criminal proceedings before pursuing any civil remedy against the felon, precluded such civil remedy altogether, or (iii) upon doctrines of Roman law which ought not to be applied at all. It is to be observed that LORD

A ELLENBOROUGH gave no reasons for his ruling; he treated the proposition he laid down as a well-known proposition of law, and the reasoning on which the proposition was based must, therefore, be found, if at all, in the earlier authorities.

B The only earlier authority to which your Lordships' attention was called was *Huggins v. Butcher* (5). This was an action in trespass by a husband for wrongful injury causing his wife's death. The action was dismissed. If it were looked on as an action in right of the deceased wife, the maxim *actio personalis, &c.*, was clearly applicable. If, on the other hand, it were looked on as an action by the husband in his own right, then the trespass was "drowned in the felony." Obviously the limits within which the maxim mentioned is applicable were already well known when *Huggins v. Butcher* (5) was decided, and LORD ELLENBOROUGH, with that case in his mind, can hardly have fallen into the error suggested. Nor
C can I find any reason to suppose that any weight has ever been given in the courts of this country to the Roman law on the subject. It remains, therefore, to consider whether the reason given in *Huggins v. Butcher* (5) that the trespass was drowned in the felony can be rejected as erroneous. It was contended that the reason must be rejected as a misconception of the rule of public policy above referred to. Whatever may have been thought in the early part of the seventeenth century, or even in LORD ELLENBOROUGH's day, it is now quite clear that the rule only
D suspends and does not require the destruction of the civil remedy. There can, therefore, it is argued, be no drowning of the trespass in the felony, and if the reason given for the decision in *Huggins v. Butcher* (5) be bad, there is, it is contended, no reason why that case should stand, or why LORD ELLENBOROUGH's ruling, which was dependent on it, should not now be overruled by this House.

E Before proceeding to deal with this point, I should like to call the attention of the House to certain historical considerations which appear to me to be of considerable materiality. I do this with some diffidence, as I cannot lay claim to any special knowledge. I have, however, read a good deal of history in connection with this case, for it is almost a commonplace that apparent anomalies in our law
F can generally be explained if we consider the conditions of its historical growth. If we carry our minds back to a period prior to the development under the influence of the Statute of Westminster II (13 Edw. 1, c. 24) of the action on the case, we find that the law of contract based on the doctrine of consideration had not yet taken shape. The basis of society was still status rather than contract, and the King's courts had not yet invented any procedure for the enforcement of simple
G contract obligations. Nevertheless, among the writs which had become *de cursu*, there were several writs which a master could obtain from the Chancery in respect of wrongs done to his servant. FITZHERBERT, in his *DE NATURA BREVIVM*, mentions (i) a writ of trespass for taking away an apprentice or servant, and (ii) a writ of trespass for injury done to a servant *per quod servitium amisit*. These writs are in all respects analogous to the writs of trespass for taking away a wife or child, or for injury done to a wife or child *per quod consortium* or *servitium amisit*;
H and also to the writs of trespass for debauching a wife, daughter, or female servant. The inference is that all these writs arose out of status at a time when the servant or apprentice, as well as the wife and child, was a member of the family, and the relation between him and the head of the family had not yet come to be looked upon as resting upon contract. This would appear to me to account for the fact that, except in the case of master and servant, the loss of A. arising out of an
I injury, whereby B. is unable to perform his contract, is not actionable. It is only in a society based on contractual obligation that the existence of such an action in the case of master and servant and in no other case can appear illogical. Further, during the period in question the writ of trespass was the only remedy for wrongs such as those we are considering. According to PROFESSOR MAITLAND, trespass was a remedy for acts of violence not amounting to a felony. Certainly no writ of trespass can be found in which the acts of which the plaintiff complains necessarily amount to a felony. In some cases they may or they may not. Take for example

the writ for breaking into the plaintiff's house and taking away his money. The acts complained of do not constitute burglary or larceny. They may be a burglary or larceny, according to whether certain additional facts be or be not proved, but the defendant cannot plead these additional facts: *Lutterell v. Reynell* (6). He cannot set up his own felony by way of defence. The facts alleged in the writ are wrongful and actionable, whether these additional facts be proved or otherwise. It is not the felony which is made the subject of complaint. It should be remembered that for felony there was the appeal, and that, to use PROFESSOR MAITLAND's expression, the writ of trespass may be called "an attenuated appeal" dealing with acts of violence for which the appeal did not lie. It arose out of the appeal, and was a criminal as well as a civil proceeding, leading not only to the plaintiff recovering damage, but to the defendant being fined or imprisoned. During the period we are considering it is probable that all homicide by act of violence amounted to felony. Certainly intentional homicide or homicide through negligence was felonious. It follows that the death of a human being occasioned by an act of violence on the part of the defendant could not be the ground of complaint in an action of trespass. It could not be alleged without alleging felony, and for felony trespass would not lie. If the writ alleged only an injury per quod servitium or consortium amisit, the writ would be unobjectionable, but if death ensued, damage could be obtained up to the date of the death only. If the injured person had been killed on the spot the action would fail altogether. The plaintiff's remedy, if he had any, would be the appeal.

If for the reasons above suggested trespass did not lie on the part of a master for an injury causing the death of his servant, it is easy to see how this fact would influence the subsequent development of the action on the case. The writ-making powers of the Chancery, which for a time had fallen into disuse largely because they were thought to infringe on the legislative function of Parliament, received in 1285 A.D. a new impulse by the passing of the Statute of Westminster II, and began to be again used as they had been originally used, to meet the needs of a growing civilisation by providing legal remedies for grievances which, however much they might be recognised as such by the general sense of the community, were not yet actionable in the King's courts. Consider for a moment the following examples: First, A.'s servant, in the course of serving A., negligently throws a beam of wood onto a highway, and in so doing injures B.'s servant. Under these circumstances B.'s servant had a writ of trespass against the wrongdoer, and B. also had a writ of trespass (per quod servitium amisit), but neither of them had any remedy against A., for trespass was in fact a criminal proceeding, and according to the common law no one could be called upon to answer in a criminal proceeding for another's crime. Nevertheless, the general sense of the community demanded such a remedy, and this was supplied by giving B. and B.'s servant an action on the case against A. By this means the modern law as to a master's liability for the acts of his servant was enabled to develop. The remedy of B.'s servant against A.'s servant was always confined to an action in trespass: see *Holmes v. Mather* (7), per LORD BRAMWELL, L.R. 10 Exch. at p. 268. Secondly, suppose, A.'s servant, in the course of serving A., placed a beam of wood on the highway and negligently left it there, so that B.'s servant fell over it and was injured. Under these circumstances neither B.'s servant nor B. himself had any remedy in trespass, for A.'s servant had committed no act of violence for which alone a writ of trespass could be obtained from the Chancery. Nevertheless, the general sense of the community demanded a remedy and such a remedy was again supplied by giving both B. and B.'s servant an action on the case against both A.'s servant and A. If in the first of the two examples I have given B.'s servant had been killed and not injured only, A.'s servant would have committed a felony and no action against him would lie in trespass. In developing the principle of respondeat superior, it may well have been thought that A.'s liability for the act of his servant ought not in any case to be greater than the liability of the servant

A himself. Again, if in the second of the two examples B.'s servant, in falling over the beam, had broken his neck, it may well have been thought that neither A.'s servant nor A. himself ought to incur, by reason of mere nonfeasance, a liability greater than would have been incurred by actual violence. These considerations may well account for the doctrine that the death of a human being could not be complained of as an injury in an action on the case any more than it could in an action of trespass.

B I will now return to *Huggins v. Butcher* (5), and I desire to suggest that it was not really based on any rule or supposed rule of public policy, but merely on the nature of an action in trespass. The declaration was by a husband for an injury to his wife. *Primâ facie*, therefore, what was complained of was a trespass, but the declaration proceeded to state that the wife died of the injury. What was C *primâ facie* a trespass thus became a felony, for which no action in trespass lay. The trespass was "drowned in felony. It was for the King only to punish, except the party brought an appeal": (Noy, 18). If the case had turned on a rule of public policy, such rule would have been applicable to a writ in trespass for breaking into the plaintiff's house and taking away his money, where what had been done in fact amounted to burglary or larceny. I cannot discover that it was ever D so applied. On the contrary, *Markham v. Cobb* (8), decided in 1625, and *Dawkes v. Coveleigh* (9), decided in 1652, are authorities that in such a case the trespass is not drowned in the felony, so as to preclude an action for the trespass provided the requirements of public policy are first satisfied. These cases were quoted with approval by SIR MATTHEW HALE (1 Hale, *PLEAS OF THE CROWN*, p. 546), and it cannot be disputed that they are good law. LORD ELLENBOROUGH himself acted on E them in *Crosby v. Leng* (10) without any apparent hesitation, though *Baker v. Bolton* (1) had been decided by him only a few years previously, namely, in 1808. It is true that neither *Huggins v. Butcher* (5) nor *Baker v. Bolton* (1) were cited in argument. Of course, this may have been due to carelessness in examining the authorities, but it is quite possible that counsel did not consider that they had any bearing on a question of public policy.

F *Gimson v. Woodfull* (11) strikes the first discordant note. This was in 1825, and in 1827 the matter was discussed in *Stone v. Marsh* (12), LORD TENTERDEN using language which might be construed to favour the view taken in *Gimson v. Woodfull* (11). The point was left open in *White v. Spettigue* (13), though that case overruled *Gimson v. Woodfull* (11) on other grounds. In *Wellock v. Constantine* (14), decided in 1863, the plaintiff sought to recover damages for G rape. Of course, if she had consented to the act alleged, there could be no civil remedy. If, on the other hand, she had not consented, she was in fact complaining of a felony, for which an action in trespass, at any rate, would not lie. WILLES, J., being of opinion that no civil action would lie for a felony, intimated that he would direct a verdict for the defendant, and the plaintiff thereupon consented to a non-suit. The case, therefore, appears to resemble *Huggins v. Butcher* (5), H and has no necessary reference to public policy, though POLLOCK, C.B., in discharging a rule for a new trial, seems to suggest that public policy was the real ground of decision. This also appears to have been the view of BLACKBURN, J., in *Wells v. Abrahams* (15), for he disapproves *Wellock v. Constantine* (14) on the ground that public policy demands only the suspension and not the destruction of the civil remedy, thus approving the earlier authorities to which I have referred. I He obviously disagreed with the ruling of WILLES, J., that no civil action would lie for a felony, for though he expressly approves *Huggins v. Butcher* (5), he says it is a mistake to suppose it was decided on that ground. Unfortunately, he does not suggest on what grounds he thought the decision could be supported. That the rule of public policy only suspends or does not destroy the civil remedy is also shown by the subsequent cases of *Re Shepherd, Ex parte Ball* (16) and *Midland Insurance Co. v. Smith* (17). It should be noticed that BAGGALLAY, L.J., in laying down in *Re Shepherd, Ex parte Ball* (16) the propositions resulting from

the authorities, says that a felonious act may (not that it must) give rise to a civil action. Before any question of public policy can arise it has first to be ascertained whether civil proceedings will lie at all. Most felonies involve a wrong less than a felony, and for such a wrong civil proceedings will lie when once the demands of public policy have been satisfied. But there may be felonies where the only wrong is the felony itself, and it may well be that the felony cannot be made the subject of complaint in civil proceedings.

It was in this state of the law as to public policy that *Baker v. Bolton* (1) came up for consideration before the Court of Appeal in *Clark v. London General Omnibus Co., Ltd.* (3), and, if that case be referred to, it is quite apparent that neither the counsel who argued it nor the judges who were party to the decision considered that public policy had anything to do with the matter. Not one of the cases on the latter subject to which I have referred was so much as mentioned. Under these circumstances it seems impossible to suppose that the decision in either *Huggins v. Butcher* (5) or *Baker v. Bolton* (1) depended on a misconception of the rule of public policy. I think it more probable that this misconception which at one time no doubt prevailed, but which has been now dispelled, was itself due to a mistake as to the meaning of what was said in *Huggins v. Butcher* (5), that case itself merely deciding that felony could not be made a ground of complaint in trespass, a decision which in *Baker v. Bolton* (1) was extended to cover all civil proceedings.

Perhaps I ought to add one word on *Smith v. Selwyn* (18). That case resembled *Wellock v. Constantine* (14). The statement of claim alleged and complained of a felony. There was an application to stay further proceedings or dismiss the action on the ground that it was based on a felony for which there had been no prosecution. Liberty was given to amend the claim by alleging only a wrong less than felony; otherwise the action was ordered to be stayed pending criminal proceedings. The question whether felony could itself be made a ground of complaint in a civil action, quite apart from any rule of public policy, does not appear to have been considered, and supposing the statement of claim had been amended in the way suggested, it would still seem that, under the authorities I have cited, public policy would, if there had been an actual felony, demand a stay until the plaintiff had done her duty by prosecuting the felon. Under these circumstances I do not think the appellants can be said to have advanced any sound reasons why your Lordships' House should disturb a rule of law which has been so long recognised in our courts and which, however anomalous it may appear to the scientific jurist, is almost certainly explicable on historical grounds. I agree that the appeal fails.

LORD SUMNER.—This appeal has been brought principally to test the rule in *Baker v. Bolton* (1), that "in a civil court the death of a human being cannot be complained of as an injury," a rule which has long been treated as universally applicable at common law. Some attempt was made to contest it only in its application to the case of master and servant. I will discuss both the narrower and the wider proposition, but it is clear that the action was not brought for the loss to a master of the services of his employee, but for the respondents' bad navigation, which sank the Crown's submarine, and the item of damage now in dispute, namely, pensions and allowances to dependants of seamen who were drowned, was claimed merely as one of the natural consequences of the tort, which consisted in sinking the ship. No claim has been made and no evidence has been given relating to damage sustained by the appellants in losing the further services of those who were drowned, and so different both in its nature and its incidents is the service of the seamen of His Majesty's Navy from the service of those who are in private employment that it may be questioned whether in any case an action per quod servitium amisit could have been brought at all.

A Never during the many centuries that have passed since reports of the decisions of English courts first began has the recovery of damages for the death of a human being as a civil injury been recorded. Since LORD ELLENBOROUGH's time the contrary has been uniformly decided by the Court of Exchequer and by the Court of Appeal. In addition to the weight of LORD ELLENBOROUGH's name (no mean authority even when sitting at nisi prius in spite of LORD CAMPBELL's sneer), the rule has

B been definitely asserted by LORD SELBORNE (*Clarke v. Carfin Coal Co.* (19), [1891] A.C. at p. 414), LORD BOWEN (*The Vera Cruz* (No. 2) (20), 9 P.D. at p. 101), and LORD ALVERSTONE and LORD GORELL (*Clark v. London General Omnibus Co., Ltd.* (8)). It has been accepted as the rule of the common law by the Supreme Court of the Dominion of Canada (*Re The Garland, Monaghan v. Horn* (21)), and the Supreme Court of the United States of America (*The Corsair* (22)). That the

C rule has also received statutory recognition appears to me to be abundantly plain. I agree that the preamble to s. 1 of the Fatal Accidents Act, 1846, should be read as applying to the particular defect in the existing law, which it was passed to remedy, namely, the disadvantageous position of widows and children, and not to the limited rights of masters and employers, though only BRAMWELL, B.'s, intrepid individualism could dismiss it as a "loose recital in an incorrectly drawn

D section of a statute, on which the courts had to put a meaning from what it did not rather than what it did say" (*Osborn (Osborne) v. Gillett* (2), L.R. 8 Exch. at p. 95). Still I think that the view taken by the legislature in 1846 is clear. Section 6 of Lord Campbell's Act provides that "nothing therein contained shall apply to that part of the United Kingdom called Scotland." Why? Because Scottish law differed from English law in the very point in question, and in this respect is

E for once illogical. The rule, says LORD WATSON, in *Clarke v. Carfin Coal Co.* (19) ([1891] A.C. at p. 419), and again in *Wood v. Gray & Sons* (23) ([1892] A.C. at p. 581), which allows

"actions of solatium and damages at the instance of husband, wife, or legitimate child in respect of the death of a spouse, child, or parent . . . does not rest upon any definite principle, but constitutes an arbitrary exception from the general law, which excludes all such actions, founded in inveterate custom and having no other ratio to support it."

F

In *Glaholm v. Barker* (24) TURNER, L.J., with the concurrence of KNIGHT-BRUCE, L.J., said (1 Ch. App. at p. 227):

G "Lord Campbell's Act first introduced into this country a remedy in case of injuries attended with loss of life, the law up to the time of the passing of this Act having stood thus—that in case of death resulting from injury the remedy for the injury died with the person."

It provided a new cause of action and did not merely regulate or enlarge an old one. It excluded Scotland from its operation because a sufficient remedy already existed there, when in England none existed at all. So much seems to me to be indubitable. It did not deal with the case of master and servant as such, presumably because the legislature found nothing in the common law rule in this regard which called for reconsideration. I think the observation of PIGOTT, B., in *Osborn (Osborne) v. Gillett* (2) (L.R. 8 Exch. at p. 93) was perfectly just.

H

I "We are not at liberty to disregard the law thus established so long ago and expressly recognised by the legislature, nor in effect to add by the decision of this court another clause to Lord Campbell's Act."

It is worthy of observation that the passing of Lord Campbell's Act was followed shortly afterwards by similar legislation in the States of New York in 1847 and 1849 and of Maryland in 1852, and statutes similar in effect have since been passed in most of the older States of the Union, where the common law prevails. Massachusetts had already dealt with the matter, though only tentatively, by direct enactment (c. 81 of 1786), which made the township as the highway authority

liable in certain cases, when death was caused on highways, and by an Act of 1840, which provided that a railway company, whose negligence had caused a fatal accident, should be liable on indictment to payment of a fine to the use of the personal representative of the deceased for the benefit of his family. Plainly it was, and long had been, the general opinion among students of the common law that the rule was as stated by LORD ELLENBOROUGH. The Supreme Court of the United States in 1877 in *Mobile Life Insurance v. Brame* (25) (95 U.S. at p. 756) said

"The authorities are so numerous and so uniform that by the common law no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question."

Since the early part of the last century the subject has been learnedly discussed on many occasions in the United States, both in connection with claims for the death of a servant and claims for the death of a relative. The re-argument in *Hubgh v. New Orleans and Carrollton Railroad Co.* (26) is particularly valuable for its contrast of the common law with the old French law and with the effect of art. 1382 and art. 2294 of the Code Napoléon, as repeatedly interpreted in the Cour de Cassation. So much for this rule as a proposition of general application.

I think that, as the appellants have argued this case as if the action had been brought by a master for the loss of a servant's service, it is better to deal also with this aspect of it. The point was concluded against the appellants in the courts below by *Osborn (Osborne) v. Gillett* (2) and *Clark v. London General Omnibus Co., Ltd.* (3). The question is whether there is any ground of principle on which your Lordships ought to overrule decisions of such authority and long standing. The case is put thus: "It is admitted that a master has an interest in his servant's life, such as to support an action if the servant is maimed; how can it be right that the tortfeasor should escape if instead of maiming the servant he kills him? Is the general rule of liability for tortious injury to the servant's health subject to an exception in relief of the tortfeasor if death ensue?" Some most learned writers have expressed dissatisfaction with the rule. It has been even suggested that LORD ELLENBOROUGH was "the victim of a confusion of ideas" and that the rule arose from a misunderstanding of the principle that a right of action for a tort, where the act done was felonious, is suspended till the tortfeasor has been prosecuted. The hope—perhaps a faint one—was long ago expressed that some day your Lordships might overrule *Baker v. Bolton* (1).

I think it is clear that the relation of master and servant presents in this matter some peculiar features. What is the right in the master which the tortfeasor infringes, or the duty towards him which he disregards? Ordinarily an action of tort is given to defend rights of property or rights of personal safety, personal freedom, and personal reputation. The latter must be confined to the person of the master, and in the person of the servant he has no property. Here is the beginning of anomaly. I do not know, and doubt if it can now be ascertained, when or pursuant to what theory this special right of the master in relation to his servant was first established. The inquiry belongs to history rather than to positive law. TINDALL, C.J., in *Grinnell v. Wells* (27) observes of the most highly artificial aspect of this cause of action (7 Man. & G. at p. 1041):

"The foundation of the action by a father to recover damages against the wrongdoer for the seduction of his daughter has been uniformly placed from the earliest times hitherto not upon the seduction itself, which is the wrongful act of the defendant, but upon the loss of service of the daughter, in which service he is supposed to have a legal right or interest. . . . It is the invasion of the legal right of the master to the services of his servant that gives him the right of action for beating his servant, and it is the invasion of the same legal right, and no other, which gives the father the right of action against the seducer of his daughter."

A So nearly did the wrong, which is the subject of this cause of action, approximate to wrongs to his property that a count for debauching the plaintiff's daughter could be joined with a count for breaking and entering his house (*Woodward v. Walton* (28)), and a man could join with a count for an assault on himself another for an assault on his wife "per quod consortium uxoris for three days amisit": *Guy v. Livesey* (29). Thus it is that the tortfeasor is liable to another's servant if he beats him, for the act is actionable per se; but he is only liable to the master of the servant if the beating interferes with the service, for at the master's suit it is only actionable per quod: *Marys's Case* (30) (9 Co. Rep. at p. 113a). They are two separate causes of action in two different persons in respect of the same act. Again, where there is no capacity for service, as in the case of an infant of tender years, the father's action per quod servitium amisit will not lie: *Hall v. Hollander* (31). If the contract of service had already determined before the wrongful act had any disabling effect upon the capacity to serve, as might be the case when a wrongful act is done to a servant under notice, I take it likewise that the action would not lie. It is the loss of service, which is the gist of the action, and loss of service depends upon a right to the service, and that depends on the contract between the master and the servant. The contract of service being purely personal determines with the servant's death. As he dies, eo instanti the master's right is extinguished. A cause of action, which essentially depends on the present existence of a right to services, cannot be asserted in respect of a state of things which is inconsistent with the existence of such a right. It cannot be changed from an action for injury to the right (for in tort the wrongful act of the defendant and an invasion of the right of the plaintiff must concur) into an action for damage arising upon an event, otherwise an action would lie for causing the death of one's cestui que vie. A similar explanation is applicable to the case of a husband's action for injury to his wife per quod consortium amisit. The right is not in the life but in the service or consortium during life. In *Lucas v. New York Central Railroad Co.* (32) the Supreme Court of the United States said:

F "Death following instantly upon the act complained of, there was no time during her life when it could be said that the husband had lost the services of his wife in consequence of the injury complained of."

G Such an explanation was offered by the court in *Re The Garland, Monaghan v. Horn* (21), and it had the approval of SIR GORELL BARNES, P., in *Clark's Case* (3). For my own part I think it is sound in this sense, that, whether or not it be the theory on which those who introduced these causes of action would have justified them, as indeed we may be sure it is not, it, at any rate, provides, though somewhat imperfectly, an intelligible basis for the existing rule, sufficient to prevent your Lordships from interfering with long-standing decisions on the plea that they are insensible or arbitrary.

H The Solicitor-General urged that such a principle is highly technical and that, if a minor hurt to a servant gives a course of action to a master, a fortiori must the major hurt, which results fatally, and he reminded your Lordships that this House in *Mills v. Armstrong, The Bernina* (33) overruled *Thorogood v. Bryan* (34), a case of long standing, and exhorted your Lordships to take heart and do likewise. I This is hardly the right view to take of your Lordships' judicial functions nowadays, nor does it follow, in the case of a legal system such as ours, that a principle can be said to be truly a part of the law merely because it would be a more perfect expression of imperfect rules, which, however imperfect, are well established and well defined. Again, an established rule does not become questionable merely because different conjectural justifications of it have been offered, or because none is forthcoming that is not fanciful. The explanations given of the rule in question are singularly varied. HALE (PLEAS OF THE CROWN, i. 476) says that a man shall forfeit his goods, though the verdict be quod interfecit per infortunium et non

per feloniam, "because the King has lost his subject and that men should be more careful." Certainly the idea of liability for breach of a duty to use care towards one's fellow-subjects was of slow growth. Again, PARKE, B., says in *Armsworth v. South Eastern Rail. Co.* (35) (11 Jur. at p. 759) that the rule had two reasons, "first, because the law provides remedies for such mischiefs only as affect legal rights, and a man has not such a legal right in the life of his parent as he has in his own," while, secondly, "it was considered impossible to form an estimate of the value of human life either to a man himself or to others connected with him."

Whether, as some have thought, the Roman law affected the matter in the distinction which it drew in various connections between the value of a slave's life and that of a free man it is probably impossible now to tell. The true explanation and the basis may be, and in our law often are, purely historical. As is well known it was long part of English law when civil injuries and criminal offences had not been clearly distinguished, that among emendable offences there was included homicide, for which payment of wite to the King, or in some cases to the lord, and of bot to the kinsfolk constituted satisfaction. The elaboration of this tariff and the heavy burden of the payments for which it provided in the case of various injuries seem to have been the cause of the disappearance of this system. It passed away very rapidly, partly through the rise of criminal jurisdiction over offences against the King's peace and partly through the attraction of the new action of trespass. The change had taken place before records of decision begin. Thereafter, while damages were recoverable by the injured man in his lifetime for trespass to his person, homicide became punishable upon indictment, and in BRACTON's day was regarded as felonious. Those homicides, which were due to negligence, could be and were dealt with by the exercise of the King's mercy. On the one hand, homicide, which deserved punishment, ceased to be emendable; on the other, personal torts, actionable in trespass, were compensated in damages; the intermediate case of an act, tortious but not heinous, causing death was dealt with by the Royal mitigation of the punishment naturally attaching to homicide. There was, I imagine, in early times no actual decision in which it was held that in a civil court the death of a human being could not be complained of, still less was any legal theory advanced in justification of such a rule. Following the development of law through the modification and development of procedure, the system of making satisfaction for homicide by payment of wer and wite died out after the twelfth century; it was dealt with as a punishable felony, with or without mitigation of punishment, in proceedings on the King's behalf. Relatives, who in the time of Henry I would have been paid by the manslayer in accordance with the rank of his victim, in the time of Edward I had lost that right and yet could not bring trespass, and this by a process of procedural change and not, so far at least as is known, on any analysis of the nature of the cause of action. Doubtless lawyers as familiar with fatal accidents due to mere negligence as we are would have analysed the injury and have distinguished fully between killing with intent to kill, killing by an intended act without intent to kill but in breach of a duty towards the victim, and killing without either intent or breach of duty by mere misadventure, but in days when negligence causing death was probably rare as compared with our day, and the guilty party more often than not had nothing with which to pay damages, men acquiesced without discussion in a procedure by which the Royal justice dealt with homicide of all kinds, and actions of trespass did not deal with homicide at all. No doubt it is the tradition of this change that was preserved in the language of TANFIELD, J., in *Huggins v. Butcher* (5) (Yelv. 89): "the servant dying of the extremity of the battery it is now become an offence to the Crown, being converted into felony," to which the report in Noy, p. 18, adds "for the King only is to pursue felony except the party brings an appeal." Though no longer in accordance with the formal law as stated by COCKBURN, C.J.,

A in *Wells v. Abrahams* (15), and by BAGGALLAY, L.J., in *Re Shepherd, Ex parte Ball* (16) (10 Ch.D. at p. 674), this was historically not far from the truth.

Pari passu with the respective proceedings in trespass and on the case and on indictment there remained the right of appeal. For many years an appeal was more common than an indictment in cases of homicide, and the judges were careful to preserve the relatives' private right to the appeal and to secure that they should not be prejudiced by the course taken by or in the name of the Crown. The liability of the manslayer to punishment might be discharged by the King's pardon, or by the appellant's release, but in case of the former the appellant's right was saved, so that the King's pardon could not be pleaded to defeat the appeal. Out of this there arose the practice of using the appeal as an engine of compulsion, by which the slayer was driven to make compensation in order to obtain the appellant's release. In the appeal there were risks on both sides, for if the appeal failed the appellee had his action on the case for a false and malicious appeal. Down to the end of the fifteenth century appeals were nevertheless common, but the statute 3 Hen. 7, c. 1, after reciting that "in appeals the party is oftentimes slow and also agreed with . . . also he that will sue any appeal must sue in proper person, which suit is long and costly, that it maketh the party appellant weary to sue," enacts that indictments should no longer be held back "so that the suit of the party may be saved," but are to be proceeded with at once. Eventually appeals fell much into disuse; but they are mentioned from time to time and a reported instance occurs, which is instructive, in Cro. Eliz. pp. 632 and 682, *Shackborough (Shuckborough) v. Biggins (Biggen)* (36). Here in a widow's appeal for murder, in which the act was held to have only been manslaughter, the Queen's pardon was relied on. It was decided, with some difference of opinion, that the pardon did not get rid of the appellee's liability to be burnt in the hand, it being the suit of the party and not an information in the Star Chamber, which is the suit of the Queen. On this the appellee promptly paid the appellant forty marks, and the suit was discontinued.

F There is little subsequent record of similar cases. In 1770 in *Bigby v. Kennedy* (37) it is stated that there had been no such case for nearly half a century, and, as eventually the appellant did not appear and a non-suit was entered, no doubt the appellee had satisfied her demands. In *Ashford v. Thornton* (38) in 1818, the case which led to the abolition of appeals by 59 Geo. 3, c. 46, s. 1, BAYLEY, J., observes (1 B. & Ald. at p. 457):

G "This mode of proceeding by appeal is unusual in our law, being brought not for the benefit of the public, but for that of the party, and being a private suit wholly under his control. It ought, therefore, to be watched very narrowly by the court, for it may take place after trial and acquittal on an indictment at the suit of the King, and the execution under it is entirely at the option of the party suing, whose sole object may be to obtain pecuniary satisfaction."

H In this sense down to 1819 the death of a human being could be complained of in a civil court, for the appeal, though "a vindictive action," was on the civil side of the court, but it could not be complained of "as an injury," and the rule as stated by LORD ELLENBOROUGH stands untouched.

I I think the history of the disappearance of wergild and the persistence of the appeal for homicide, which is to be found in full in the words of HAWKINS, FITZJAMES STEPHEN, and POLLOCK and MAITLAND, proves, if proof were needed, that LORD ELLENBOROUGH's canon correctly states the law and is one which is not now susceptible of expansion by judicial interpretation. There never was an action in the sense now contended for to recover damages for the death of a human being, and the remedy by appeal, which so long persisted in the case of the widow, the most crying case of all, was one which the most hardened formalist would not have tolerated, had any such action at law been possible, for it was long a form of legalised blackmail. The historical explanation of the absence of such an action

at the suit of relatives applies equally to the case of a master's claim for the death of a member of his familia, for example, a servant. It is equally incapable of judicial creation. Indeed, what is anomalous about the action per quod servitium amisit is not that it does not extend to the loss of service, in the event of the servant being killed, but that it should exist at all. It appears to be a survival from the time when service was a status. The canon in question has often been classified under the maxim actio personalis moritur cum personâ, and ill-advised arguments have sometimes suggested that, even as applied to the case of master and servant, it has something to do with the abatement of actions. The maxim itself has many critics; it has been coldly disparaged as post-classical, meaning thereby that it is bad Latin: *Finlay v. Chirney* (39) (20 Q.B.D. at p. 502); it has been suggested to be a mistake for actio poenalis (POSTE'S GAUUS, 493), whence it is sometimes insinuated that it is bad law; and it has been peevishly described as "a wretched saw" and as "a purely identical proposition" (AUSTIN'S JURISPRUDENCE (3rd Edn.), vol. 2, p. 1013). Of course, reliance on the maxim in this connection leads to the effective retort that the person who has the action is the master and he is alive and sues just because someone else, his servant, to wit, is dead. If, however, this maxim is put aside, since in the present case it is irrelevant, I think that the argument that your Lordships should discover under this ancient form of action some principle hitherto undetected is really an appeal to this House in its legislative and not in its judicial capacity.

Apart from the question of civil liability for the death of a human being, there is another aspect of this case. Injury is the gist of any action of negligence—if the negligence does no damage no action lies. In the present case the sums claimed were paid to widows and other dependants of the drowned men under Admiralty Regulations (paras. 1974 A 1 and 2011 A), which expressly declare that these are compassionate payments, and granted of grace and not of right both in kind and in degree. True that in such cases they are always made, and most properly made, but none the less the money claimed was lost to the Exchequer directly because the Crown through its officers was pleased to pay it. The collision was the causa sine qua non; the consequent drowning of the men was the occasion of the bounty; but the causa causans of the payment was the voluntary act of the Crown. Had the present action been brought upon a contract it might well be the case that these payments would have been within the contemplation of the contracting parties, but they are not the natural consequences of the tort which is sued for. Nor would it have assisted the appellants' case if they could have established that the making of these compassionate allowances by the Crown was in the nature of a contractual obligation. In any case the contract would have been a contract with the deceased man, and the damages must be measured by the value of his services which were lost, not by the incidents of his remuneration under the terms of his contract of employment. Just as the damages recoverable by an injured man cannot be reduced by the fact that he has effected and recovered upon an accident policy: *Bradburn v. Great Western Rail. Co.* (40); and those recovered under Lord Campbell's Act are not affected by the fact that his life was insured, so conversely a master cannot count as part of his damage by the loss of his employee's service sums which he has to pay because his contract of employment binds him to pay wages to the servant while alive and a pension to his widow when he is dead. The appeal is enterprising and has been of considerable interest, but, I think, it fails.

Appeal dismissed.

Solicitors: *Treasury Solicitor; Pritchard & Co.*

[Reported by W. E. REID, Esq., Barrister-at-Law.]

A

DAIMLER CO., LTD. v. CONTINENTAL TYRE AND RUBBER CO. (GREAT BRITAIN), LTD.

B

[HOUSE OF LORDS (Earl of Halsbury, Viscount Mersey, Lord Kinnear, Lord Atkinson, Lord Shaw, Lord Parker of Waddington, Lord Sumner and Lord Parmoor), February 21, 22, 24, 25, June 30, 1916]

[Reported [1916] 2 A.C. 307; 85 L.J.K.B. 1333; 114 L.T. 1049; 32 T.L.R. 624; 60 Sol. Jo. 602; 22 Com. Cas. 32]

Company—Enemy alien—Enemy directors and shareholders—Rights suspended during war—Conservation of property of company.

C

A company incorporated in the United Kingdom may assume an enemy character if its agents or the persons in de facto control of its affairs, whether authorised or not, are resident in an enemy country, or, wherever resident, are adhering to the enemy or taking instructions from or acting under the control of the enemy, but the character of individual shareholders cannot of itself affect the character of the company, and a company does not assume an enemy character because its shareholders are wholly or largely alien enemies. The enemy character of individual shareholders and their conduct may, however, be very material on the question whether the company's agents, or the persons in de facto control of its affairs are in fact adhering to, taking instructions from, or acting under the control of, enemies. This materiality will vary with the number of shareholders who are enemies and the value of their holdings.

D

E

A person knowingly dealing with a company which has acquired enemy character commits the offence of trading with the enemy, and any transaction between the company and its enemy directors and shareholders would also be illegal. Enemy directors and enemy shareholders cannot have anything to do with the management of the company, and no payment of dividends or other sums may be made to them. Their rights are suspended during the period of the war. On the other hand, the property of the company may be conserved, and acts otherwise lawful are not rendered unlawful by the fact that they might tend to the enrichment of the enemy when the war is over.

F

Per LORD PARKER OF WADDINGTON: A company registered in the United Kingdom, but carrying on business in a neutral country through agents properly authorised and resident here or in the neutral country, is *prima facie* to be regarded as a friend, but may, through its agents or persons in de facto control of its affairs, assume an enemy character. A company registered in the United Kingdom, but carrying on business in an enemy country is to be regarded as an enemy.

G

Company—Legal proceedings—Initiation by secretary—Need for authority of directors.

H

Observations regarding the incapacity of the secretary of a company to initiate on behalf of the company legal proceedings without the authority of the directors which should be expressed by resolution.

I

Notes. Considered: *The St. Tudno*, [1916] P. 231; *Re Hilckes, Ex parte Muhesa Rubber Plantations, Ltd.*, [1917] 1 K.B. 48; *Continho Caro & Co. v. Vermont & Co.*, [1917] 2 K.B. 587; *Rio Tinto Co. v. Ertel Bieber & Co.* (1917), 116 L.T. 810; *Tingley v. Müller*, post p. 470; *Hugh Stevenson & Sons, Ltd. v. Akt. für Cartonnagen-Industrie*, [1918-19] All E.R. Rep. 600; *Naylor, Benzon & Co. v. Krainische Industrie Gesellschaft*, [1918] 1 K.B. 331; *The Noordam* (No. 2), [1919] P. 225. Applied: *The Hamborn*, [1919] A.C. 993. Considered: *Re Badische Co., Bayer Co., etc.*, [1921] 2 Ch. 331; *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse*, [1923] 2 K.B. 630; *John Shaw & Sons (Salford), Ltd. v. Shaw*, [1935] All E.R. Rep. 456; *Kuenigl v. Donnersmark*,

[1955] 1 All E.R. 46. Referred to: *Re Aramayo Francke Mines*, [1917] 1 Ch. 451; *Clapham Steamship Co. v. Handels-en-Transport-Maatschappij Valcaan of Rotterdam*, [1917] 2 K.B. 639; *Elders and Fyffles v. Hamburg-Amerikanische Packetfahrt Act* (1918), 34 T.L.R. 275; *Rodriguez v. Speyer Bros.*, [1919] A.C. 59; *The Vesta*, [1920] P. 385; *Re Munster*, [1920] 1 Ch. 268; *I.R. Comrs. v. Sansom* (1921), 8 Tax Cas. 20; *Re Ferdinand, Ex-Tsar of Bulgaria*, [1921] 1 Ch. 107; *Re British Incandescent Mantle Works* (1923), 129 L.T. 126; *Re Rush, Warre v. Rush*, [1923] 1 Ch. 56; *Central Rail. Co. v. Thompson*, [1924] All E.R. Rep. 710; *Russian Commercial and Industrial Bank v. Le Comptoir d'Escompte de Mulhouse*, [1924] All E.R. Rep. 381; *Bohemian Union Bank v. Austrian Property Administrator*, [1927] 2 Ch. 175; *Simpson v. Maurice's Executors* (1929), 14 Tax Cas. 580; *Todd v. Egyptian Delta Land and Investment Co.*, [1928] 1 K.B. 152; *Lazard Bros. v. Midland Bank* (1932), 49 T.L.R. 94; *Sovfracht (V/O) v. Van Edens Scheepvaart en Agentuur Maatschappij (N.V. Gebr.)*, [1943] 1 All E.R. 76; *Schering, Ltd. v. Stockholms Enskilda Bank Aktiebolag*, [1943] 2 All E.R. 486; *Glenroy, Part Cargo ex M.V., H.M. Procurator-General v. M. C. Spencer, Controller of Mitsui & Co.*, [1945] A.C. 124; *Boissevian v. Weil*, [1948] 1 All E.R. 893; *The Unitas*, [1950] 2 All E.R. 219; *Bank Voor Handel en Scheepvaart (N.V.) v. Slatford*, [1952] 2 All E.R. 956; *Esablissement Baudelot v. R. S. Graham & Co.*, [1952] 2 T.L.R. 736; *R. J. Reuter Co.*, [1953] 2 All E.R. 1160.

As to the nationality of a company see 6 HALSBURY'S LAWS (3rd Edn.) 113, 114, and as to the duties of the secretary of a company see *ibid.*, pp. 324-329. For cases see 2 DIGEST (Repl.) 218-221, 9 DIGEST (Repl.) 570-575.

Cases referred to:

- (1) *De Beers Consolidated Mines, Ltd. v. Howe*, [1906] A.C. 455; 75 L.J.K.B. 858; 95 L.T. 221; 22 T.L.R. 756; 50 Sol. Jo. 666; 5 Tax Cas. 198; 13 Mans. 394, H.L.; 28 Digest (Repl.) 257, 1135.
- (2) *M'Connell v. Hector* (1802), 3 Bos. & P. 113; 127 E.R. 61; 2 Digest (Repl.) 217, 306.
- (3) *Crump v. Cavendish* (1880), 5 Ex.D. 211, 214; 49 L.J.Ex. 491; 42 L.T. 136; 28 W.R. 562, C.A.; Digest (Practice) 281, 148.
- (4) *Janson v. Driefontein Consolidated Mines, Ltd.*, [1901] 2 K.B. 419; 70 L.J.K.B. 881; 85 L.T. 104; 17 T.L.R. 604; 49 W.R. 660, C.A.; affirmed [1902] A.C. 484; 71 L.J.K.B. 857; 87 L.T. 372; 51 W.R. 142; 18 T.L.R. 796; 7 Com. Cas. 268, H.L.; 2 Digest (Repl.) 218, 308.
- (5) *Horlock v. Beal*, ante p. 81; [1916] 1 A.C. 486; 85 L.J.K.B. 602; 114 L.T. 193; 32 T.L.R. 251; 60 Sol. Jo. 236; 13 Asp. M.L.C. 250; 21 Com. Cas. 201, H.L.; 12 Digest (Repl.) 433, 3322.
- (6) *Salomon v. Salomon & Co.*, [1897] A.C. 22; 66 L.J.Ch. 35; 75 L.T. 426; 45 W.R. 193; 13 T.L.R. 46; 41 Sol. Jo. 63; 4 Mans. 89, H.L.; 9 Digest (Repl.) 30, 11.
- (7) *Netherlands South African Rail. Co., Ltd. v. Fisher* (1901), 18 T.L.R. 116; 2 Digest (Repl.) 218, 307.
- (8) *Bank of United States v. Deveaux* (1809), 5 Cranch 61.
- (9) *Louisville, Cincinnati and Charleston Railroad Co. v. Letson* (1844), 2 Howard S.C. 497.
- (10) *St. Louis and San Francisco Rail. Co. v. James* (1896), 54 Davis 545.
- (11) *Daniel v. Comrs. for Claims on France* (1825), 2 Knapp 23; 2 State Tr. N.S. App. A. 988; 12 E.R. 387, P.C.; 11 Digest (Repl.) 636, 602.
- (12) *Long v. Comrs. for Claims on France* (1832), 2 Knapp, 51; 12 E.R. 398.
- (13) *St. Louis Breweries, Ltd. v. Apthorpe* (1898), 79 L.T. 551; 63 J.P. 135; 47 W.R. 334; 15 T.L.R. 112; 43 Sol. Jo. 114; 4 Tax Cas. 111, D.C.; 28 Digest (Repl.) 255, 1129.
- (14) *Apthorpe v. Peter Schoenhofen Brewing Co., Ltd.* (1899), 80 L.T. 395; 15 T.L.R. 245; 4 Tax Cas. 41, C.A.; 28 Digest (Repl.) 256, 1130.

- A (15) *The Roumanian*, [1915] P. 26; 84 L.J.P. 65; 112 L.T. 464; 31 T.L.R. 111; 59 Sol. Jo. 206; 13 Asp. M.L.C. 8; affirmed [1916] 1 A.C. 124; 85 L.J.P.C. 33; 114 L.T. 3; 32 T.L.R. 98; 60 Sol. Jo. 58; 13 Asp. M.L.C. 208; 1 P. Cas. 536, P.C.; 2 Digest (Repl.) 222, 335.
- (16) *Esposito v. Bowden* (1857), 7 E. & B. 763; 8 State Tr. N.S. 807; 27 L.J.Q.B. 17; 29 L.T.O.S. 295; 3 Jur. N.S. 1209; 5 W.R. 732; 119 E.R. 1430, Ex.Ch.; 2 Digest (Repl.) 251, 524.
- B (17) *City of London v. Wood* (1701), 12 Mod. Rep. 669; 88 E.R. 1592; sub nom. *Wood v. London Corpn.*, Holt, K.B. 396; 1 Salk. 397; 13 Digest (Repl.) 237, 612.
- (18) *Society for the Propagation of the Gospel v. Wheeler* (1814), 2 Gallison, 105.
- C (19) *Ex parte Boussmaker* (1806), 13 Ves. 71; 33 E.R. 221; 2 Digest (Repl.) 243, 457.

Also referred to in argument :

- Robson v. Premier Oil and Pipe Line Co., Ltd.*, [1915] 2 Ch. 124; 84 L.J.Ch. 629; 113 L.T. 523; 31 T.L.R. 420; 59 Sol. Jo. 475, C.A.; 2 Digest (Repl.) 258, 573.
- D *Compagnie de Mayville v. Whitley*, [1896] 1 Ch. 788; 65 L.J.Ch. 729; 74 L.T. 441; 44 W.R. 568; 12 T.L.R. 268; 40 Sol. Jo. 352, C.A.; 9 Digest (Repl.) 454, 2980.
- Automatic Self-Cleansing Filter Syndicate Co., Ltd. v. Cuninghame*, [1906] 2 Ch. 34; 75 L.J.Ch. 437; 94 L.T. 651; 22 T.L.R. 378; 50 Sol. Jo. 359; 13 Mans. 156, C.A.; 9 Digest (Repl.) 498, 3282.
- E *Gramophone and Typewriter, Ltd. v. Stanley*, [1908] 2 K.B. 89; 77 L.J.K.B. 834; 99 L.T. 39; 24 T.L.R. 480; 15 Mans. 251; sub nom. *Stanley v. Gramophone and Typewriter, Ltd.*, 5 Tax Cas. 358, C.A.; 9 Digest (Repl.) 30, 14.
- Kodak, Ltd. v. Clark*, [1903] 1 K.B. 505; 72 L.J.K.B. 369; 88 L.T. 155; 67 J.P. 213; 51 W.R. 459; 19 T.L.R. 243; 47 Sol. Jo. 296; 4 Tax Cas. 549, C.A.; 28 Digest (Repl.) 256, 1132.
- F *Amorduet Manufacturing Co. v. Defries & Co.* (1914), 84 L.J.K.B. 586; 112 L.T. 131; 31 T.L.R. 69; 59 Sol. Jo. 91; 2 Digest (Repl.) 218, 314.

Appeal by the defendants in the action, the Daimler Co., Ltd., from an order of the Court of Appeal which affirmed an order of SCRUTTON, J., in chambers giving the plaintiffs, the Continental Tyre & Rubber Co. (Great Britain), Ltd., leave to sign summary judgment against the defendants for the amount of the claim.

- G The plaintiff company was incorporated in 1905 under the Companies Acts to trade in England in motor-car tyres made in Germany by a company incorporated in that country under German law. The plaintiff company had its registered office in London. The capital of the company was £25,000 in £1 shares, all but one of which were held either by the German company or by Germans resident abroad.
- H The remaining share was held by one Wolter, who was born in Germany, but was resident in England, and had become a naturalised British subject, and was at all material times the secretary to the company. At the time of the outbreak of the war between Great Britain and the German Empire on Aug. 4, 1914, there were four directors, of whom three resided in Germany. The fourth, one Brodtmann, lived in England before the war, but left this country early in August, 1914. The plaintiff company brought an action against the defendant company as acceptors of three bills of exchange in payment of goods supplied by the plaintiffs to the defendants before the outbreak of war. The defendants contended that (i) it was illegal to trade with or pay money to or for the benefit of alien enemies during the war, and that in substance and in fact the respondent company was an alien enemy, and (ii) the solicitors for the respondent company had no authority to issue the writ in the action. The respondent company issued the writ in the action on Oct. 23, 1914. They obtained leave from the master to sign
- I

judgment for the amount of the claim and costs. That order was affirmed by SCRUTTON, J., and by the Court of Appeal (LORD READING, C.J., LORD COZENS-HARDY, M.R., and KENNEDY, PHILLIMORE and PICKFORD, L.JJ., BUCKLEY, L.J., dissenting). The defendants appealed to the House of Lords.

Gore-Browne, K.C., and *Maddocks* for the appellants.

Upjohn, K.C., and *Douglas Hogg* for the respondents.

The House took time for consideration.

June 30, 1916. The following opinions were read.

EARL OF HALSBURY.—I am of opinion that this judgment should be reversed. In my opinion, the whole discussion is solved by a very simple proposition that in our law when the object to be obtained is unlawful the indirectness of the means by which it is to be obtained will not get rid of the unlawfulness, and in this cause the object of the means adopted is to enable thousands of pounds to be paid to the King's enemies.

Before war existed between Great Britain and Germany, an associated body of Germans availed themselves of our English law to carry on a business for manufacturing motor car tyres in Germany and selling them here in England and elsewhere, as they were entitled to do, but in doing so were bound to observe the directions which the Act of Parliament under which they were incorporated required. They were entitled to receive in the shape of dividends the profits of the concern in proportion to their shares in it. They were all Germans originally, though one afterwards became a naturalised Englishman. Now the right and proper course to deal in the matter—and I have no reason to suppose that any other course was followed—was to distribute to them rateably, according to their shares, the profits of their adventure. But this machinery, while perfectly lawful in peace time, becomes absolutely unlawful when the German traders are at war with this country. I confess it seems to me that the question becomes very plain when one applies the language of the law to the condition of things when war is declared, between the German who is in the character of shareholder and in control of the company. They can neither meet here nor can they authorise any agent to meet on any company business. They can neither trade with us nor can any British subject trade with them. Nor can they comply with the provisions for the government of the company which they were bound by their incorporated character to observe.

Under these circumstances it becomes material to consider what is this thing which is described as a "corporation." It is, in fact, a partnership in all that constitutes a partnership except the names, and in some respects the position, of those who I shall call the managing partners. No one can doubt that the names and the incorporation were but the machinery by which the purpose (giving moneys to the enemy) would be accomplished. The absence of the authority to issue the writ is only a part of the larger question. No one has authority to issue a writ on behalf of an alien enemy because he has no right himself to sue in the courts of a King with whom his own Sovereign is at war. No person or any body of persons to whom attaches the disability of suing under such circumstances can have authority, and to attempt to shield the fact of giving the enemy the money due to them by the machinery invented for a lawful purpose would be equivalent to inclosing the gold and attempting to excuse it by alleging that the bag containing it was of English manufacture. I observe the Lord Chief Justice says that the company is a live thing. If it were, it would be capable of loyalty and disloyalty. But it is not; and the argument of its being incapable of being loyal or disloyal is founded on its not being "a live thing." Neither is the bag in my illustration "a live thing." And the mere machinery to do an illegal act will not purge its illegality—*fraus circuitu non purgatur*. After all, this is a question of ingenious words, useful for the purpose for which they were designed, but wholly incapable

A of being strained to an illegal purpose. The limited liability was a very useful introduction into our system, and there was no reason why foreigners should not, while dealing honestly with us, partake of the benefits of that institution, but it seems to me too monstrous to suppose that for an unlawful, because, after a declaration of war, a hostile, purpose the forms of that institution should be used, and enemies of the State, while actually at war with us, be allowed to continue trading and actually to sue for their profits in trade in an English court of justice.

B There are one or two observations which I think it right to make upon this very singular performance. This is a joint appeal partly upon a judgment under Ord. 14, partly upon a cause—*Continental Tyre and Rubber Co. (Great Britain), Ltd. v. Thomas Tilling, Ltd.* (112 L.T. 324)—tried before LUSH, J. With respect to Ord. 14, it is almost ludicrous to treat seriously an order made under such circumstances as these, and that observation is sufficiently proved by the short history of this litigation. The second observation I have to make is that if this question turned only upon the question of the secretary's authority to issue the writ, I should certainly not be contented with the position in which that question was left. In the somewhat flippant evidence given by Mr. Wolter, it was stated that the secretary was given authority, and a minute recorded of the fact; but in the absence of the learned judge some search was made for the minute in question, and no such document could be found. I will say no more, since the witness was not again brought before the learned judge, and, therefore, had no opportunity of explanation, but I certainly would not act upon evidence such as I have described. I am, therefore, of opinion that this appeal should be allowed, and I so move your Lordships. I would like to add that I by no means desire to minimise the value of the weighty judgments to be delivered by your Lordships, but I have thought it important that all may understand the principle that the unlawfulness of trading with the enemy could not be excused by the ingenuity of the means adopted.

E **VISCOUNT MERSEY.**—I had prepared an opinion expressing my view that this appeal ought to be allowed, but since then I have had the opportunity of reading the opinion prepared by my noble and learned friend LORD PARKER, and in that opinion my reasons are so fully expressed that I have thought it better to withdraw the opinion I had written. I am desired to say that **LORD KINNEAR** also had prepared his opinion, but that he will withdraw it in favour of the opinion of my noble and learned friend LORD PARKER.

G **LORD ATKINSON.**—This is an appeal from an order of the Court of Appeal, dated Jan. 19, 1915, affirming an order of SCRUTTON, J., dated Nov. 27, 1914, made in an action brought in the name of the respondent company (a private company) to recover from the appellant company on a specially indorsed writ, dated Oct. 23, 1914, a sum of £5,605 16s., with interest, the amount due on three bills of exchange drawn by the former company and accepted by the latter. The legal question for decision is whether the order appealed from, made upon additional evidence not before the master or SCRUTTON, J., is right. I, therefore, abstain from considering whether, in the events which have happened, this appeal is now necessary for the protection of the appellant company.

H On Oct. 30, 1914, the respondents issued a summons pursuant to R.S.C., Ord. 14, for leave to sign final judgment in the action. Affidavits were filed on behalf of both the parties litigant respectively in support of an in opposition to the respondents' application. MASTER MACDONELL, upon the affidavits and the documents made exhibits by them, made an order of Nov. 24, 1914, granting the leave asked for. Presumably the memorandum or articles of association of the respondent company were brought before the master and examined by him, as they should have been, although this does not appear on the face of the proceedings. On appeal from this order by the appellant company, SCRUTTON, J., presumably on the evidence before the master, made the order already mentioned, dismissing the

appeal and upholding the order of the master. An appeal was heard in the Court of Appeal, together with an appeal raising somewhat the same questions arising out of an action brought by the present respondents against a third company, Thomas Tilling, Ltd. (reported 112 L.T. 324), tried before LUSH, J., without a jury. It does not appear from the appendix what were the particular issues raised in that action, but it certainly would appear that not only was the evidence given in it by one of the plaintiffs' witnesses, the secretary, referred to and relied upon by the lords justices in the appeal in the present case, but the findings of the learned judge at the trial were apparently also relied upon against the present appellants as if they had been parties to the suit in which those rulings were made. The evidence of the secretary was, however, much relied on by both sides in argument before your Lordships. Strange as it may appear, the minute book of the company, showing presumably from what centre the business of the company was managed and directed, was not given in evidence before any one of the three tribunals. The embarrassing and, as I think, rather unfortunate result of this omission is, that the full facts, showing in what country—England or Germany—lay the real business centre from which the governing and directing minds of the company or its directors operated, regulating and controlling its important affairs, were, save so far as revealed in the evidence of its secretary, never disclosed. These are, however, the very things which, for the purpose of income tax at all events, have been held to determine the place of residence of a company like the respondent company, so far as such a fictitious legal entity can have a residence: *De Beers Consolidated Mines, Ltd. v. Howe* (1). And I can see no reason why for the purpose of deciding whether the carrying on by such a company of its trade or business does or does not amount to a trading with the enemy they should not equally determine its place of residence. It is well established that trading with the most loyal British subject, if he be resident in Germany, would, during the present war, amount to trading with the enemy, and be a misdemeanour if carried on without the consent of the Crown, the reason being that thereby he might furnish resources against his own country: *M'Connell v. Hector* (2). The same principle would presumably apply to a trading company resident in an enemy country. It would certainly appear to me, therefore, that, having regard to the issue raised in this suit, the residence of the respondent company was of necessity a vital matter for consideration. During the argument a passage was read out from the shorthand writer's notes of the argument before the Court of Appeal, from which it appeared that the leading counsel for the Daimler Co., Ltd., admitted that the residence of the respondent company was in England. He could not well do otherwise, since the company was registered and incorporated in England, and all the facts going to show where it really resided were, with the exception already mentioned, shut out from the view of the court. It by no means follows, however, that, despite that admission of counsel, your Lordships could not, if sufficient facts were disclosed in evidence before you, hold that the residence of the company was not in England, but, in truth, in Germany.

In *Crump v. Cavendish* (3) THESTER, L.J., dealing with the above-mentioned Ord. 14, said (5 Ex.D. at p. 214):

"He [the judge] has to form an opinion on the facts before him, and is to stay his hand only if he is satisfied that the defendant has a good defence upon the merits, or thinks the facts disclosed by the defendant sufficient to entitle him to be permitted to defend the action."

I turn to the affidavits and documents before the master and SCRUTTON, J., to consider whether the facts therein disclosed were sufficient to entitle the appellant company within this rule to be permitted to defend the action brought against them. What are those facts? They are (i) that the 25,000 shares into which the capital of the respondent company is divided are held by five individuals and a joint stock company called the parent company; that this company, incorporated

A and resident in Hanover, holds 23,398 of these shares, that the three individuals who hold between them 1,600 shares are all German subjects resident in Hanover; that the two remaining shares are held, one by the secretary, Hans Frederick Wolter, and one by the managing director, Paul Scharnhorst Brodtmann, both according to the list of shareholders having residences in England; (ii) that the directors, three in number, excluding the managing director, are also German subjects resident in Hanover; (iii) that, with the exception of the secretary, all the directors and shareholders are German subjects; that the secretary is also a German, but, unlike the others, took out naturalisation papers on Jan. 1, 1910; (iv) that the appellant company were ready and willing to pay the amount sued for on two conditions—first, that in doing so they were not acting in contravention of the provisions of the Trading with the Enemy Act, 1914, and, second, that the respondent company were able to institute this action and also were entitled to give a good and valid discharge for the amount claimed; (v) that it is averred that the so-called parent company controlled the respondent company; that the former and all the officers of the latter are alien enemies, that alien enemies who were officers or agents of the company were incapable of acting either in the name of, or on behalf of, the company, or individually; that the appellant company were advised and believed that the respondent company were incapable of instituting proceedings or giving receipts for sums due to them, or doing any of those acts which must be done through agents or officers, unless and until agents and officers who were not alien enemies have been appointed; that for these reasons the proceedings were wrongly instituted, and that unconditional leave to defend should be given.

E The affidavit making these averments distinctly challenged the right of the respondent company, or any of its officers acting on its behalf, to institute the present action, or to give a valid discharge for the amount claimed by it. Their secretary filed an affidavit in reply. He contented himself with asserting that his company is an "English company, being registered at Somerset House under the Companies (Consolidation) Act, 1908, and that he himself is a British subject, having been naturalised on Jan. 1, 1910." He adds lengthy paragraphs relative to his dealings with the Committee on Trade, with sales made to the War Office, with the payments made to his company by some others of its creditors, but not a word as to the place where its important business was conducted, or from which its action was directed by its governing minds, and not a syllable as to his ever having been authorised by the directors, or any of them, or any person connected with the company, to institute actions of any kind on its behalf. This, if ever, was the time for him to have disclosed the fact that he was clothed with authority to bring this action, if the fact were so. In my view, his silence, on the assumption that he had the authority, is inexplicable. It was greatly pressed in argument that LUSH, J., had, in the action tried before him (*Continental Tyre and Rubber Co. (Great Britain), Ltd. v. Thomas Tilling, Ltd.*) (a) come to the conclusion that the secretary was a truthful, though a forgetful and inaccurate, witness, and also that he had authority to institute the suit against Thomas Tilling, Ltd. I have the utmost confidence in any conclusion at which that learned judge would arrive on the evidence given before him. These affidavits were, as I understand, not before him, and it is, in my view, quite unjust to press against the appellant company the conclusions arrived at by LUSH, J., without the light which this unaccountable reticence throws on the secretary's character and veracity.

I [HIS LORDSHIP considered the articles of association of the respondent company and the evidence, and said that there was not a scrap of writing of any kind given in evidence to prove that any power to institute actions or give receipts for money recovered was ever conferred upon the secretary of the company. The only document he referred to as conferring it upon him contradicted every statement made by him on the point. It seemed incredible that he ever was clothed with the power, without consulting his directors or managing directors, to institute in

the name of the company any actions of any kind he pleased. There was no proof other than his own testimony that he ever instituted any action or gave instructions for its institution. The burden of proving that the secretary had power and authority to institute the present action some months after the outbreak of the war rested on the respondent company. He (HIS LORDSHIP) was clearly of opinion that they had not discharged that burden.]

Having formed this opinion, I do not desire to express any opinion on the other and main point raised in the case further than to say that, the question of residence of the company apart, I do not think that the legal entity the company can be so identified with its shareholders, or the majority of them, as to make their nationality its nationality or their status its status, so completely as to make it an alien enemy because they are alien enemies, or to give it an enemy character because they have that character. I think the judgment of LORD MACNAGHTEN in *Janson v. Driefontein Consolidated Mines, Ltd.* (4) is inconsistent with any such view. Speaking of a Transvaal company, he said ([1902] A.C. at p. 497):

"If all its members had been subjects of the British Crown the corporation itself would have been none the less a foreign corporation and none the less in regard to this country an alien."

I think it is much to be regretted that the appellant company were not permitted to defend, as, in my opinion, they should have been, so that all the facts might have been elicited, and it could be determined whether the company resides and trades in Germany or not. I think the order suggested by my noble and learned friend LORD PARKER should be made.

LORD SHAW.—The Daimler company is indebted to the Continental company in certain sums of money. It was willing to pay these sums if payment could have been made with safety. The Continental company took legal proceedings to recover the moneys. To these proceedings the Daimler Company tabled two defences. The first is that payment would be of the nature of trading with the enemy, and the second is a challenge of the authority to institute the action. Upon the first point I am of opinion that the judgment of the Court of Appeal is right. Upon the second point and with regret I am of opinion that it is erroneous.

The first point is of much general importance: it was carefully and anxiously argued. My views upon it in its general aspect and apart from the statutes and proclamations—which were the subject of a keen analysis and which are afterwards referred to—may be expressed in the following propositions. Before stating them, however, may I say that I have found myself to be in substantial agreement with LORD PARMOOR in the judgment about to be pronounced by him, supported, as in my humble opinion it is, by the authorities which he has cited and which I do not here repeat. The propositions I have mentioned are these. (i) There is no debate at this time of day on the general proposition that the direct and immediate consequence of a declaration of war by or against this country is to make all trading with the enemy illegal. The proposition was dealt with recently in this House in *Horlock v. Beal* (5). War is war, not between Sovereigns or governments alone. It puts each subject of the one belligerent into the position of being the legal enemy of each subject of the other belligerent; and all persons bound in allegiance and loyalty to His Majesty are consequently and immediately, by the force of the common law, forbidden to trade with the enemy Power or its subjects. (ii) This obligation and restraint is binding in every sense. It is, therefore, no defence to a breach of the duty to forbear from trading with the enemy that the act was done, not for personal benefit or advantage, but in the service or under the agency or orders of another who is not so bound. No one subject to the laws of this country could be permitted to escape from obedience thereto by pleading that he was acting merely as the hand of others, say a German, Austrian, or Turkish company. The prohibition against trading is binding in regard to all action direct or indirect,

A personal or representative. (iii) In so far as the obligation and restraint imposed by the common law are rested upon the allegiance or loyalty of the subject, the application of such ideas to a limited company is incongruous; allegiance and loyalty are personal, by the nature of the case. An incorporated company cannot with propriety have such terms applied to it, as if it were a mind subject to emotions or passions or a sense of duty. It is a creation of the law convenient for the purposes of management, of the holding of property, of the association of individuals in business transactions, in short for all the purposes and with the limitations and remedies set forth in the Companies Acts. (iv) Once, however, it is clear that, although this may be so under proposition (iii), yet that under proposition (ii) every individual subject to the common law is inhibited and interpellated from trading with the enemy, then trading with the enemy on behalf of a company is just as much prohibited as personal trading. A limited company, incorporated in England and although English as regards all the results which flow from such incorporation, is thus completely barred by the Trading with the Enemy Acts—not by reason of the company's allegiance or loyalty, but by reason of the fact that there is no human agency possible within the realm through which, and within the law, trading with the enemy could be accomplished. In obedience to that law all trading with the enemy, direct or indirect, stops; no firm or company wheresoever or howsoever directed can so trade, nor can anything be negotiated or transacted for it through any person or agency in this country. (v) Transactions and trading require two parties, and the same principle applies to trading by the enemy as to trading with the enemy. In this way a company registered in Britain may have shareholders and directors who are alien enemies. Transactions or trading with any one of them become illegal. They have no power to interfere in any particular with the policy or acts of companies registered in Britain; alien enemy shareholders cannot vote; alien enemy directors cannot direct; the rights of all these are in complete suspense during the war. (vi) As to shareholders or directors who are not alien enemies, they stand pendente bello legally bereft of all their coadjutors who are. And, if the company be a company registered in Great Britain, they must face the situation thus created by adopting the courses suitable either under the Companies Acts or the recent legislation. In this way, while no payments of assets, dividends, or profits can be made to alien enemy shareholders, yet the property and business of the company may be conserved. There may be loss consequent on commercial dislocation, but neither loss nor forfeiture is imposed by the law. The law is completely satisfied if in the conduct and range of the business trading with the enemy is avoided. To put in a word one plain instance: All British trading by the company is still permitted if there are British shareholders who can carry it on. With much respect I see no advantage to be gained, but much confusion to result, from proceeding to a further stage and treating or even characterising British registered companies as either alien enemies or companies with an alien enemy character. As stated, all the enemy shareholders' rights being placed in suspense and all trading with these shareholders or with any other enemy being interpellated, there is no principle of law which would, in my humble opinion, justify the incongruity of denominating or regarding the company itself as enemy either in character or in fact.

Much of the discussion at your Lordships' Bar—probably the major part of it—had reference to the recent legislation. This was minutely and anxiously analysed. I think it necessary accordingly to deal with it; but I may say at once that I do not think that it invades or varies any of the principles which I have humbly ventured to sketch. The question, however, with whom this trading is forbidden is one of wide and serious importance. So much of the commerce of the country is now carried on by incorporated companies that it is manifestly critical for the citizen to know what is the scope of the term "enemy," and if it can apply to such companies, and if so to which of them. This is all the more so because the legislation upon the subject almost at its opening creates trading with the enemy a

misdeemeanour. The obligation under the common law is backed by criminal sanction. Once such a statute is passed it would, of course, not be open to any citizen to plead his ignorance of the law of the land as a defence against the charge of misdeemeanour. This, however, makes it clear that courts of law should give a strict interpretation to statutory provisions of this character—an interpretation which in any case of dubiety or ambiguity shall be favourable to the liberty of the subject. Speaking for myself, I do not find that the Trading with the Enemy Acts and proclamations now to be considered were such as to leave any substantial doubt in the mind of the citizen as to what should be his attitude with regard to incorporated companies.

By the Trading with the Enemy Act, 1914 [repealed by Trading with the Enemy Act, 1939] it was provided, s. 1 (2) :

"For the purposes of this Act a person shall be deemed to have traded with the enemy if he has entered into any transaction or done any act which was at the time of such transaction or act prohibited by or under any proclamation by His Majesty dealing with trading with the enemy for the time being in force or which by common law or statute constitutes an offence of trading with the enemy: Provided that any transaction or act permitted by or under any such proclamation shall not be deemed to be trading with the enemy."

There was much discussion as to this proviso. It appears to me to be a proviso applicable to the whole of the sub-section, and, if so, applicable to all transactions or acts of trading which either by common law or by this or any other statute constitute trading with the enemy. This, in my view, is equivalent to a statutory declaration that every transaction or act permitted under proclamation shall, notwithstanding all such common law or statutory prohibitions not be deemed to be trading with the enemy. I look upon this statute as one for direction and guidance; and it does not appear to me legitimate to contend that the direction and guidance were not of this character—that if a thing was permitted by a proclamation it was not trading with the enemy or a contravention of the law. The statute was dated Sept. 18, 1914; and the question accordingly is: What did the proclamation then in force—namely, that of date Sept. 9—provide? It provided, art. 5:

"From and after the date of this proclamation the following prohibitions shall have effect (save so far as licences may be issued as hereinafter provided), and we do hereby accordingly warn all persons resident carrying on business or being in our dominion: (1) Not to pay any sum of money to or for the benefit of an enemy."

There occurs in art. 3 of the proclamation a definition of enemy. It is as follows:

"The expression 'enemy' in this proclamation means any person or body of persons of whatever nationality resident or carrying on business in the enemy country, but does not include persons of enemy nationality who are neither resident nor carrying on business in the enemy country. In the case of incorporated bodies, enemy character attaches only to those incorporated in an enemy country."

It appears to me that this was a plain guide and instruction to persons in the position of the appellants. They were told first that a transaction permitted under the proclamation should not be deemed trading with the enemy; secondly, that in the case of incorporated bodies enemy character attached to those incorporated in an enemy country; but, thirdly, that it attached only to those. I think, in short, that it was a very plain intimation that if a company was not incorporated in an enemy country, but was incorporated in our own country, then this was, though negatively expressed, the exact case in which a payment to such a company became unexceptionable and legitimate.

It is not to be forgotten that under the very same statute provisions were enacted to cover the case of companies whose share capital or directorate was either wholly

A or in certain proportion held by alien enemies. By s. 2 (2), for example, in the case of such companies, when a third or more of the issued share capital or the directorate was so held, the Board of Trade might obtain authority to inspect the books, &c., and appoint an inspector. By s. 3 further cautionary provisions were made giving to the Board of Trade power to apply to the court for the appointment of a controller. So that—to carry the legislation no further than the one Act of
B Parliament referred to—it was clear that the case of companies held by a majority or even by a minority of alien enemies was put under surveillance to such an extent that payments made or transactions carried on with such a company in this country would have been under official inspection. It appears to me to be a somewhat strong proposition under these circumstances to hold that one is entitled to go behind the English incorporation of the company and to declare
C that all these statutory stipulations were vain, seeing that such a company was an enemy, to trade with whom, directly or indirectly, was a misdemeanour. Further, it appears to me to be equally unsound for a court of law to announce that, notwithstanding all those statutory provisions, the law of the land is such that the shareholding of a company incorporated in England has to be investigated, and trading with it is forbidden if the substantial majority of shares is found to be, say, German.
D Such an operation would write out a large portion of the statute. It would render meaningless the particular proviso which declared that enemy character attached only to companies incorporated in an enemy country. It is also fairly clear that under the word “substantially” every kind of inquiry would have to be made in individual instances, say, for instance, as to whether there were enough of alien enemy shareholders to make it an alien enemy company; as to whether a majority
E would determine the matter, with the possible result of seriously injuring large minorities of British shareholders; and, indeed, whether a company whose shares might be transferred from day to day stood to change into and out of its character as an alien enemy in consequence of the change of personnel in its shareholders. Such results would necessarily follow from upsetting the plain announcement of the statute which makes British incorporation settle high or low that the company
F so incorporated is not “enemy.”

What happened in the present case? Under the statute the Board of Trade did appoint an inspector. Since the beginning of August—that is since the war broke out—that inspector has initialled the cheques given by the company. The company has two banking accounts, into one of which moneys received are paid. When
G the company receives a sum of money it gives a receipt, and that receipt goes through the hands of the inspector, so that he knows exactly the details. The inspector has charge of the bank account and the company is not able to pay any money to the shareholders. The fact is, that all these shareholders are German except one; but not one of these shareholders can receive under such a régime, and during the war, any part of the assets, dividends, or profits of this concern.
H The company has, however, a stock of rubber goods. I put to the learned counsel for the appellants what would be the result of the argument with regard to such stock; he replied that it could not be dealt with. To the further question: “If the stock were perishable?” he replied in effect that it must perish. I think that this was a perfectly logical result, but it appears to confirm the view that the argument itself was unfounded either upon the general law of the case or upon
I the legislation to which I have referred. I do not detain your Lordships with what I think to be the extraordinary argument that if assets are realised and a business kept up, enemy shareholders of an English company will, at the end of the war, be benefited. Possibly they may. It is true enough that on the other argument both they and the English shareholders might enormously suffer, so that a species of indirect pillage seems to be involved—pillage first of the enemy and secondly of English shareholders—thus presumably penalised for their association with others. I must respectfully decline to admit the validity of any argument of the kind. I may, however, further point out that if the statute and proclamation be construed

as the Court of Appeal have, I think, very rightly construed them, the results post bellum would be results depending upon the state of British legislation and of the terms of peace. So far as British legislation is concerned it may be mentioned that by the Trading with the Enemy Amendment Act, 1914, various provisions were made for the constitution of an office of Custodian of Enemy Property, the custodian being appointed to hold such property "until the termination of the present war," and thereafter to "deal with the same in such manner as His Majesty may by Order in Council direct" [s. 5 (1)]. In short, it seems plain beyond question that under the existing legislation or under future Acts, or as part of a diplomatic settlement after the war, the question of the disposal of enemy property will be fully dealt with. This does not seem to afford any argument in support of its deterioration or destruction, meanwhile, together with the deterioration and destruction of British rights associated with it.

In conclusion—on this head of the case—I may point out that the amending Act of 1914 provides by s. 14 that it "shall be construed as one with the principal Act," that is, the Trading with the Enemy Act, 1914, and that

"(2) No person or body of persons shall, for the purposes of this Act, be treated as an enemy who would not be so treated for the purpose of any proclamation issued by His Majesty dealing with trading with the enemy."

It is, of course, true that this Act cannot bind the parties to the present litigation; but it appears to be entirely in accord with the view of the former Act and of the proclamation of September which has been taken in this opinion. So far as Parliament is concerned, the situation is, as stated, that the country of incorporation of the company if English excludes the company from being either an enemy company or of an enemy character; and that all the provisions relative to the working of a company whose shareholders are mixed are provisions which proceed upon that foundation. I am, accordingly, of opinion that the official of the Daimler company, charged with the payment of moneys, who would have ventured to make payment of the debt due by that company to the Continental company or to a person properly acting as its representative, would have been safe in doing so and guilty of no misdemeanour. The view taken upon this part of the case by the majority of the Court of Appeal appears to me to be well founded.

It is with regret that—this being so—I find myself constrained to concur in the opinion which your Lordships take as to the initiation of these legal proceedings. I think they naturally followed as part of a course of previous dealings; and I am not surprised at the view taken by LUSH, J., in regard to this point. But, on the other hand, the point, it is only fair to the appellants to say, has been from the first raised by them. Authority to raise legal proceedings appears to be in the directors, who are all Germans, or in some person to whom they delegated the authority. They did not before the war make such delegation of authority to raise these proceedings. Since the outbreak of war it is not, according to my opinion, competent for enemy directors or shareholders to have anything to do with the management of this company's affairs in England. A different course might possibly have been adopted by the single shareholder in England. But the point against agency and authority to take these particular legal proceedings has been taken; and I do not differ from the view of your Lordships that it is well founded. I agree, accordingly, to the suit being dismissed upon that ground; but if I may venture to say so, it does not appear to me to be a case in which costs should be awarded, even if such an award could be effective.

LORD PARKER OF WADDINGTON.—The opinion I am about to read has been prepared with the assistance and collaboration of **LORD SUMNER**, who authorises me to state that he agrees with it.

In my opinion, this appeal ought to be allowed. When the action was instituted all the directors of the plaintiff company were Germans resident in Germany. In

A other words they were the King's enemies, and as such incapable of exercising any of the powers vested in them as directors of a company incorporated in the United Kingdom. They were incapable, therefore, of authorising the institution of this action. The contention that the secretary of the company could authorise such institution is untenable. The resolution by which he was appointed secretary would confer on him such powers only as were incident to the performance of his secretarial duties. It is true that the directors of the company might by a proper resolution in that behalf have conferred on him a power to authorise the institution of proceedings in the company's name, but they did not do so. Their conduct in holding him out as a person having this power, if they in fact so held him out, may in particular cases have operated to estop the company from denying the authority of a solicitor whom he retained, but it could not confer the power in question. It follows that this action was instituted without authority from the company, and, in my opinion, the court, having notice of the fact, should have refused relief. It is true that a question whether the plaintiff's solicitor has or has not been validly retained is in general brought before the court by motion to which the solicitor is made a party. But when the court in the course of an action becomes aware that the plaintiff is incapable of giving any retainer at all, it ought not to allow the action to proceed. It clearly would not do so in the case of an infant plaintiff, and I can see no difference in principle between the case of an infant and the case of a company which has no directors or other officers capable of giving instructions for the institution of legal proceedings. This is more especially so when, by reason of all the shareholders (with one exception) being the King's enemies, no agent or officer capable of giving such instructions can be validly appointed. It was suggested that the secretary, being the only shareholder who is not an enemy, could in some way or other call and hold a meeting of the company at which he might appoint himself to be a director or agent of the company with such powers as he might think fit. He has not attempted to do so, and after a careful examination of the articles I think it reasonably clear that any such attempt would fail. Further, it is quite clear that the articles of association of the company do not contemplate or provide for the continuance of the company's trading without any directors at all, nor is a secretary of a company an official who *virtute officii* can manage all its affairs, with or without the help of servants, in the absence of a regular directorate.

G Under these circumstances it is, strictly speaking, unnecessary to consider whether a company incorporated in the United Kingdom can under any and what circumstances be an enemy or assume an enemy character. The question has, however, been so elaborately argued both here and in the Court of Appeal and is of such general importance that it would not be right to ignore it. The principle, upon which the judgment under appeal proceeds, is that trading with an incorporated company cannot be trading with an enemy, where the company is registered in England under the Companies Acts and carries on its business here. Such a company it calls an "English company," obviously likens it to a natural-born Englishman, and accordingly holds that payment to it of a debt, which is due to it, and of money, which is its own, cannot be trading with the enemy, be its incorporators who they may. The view is that an English company's enemy officers vacate their office on becoming enemies and so affect it no longer, and that its enemy shareholders, being neither its agents nor its principals, never in law affect it at all. Much of the reasoning by which this principle is supported is quite indisputable. No one can question that a corporation is a legal person distinct from its incorporators; that the relation of a shareholder to a company, which is limited by shares, is not in itself the relation of principal and agent or the reverse; that the assets of the company belong to it and the acts of its servants and agents are its acts, while its shareholders, as such, have no property in the assets and no personal responsibility for those acts. The law on the subject is clearly laid

down in a passage in LORD HALSBURY's opinion in *Salomon v. Salomon & Co.* (6) where he says ([1897] A.C. at p. 30):

"I am simply here dealing with the provisions of the statute, and it seems to me to be essential to the artificial creation that the law should recognise only that artificial existence—quite apart from the motives or conduct of individual corporators. . . . Short of such proof [i.e., proof in appropriate proceedings that the company had no real legal existence] it seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person, with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are."

I do not think, however, that it is a necessary corollary of this reasoning to say that the character of its corporators must be irrelevant to the character of the company; and this is crucial, for the rule against trading with the enemy depends upon enemy character.

A natural person, though an English-born subject of His Majesty, may bear an enemy character and be under liability and disability as such by adhering to His Majesty's enemies. If he gives them active aid, he is a traitor; but he may fall far short of that and still be invested with enemy character. If he has what is known in prize law as a commercial domicile among the King's enemies, his merchandise is good prize at sea, just as if it belonged to a subject of the enemy Power. Not only actively, but passively, he may bring himself under the same disability. Voluntary residence among the enemy, however passive or pacific he may be, identifies an English subject with His Majesty's foes. I do not think it necessary to cite authority for these well-known propositions, nor do I doubt that, if they had seemed material to the Court of Appeal, they would have been accepted. How are such rules to be applied to an artificial person, incorporated by forms of law? So far as active adherence to the enemy goes, there can be no difference, except such as arises from the fact that a company's acts are those of its servants and agents acting within the scope of their authority. An illustration of the application of such rules to a company (as it happens a company of neutral incorporation, which is an *à fortiori* case) is [to be found] in *Netherlands South African Co., Ltd. v. Fisher* (7). In the case of an artificial person, what is the analogue to voluntary residence among the King's enemies? Its impersonality can hardly put it in a better position than a natural person and lead to its being unaffected by anything equivalent to residence. It is only by a figure of speech that a company can be said to have a nationality or residence at all. If the place of its incorporation under municipal law fixes its residence, then its residence cannot be changed, which is almost a contradiction in terms, and in the case of a company residence must correspond to the birthplace and country of natural allegiance in the case of a living person and not to residence or commercial domicile. Nevertheless, enemy character depends on these last. It would seem, therefore, logically to follow that, in transferring the application of the rule against trading with the enemy from natural to artificial persons, something more than the mere place or country of registration or incorporation must be looked at. I think that the analogy is to be found in control, an idea which, if not very familiar in law, is of capital importance and is very well understood in commerce and finance. The acts of a company's organs, its directors, managers, secretary and so forth, functioning within the scope of their authority, are the company's acts and may invest it definitely with enemy character. It seems to me that similarly the character of those, who can make and unmake those officers, dictate their conduct mediately or immediately, prescribe their duties and call them to account, may also be material in a question of the enemy character of the company. If not definite and conclusive, it must at

- A least be *prima facie* relevant, as raising a presumption that those who are purporting to act in the name of the company are, in fact, under the control of those whom it is their interest to satisfy. Certainly I have found no authority to the contrary. Such a view reconciles the positions of natural and artificial persons in this regard, and the opposite view leads to the paradoxical result that the King's enemies, who chance during war to constitute the entire body of corporators in a company
- B registered in England, thereby pass out of the range of legal vision, and instead, the corporation, which in itself is incapable of loyalty, or enmity, or residence, or of anything but of bare existence in contemplation of law and of registration under some system of law, takes their place for almost the most important of all purposes, that of being classed among the King's friends or among his foes in time of war.
- C What is involved in the decision of the Court of Appeal is that, for all purposes to which the character and not merely the rights and powers of an artificial person are material, the personalities of the natural persons, who are its corporators, are to be ignored. An impassable line is drawn between the one person and the others. When the law is concerned with the artificial person, it is to know nothing of the natural persons, who constitute and control it. In questions of property and capacity, of acts done and rights acquired or liabilities assumed thereby, this may be always true. Certainly it is so for the most part. But the character in which property is held, and the character in which the capacity to act is enjoyed and acts are done, are not in *pari materia*. The latter character is a quality of the company itself, and conditions its capacities and its acts. It is not a mere part of its energies or acquisitions, and if that character must be derivable, not from the circumstances of its incorporation, which arises once for all, but from qualities of enmity and amity, which are dependent on the chances of peace or war and are attributable only to human beings, I know not from what human beings that character should be derived, in cases where the active conduct of the company's officers has not already decided the matter, if resort is not to be had to the predominant character of its shareholders and corporators. So far as I can find,
- F this precise question has been asked heretofore once and once only—namely, in argument in *Bank of United States v. Deveaux* (8) (5 Cranch at p. 81). The judgment of MARSHALL, C.J., did not answer it, though he decided the case in favour of the party whose counsel suggested this point as part of a wider argument. Accordingly, all that can be said is that the suggestion cannot have shocked that great jurist, and his actual decision proceeds upon the assumption that for certain
- G purposes a court must look behind the artificial persona—the corporation—and take account of and be guided by the personalities of the natural persons, the corporators. In the Court of Appeal the Lord Chief Justice expressed the opinion that the judgment of MARSHALL, C.J., had not been approved in later cases before the Supreme Court of the United States. I have examined the cases in question—*Louisville, Cincinnati and Charleston Railroad Co. v. Letson* (9) and *St. Louis and San Francisco Rail. Co. v. James* (10) and have come to the conclusion that, so far as is material to the question in hand, they do not bear out this criticism. This is how the matter stands. Under the constitution of the United States jurisdiction is given to federal circuit courts to decide controversies between “citizens” of different States. In the case in question MARSHALL, C.J., held that an artificial person could not be a citizen for this purpose, but, not to deny justice to a corporation, he took cognisance of the corporators and, finding them all to be citizens of the State which had incorporated the plaintiff bank, he admitted jurisdiction, treated the bank like a citizen of that State, and entertained the suit. It was afterwards contended, and for some time with success, that this decision applied only when all the corporators were citizens of that State and that it required a refusal of jurisdiction, when some of them were citizens of another State. It was in this stage that he expressed the doubts referred to in the judgment below. Long after his time the matter was at last set at rest in the case of the *St. Louis*
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Railway (10), when the court surveyed all the different phases of the controversy. What is remarkable is the way in which this was done. The federal courts did not ignore the existence of the corporators and fix their attention on the place where the corporation was chartered, or the State, under whose laws it was registered. They continued to fix their attention on the citizen corporators, but they conclusively and incontestably presumed that they were all citizens of the State of the incorporation. Such bearing, therefore, as these cases have on the present question is in favour of the appellants, for it is plain that great judges, trained in the principles of the English common law, have not found it contrary to principle to look, at least for some purposes, behind the corporation, and consider the quality of its members.

A somewhat similar observation arises upon *Janson v. Driefontein Consolidated Mines, Ltd.* (4). The question fought throughout in that case was, whether it was against public policy for English underwriters to indemnify a company, registered in the Transvaal, against losses inflicted upon it just before the outbreak of war by the government of the South African Republic in order to strengthen its resources in the impending conflict with this country. The case was tried before the conclusion of peace, but on the common footing that it should be taken that the war was over. The mere suspension of an enemy's right of suit during war never was relied on at all, and the plea that payment on the policy would be an act of trading with the enemy was dropped. The only case made was that payment would relieve enemies of the Crown from losses, which the public policy of this country, applicable to war and warlike conditions, required that they should bear themselves. It was the underwriters who insisted on the enemy character of the company, for the company itself denied it. As I read the judgments of the noble Lords, none purported to decide that the company must be an enemy corporation for all purposes, by reason of its registration in the Transvaal. They held that, even if that assumption were made in the underwriters' favour, yet their appeal must fail. The Lord Chancellor expressly stated that the question might be debatable, as it is now actually being debated, and other noble Lords concurred. LORD LINDLEY, whose observations alone are expressed at length, could not, I think, have meant to intimate thereby that, in such a case as the present, he would decide for the respondents. What really is significant in that case is this: few, if any, of the shareholders in the company were, in fact, subjects of the South African Republic. The vast majority were subjects of various European States. The company's argument was: "How can it be contrary to British public policy that individual Frenchmen and Germans or Italians should get the practical benefit of this policy." In the Court of Appeal SIR A. L. SMITH, M.R., expressly accepted this argument. To him at least there was no impenetrable screen, interposed by registration, between the company and its shareholders. Beyond this, I think for present purposes the case does not go.

Further, *Daniel v. Comrs. for Claims on France* (11) and *Long v. Comrs. for Claims on France* (12), cited to your Lordships from 2 Knapp at pp. 23 and 51, do not seem to me to be in point. They turn on the meaning to be attributed to the expression "British subjects" in a particular treaty. If anything, the reliance placed on the fact of the French government's control over the colleges and on the existing state of English legislation towards Roman Catholic ecclesiastics would militate against the respondent's argument. As an illustration of the view which has been taken (under the Income Tax Acts it is true) of the control which one trading company exercises over another company through the ownership of a controlling interest in the latter's shares, I would refer to *St. Louis Breweries, Ltd. v. Apthorpe* (13), and *Apthorpe v. Peter Schoenhofen Brewing Co., Ltd.* (14). In the latter case, in deciding that an English company, which held a controlling interest in the shares of a United States company, carried on business for income tax purposes in the United States by virtue of that holding and of its control over the business of the latter company, COLLINS, L.J., expressly said that he was not

- A deterred from so deciding by the decision of your Lordships' House in *Salomon v. Salomon & Co.* (6), which was so much relied on in the court below. I think this analogy not without importance. In *The Roumanian* (15) it is to be remembered that the Prize Court was dealing with a matter in which the enemy character of goods is by settled rule determined by ownership, and when that case was affirmed in the Privy Council no decision on this point was invited or given.
- B The truth is that considerations, which govern civil liability and rights of property in time of peace, differ radically from those which govern enemy character in time of war. Joint stock enterprise and English legislation and decisions about it have developed mainly since this country was last engaged in a great European war and have taken little, if any, account of warlike conditions. The ideal of joint stock enterprise, that with limited liability, the more unlimited the trading the better, is an ideal of profound peace. The rule against trading with the enemy is a belligerent's weapon of self-protection. I think that it has to be applied to modern circumstances as we find them and not limited to the applications of long ago, with as little desire to cut it down on the one hand as to extend it on the other beyond what those circumstances require. Though it has been said by high authority (see *M'Connell v. Hector* (2); *Esposito v. Bowden* (16)) to aim at curtailing the commercial resources of the enemy, it has, according to other and older authorities, the wider object of preventing unregulated intercourse with the enemy altogether. Through the Royal licence, which validates such intercourse and such trade, they are brought under necessary control. Without such control they are forbidden. To my mind, the rule would be deprived of its substantial justification and be reduced to a barren canon, if it were held, in circumstances such as these, that it had no application by reason of the mere fact that the company is registered in London.
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Having regard to the foregoing considerations, I think the law on the subject may be summarised in the following propositions. (i) A company incorporated in the United Kingdom is a legal entity, a creation of law with the status and capacity which the law confers. It is not a natural person with mind or conscience. To use the language of BUCKLEY, L.J. ([1915] 1 K.B. at p. 916), "it can be neither loyal nor disloyal. It can be neither friend nor enemy." (ii) Such a company can only act through agents properly authorised, and so long as it is carrying on business in this country through agents so authorised and residing in this or a friendly country it is *prima facie* to be regarded as a friend, and all His Majesty's lieges may deal with it as such. (iii) Such a company may, however, assume an enemy character. This will be the case if its agents or the persons in *de facto* control of its affairs, whether authorised or not, are resident in an enemy country, or, wherever resident, are adhering to the enemy or taking instruction from or acting under the control of the enemy. A person knowingly dealing with the company in such a case is trading with the enemy. (iv) The character of individual shareholders cannot of itself affect the character of the company. This is admittedly so in times of peace during which every shareholder is at liberty to exercise and enjoy such rights as are by law incident to his status as shareholder. It would be anomalous if it were not so also in a time of war during which all such rights and privileges are in abeyance. The enemy character of individual shareholders and their conduct may, however, be very material on the question whether the company's agents, or the persons in *de facto* control of its affairs, are in fact adhering to, taking instructions from, or acting under the control of enemies. This materiality will vary with the number of shareholders who are enemies and the value of their holdings. The fact, if it be the fact, that after eliminating the enemy shareholders the number of shareholders remaining is insufficient for the purpose of holding meetings of the company or appointing directors or other officers, may well raise a presumption in this respect. For example, in the present case, even if the secretary had been fully authorised to manage the affairs of the company and to institute legal proceedings on its behalf, the fact that he held one share

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only out of 25,000 shares, and was the only shareholder who was not an enemy, might well throw on the company the onus of proving that he was not acting under the control of, taking his instructions from, or adhering to the King's enemies in such manner as to impose an enemy character on the company itself. It is an a fortiori case when the secretary is without authority and necessarily depends for the validity of all he does on the subsequent ratification of enemy shareholders. The circumstances of the present case were, therefore, such as to require close investigation and preclude the propriety of giving leave to sign judgment under Ord. 14, r. 1. (v) In a similar way a company registered in the United Kingdom, but carrying on business in a neutral country through agents properly authorised and resident here or in the neutral country, is *prima facie* to be regarded as a friend, but may, through its agents or persons in *de facto* control of its affairs, assume an enemy character. (vi) A company registered in the United Kingdom, but carrying on business in an enemy country is to be regarded as an enemy.

The foregoing propositions are not only consistent with the authorities cited, in argument, and, in particular, with what was said in this House in *Janson v. Driefontein Consolidated Mines, Ltd.* (4), but they have, I think, the advantage of affording convenient and intelligible guidance to the public on questions of trading with the enemy. It would be a misfortune if the law were such that during war every one proposing to deal with a British company had to examine the character of its shareholders and decide whether the number of the enemy shareholders coupled with the value of their holdings were such as to impose an enemy character on the company itself. It would be still more unfortunate if this question were a question for the jury in each particular case. No one could maintain that a company had assumed an enemy character merely because it had a few enemy shareholders. It might possibly be contended that it assumed an enemy character when its enemy shareholders amount to (say) one-half, or three-fifths, or five-eighths of the whole, but how if the one-half, three-fifths, or five-eighths held only one-sixth, one-fifth, or one-fourth of the shares? The legislature might, but no court could possibly, lay down a hard-and-fast rule, and, if no such rule were laid down, how could anyone proposing to deal with the company ascertain whether he was or was not proposing to deal with the enemy?

I desire to add this. It was suggested in argument that acts otherwise lawful might be rendered unlawful by the fact that they might tend to the enrichment of the enemy when the war was over. I entirely dissent from this view. I see no reason why a company should not trade merely because enemy shareholders may after the war become entitled to their proper share of profits of such trading. I see no reason why the trustee of an English business with enemy *cestuis qui trust* should not during the war continue to carry on the business, although after the war the profits may go to persons who are now enemies, or why moneys belonging to an enemy, but in the hands of a trustee in this country, should not be paid into court and invested in government stock or other securities for the benefit of the persons entitled after the war. The contention appears to me to extend the principle on which trading with the enemy is forbidden far beyond what reason can approve or the law can warrant. In early days the King's prerogative probably extended to seizing enemy property on land as well as on sea. As to property on land, this prerogative has long fallen into disuse. Subject to any legislation to the contrary or anything to the contrary contained in the treaty of peace when peace comes, enemy property in this country will be restored to its owners after the war just as property in enemy countries belonging to His Majesty's subjects will or ought to be restored to them after the war. In the meantime it would be lamentable if the trade of this country were fettered, businesses shut down, or money allowed to remain idle, in order to prevent any possible benefit accruing thereby to enemies after peace. The prohibition against doing anything for the

A benefit of an enemy contemplates his benefit during the war and not the possible advantage he may gain when peace comes.

I need only briefly refer to the argument submitted on the effect of the recent statutes against trading with the enemy and the Royal Proclamations connected with them. I have carefully considered them and do not think that they limit or exclude common law rules or principles or, in the case of corporations, restrict the trade which is unlawful to trading with such corporations as are incorporated under the laws of an enemy country. Equally little can the proclamations be read as licences to do anything that they do not in terms prohibit. No suggestion has been made that the position of the respondent company is that of an alien enemy commorant within the realm sub protectione regis, or that the royal licence has specifically been extended to trading with it.

C I feel some little difficulty as to the precise form which your Lordships' order ought to take. The action is altogether irregular and should be struck out, all orders made therein being, of course, discharged. But there is no one before the House who can be made liable for costs or who can be ordered to replace in court the moneys paid out to the secretary. There can therefore be no order as to costs, and the appellants must be left to pursue any remedy they may have against the secretary personally in respect of the money which was erroneously paid to him.

LORD PARMOOR.—The respondents were registered at Somerset House, on Mar. 29, 1905, as a limited liability company under the Companies Acts, 1862 to 1900. At the date of the outbreak of war the company was carrying on business in the United Kingdom under a system of local management. It appears not to be open to question that, before the war, the company was a British company, irrespective of the nationality of the directors and other corporators. The respondents brought an action against the appellants as acceptors of three bills of exchange for £1,100, £1,018 4s. 2d., and £3,462 9s. 4d., in payment of goods supplied before the declaration of war. On Nov. 24, 1914, MASTER MACDONNELL gave leave to the plaintiffs to sign final judgment under Ord. 14. This order was affirmed by SCRUTTON, J., and the Court of Appeal. At the date of the writ all shares in the respondent company except one were held by a German company, or by subjects of the German Empire, residing in Germany. One share was registered in the name of the secretary of the company, who resides in London, and in January, 1910, became a naturalised subject of the Crown. All the directors are subjects of the German Empire and reside in Germany. The appellants do not deny that they accepted the three bills of exchange, but raise two points—(i) that having regard to the enemy character of the shareholders and directors of the respondent company no payment can be enforced by the company during the war of debts owing to the company, and (ii) that there was no authority in the solicitors for the company to issue the writ in the action. Both matters are of importance, but the main argument both in this House and in the Court of Appeal has been directed to the question how far the enemy nationality of the directors, and of the shareholders of the company for the time being on the register, affects the status of the company after the outbreak of war, and its right to sue in the British courts.

A company incorporated under the Companies Acts has a continued existence, irrespective of the shareholders for the time being on the register. It is a legal person or entity, which comprises not only those shareholders, but their predecessors and successors. It has a right to sue, and a liability to be sued, in the corporate name. It possesses powers and is subject to obligations distinct from those of the shareholders for the time being on the register, acting either individually or in their collective capacity. I see no reason why the word nationality may not be properly applied to a corporate body. The nationality of such a body is wholly distinct from that either of a majority or of the whole number of shareholders for the time being on the register. The contention of the appellants is that when, at the outbreak of war, the shareholders on the register of a British company,

carrying on business within the United Kingdom, are wholly or largely alien enemies, the company loses the right, which it would otherwise have, to sue in the British courts. I do not think that this contention is well founded, and I agree in this respect with the opinion expressed by LORD SHAW. The company, after the outbreak of war, does not lose the status of a company registered in this country. If there is an agent duly appointed, who may or may not be a shareholder, the outbreak of war does not per se terminate the agency, and the company is liable to be sued in respect of obligations and is enabled to sue to enforce its rights. In other words, the company still owes obedience to the laws of this country, and is entitled to their protection.

It is not necessary to go through the numerous cases quoted to your Lordships. I agree with the conclusion in the judgment of the Lord Chief Justice that, subject to the doubtful exception of one case (*City of London v. Wood* (17)), there is no English authority which supports the contention of the appellants. On the other hand, there is no direct authority against this contention. Two cases decided in this House support the principle on which the decision of the Court of Appeal is based. In *Salomon v. Salomon & Co.* (6), LORD MACNAGHTEN, in specific terms, states his opinion that a company is a different person altogether from the subscribers to the memorandum or the shareholders on the register. In *Janson v. Driefontein Consolidated Mines, Ltd.* (4) the question now in debate was indirectly involved, and there are passages in the opinion of the noble and learned Lords which are entitled to be regarded as a high authority. LORD MACNAGHTEN says ([1902] A.C. at p. 487):

"If all the members of the corporation had been subjects of the British Crown, the corporation itself would be none the less a foreign corporation and none the less in regard to this country an alien."

LORD DAVEY says (*ibid.* at p. 498):

"I think it must be taken that the respondent company was technically an alien, and became, on the breaking out of hostilities between this country and the South African Republic, an alien enemy."

LORD BRAMPTON says (*ibid.* at p. 501):

"The company clearly must be treated as a subject of the republic, notwithstanding the nationality of its shareholders."

LORD ROBERTSON says (*ibid.* at p. 504):

"That this company was a Transvaal company, and that the nationality of its shareholders is immaterial."

LORD LINDLEY says (*ibid.* at p. 505):

"For all purposes material for the determination of the present appeal, the company must, in my opinion, be regarded as a company resident and carrying on business in the Transvaal, although not exclusively there. It was subject to the laws of that country. When war broke out the company became an alien enemy of this country: see the American case of the *Society for the Propagation of the Gospel v. Wheeler* (18). If it becomes material to attribute nationality to the company it would, in my opinion, be correct to say that the company was a Transvaal company and a subject of the Transvaal government, although almost all its shareholders were foreigners resident elsewhere and subjects of other countries. But when considering questions arising with an alien enemy, it is not the nationality of the person, but his place of business during the war that is important."

I have troubled your Lordships at some length with quotations from the opinions of noble and learned Lords in the above case in order to avoid the necessity of further references to other cases. I do not doubt the proposition that a company registered in this country would, if proved to be carrying on its business, through

A its agent or agents, in an enemy country, become enemy in character. I draw
no distinction in this respect between a British company and a British born subject.
The enemy character would be the same, though every shareholder and every
director was a British born subject. In the present case there is no evidence that
since the outbreak of the war the respondents have carried on business in an
enemy country. In the absence of such evidence the respondents have the same
B right of access to the courts as any other British subject or subject of a friendly
State, and if it is relevant to clothe the company with a nationality, their nationality
was British.

In the Court of Appeal BUCKLEY, L.J. (now LORD WRENBURY) has expressed the
opinion that, though the respondent company has an independent legal existence
and is a British legal person, all its directors and all its corporators on the register
C are German residents in Germany, and that these apart from technicality determine
the thoughts, wishes, or intention of the company. "The question for determination
is whether when all the natural persons who express and give effect to their wishes
through the corporation as a legal abstraction are Germans, resident in Germany,
the corporation can sue in this country, because those persons who could not sue
are, as a matter of law, absorbed in a separate legal person which is British, and
D which (regarding the corporation as a legal person existing apart from and irres-
pective of its corporators) can sue." Assuming that it is permissible for some
purposes to consider the nationality of the corporators on the register, I find it
difficult to accept the conclusion that, after the outbreak of war, the thoughts,
wishes, or intentions of the company are the thoughts, wishes or intentions of
Germans resident in Germany. The effect of the outbreak of the war is to
E suspend, as from that date, and during the war, all rights of the enemy directors
or corporators to take any part in the management and direction or control of
a British company carrying on business in this country. This is in no sense a
technical question, but one of substance and reality. If any official of the com-
pany in this country entered into any intercourse with the enemy directors or
corporators he would be liable to a charge of misdemeanour, and subject, if con-
F victed, to a heavy punishment. It is fair to say that the secretary of the com-
pany has denied that he has had any intercourse with the German directors or
corporators since the outbreak of the war, or that any payment to the respondent
company since that date has been remitted to the enemy. Furthermore, the Board
of Trade has taken control of the books of the respondent company in accordance
G with the powers conferred upon them by statute. Counsel for the appellants
argued that the enemy corporators had disappeared during the period of the war.
It is more accurate to say that their rights have been suspended by the outbreak
of the war and will remain in suspense during the period of the war. The principle
applicable is well stated in *Ex parte Boussmaker* (19) where a bankruptcy claim was
admitted on behalf of an alien enemy, the dividend to be reserved during the
H continuance of the war. The Lord Chancellor, after referring to the general
principle that a contract with an alien enemy would be void, says:

"But if the two nations were at peace at the date of the contract, from the
time of war taking place the creditor could not sue; but, the contract being
originally good, upon the return of peace the right would survive."

I Special reference was made in the argument to the case of a corporation sole.
Corporations sole are, in the main, ecclesiastical, but, by the Public Trustee Act,
1906, a public trustee has been constituted a corporation sole, with perpetual
succession and an official seal, and may sue or be sued under the above name like
any other corporation sole. The object is to give the corporation a continued
existence irrespective of the person holding the office of public trustee for the time
being. If the person holding the office for the time being became an alien enemy,
or in any other way became disentitled to sue or be sued in the British courts, this
would not affect the right of the corporation to sue, or its liability to be sued by

any persons entitled to receive payment due from funds held by the corporation as trustees. The distinction between the corporators for the time being, and the corporation with perpetual succession, is not technical, but of essential importance. Similar considerations arise in the case of an ecclesiastical corporation sole. Many of these corporations have existed for centuries with a succession of individual corporators, who are considered in law as one person. A particular bishop or rector might be a person whose rights to sue or be sued had been suspended, but the funds of the corporation are not on that account relieved from liability, and the work of the corporation is not brought to a standstill by a disability to recover debts due in the British courts.

The principle that the enemy character of shareholders on the registers does not take away the right of a British company to sue, or its liability to be sued, is recognised in the proclamation against trading with the enemy of Sept. 9, 1914, read in connection with the Trading with the Enemy Act, 1914, and the Trading with the Enemy Amendment Act, 1914. The proclamation, taken by itself, can in no way affect the legal position, but it is different if the terms of the proclamation subsequently receive statutory confirmation. Article 3 of the proclamation states: "In the case of incorporated bodies, enemy character attaches only to those incorporated in an enemy country." In s. 1 (2) of the Trading with the Enemy Act, 1914, it is enacted that, for the purposes of that Act, a person should be deemed to have traded with the enemy if he has entered into any transaction or done any act which was, at the time of such transaction or act, prohibited by or under any proclamation issued by His Majesty dealing with trading with the enemy, for the time being in force, or which at common law, or by statute, constitutes an offence of trading with the enemy; provided that any transaction or act permitted by or under any such proclamation shall not be deemed to be trading with the enemy. This section is not directed to the determination of what constitutes an enemy, but to transactions and acts prohibited either by proclamation, common law, or statute. The proviso does not in my opinion, assist the argument of the appellant company and is not relevant to the question now in debate. It is indeed essential not to confuse the question of enemy character with the question of trading with the enemy. A British subject is liable to all the penalties which attach to enemy trading, but he does not thereby cease to be a British subject or divest himself of his status as a British citizen. Section 14 (2) of the Trading with the Enemy Amendment Act, 1914, is directed to a determination of the persons or body of persons to be treated as enemy. It provides:

"No person or body of persons shall, for the purposes of this Act, be treated as an enemy who would not be so treated for the purpose of any proclamation issued by His Majesty dealing with trading with the enemy, for the time being in force . . ."

This definition is limited to the purposes of this Act, but the Act is to be construed as one with the principal Act, and the purpose of the Act is stated in the preamble to be to prevent the payment of money to persons or bodies of persons resident or carrying on business in any country with which His Majesty is, for the time being, at war. The effect is that a company registered in this country, which is not carrying on business in an enemy country, is not an enemy company, and that any person paying debts, due from him to such company, is not trading with the enemy or committing any offence, whatever may be the nationality of its directors and corporators.

At the conclusion of his judgment BUCKLEY, L.J., quotes the language of *Bank of United States v. Deveaux* (8) (5 Cranch at p. 91): "The action is by aliens suing by a corporate name." I think that this dictum is not applicable where the aliens are alien enemies, whose rights of interference or control in the management of the corporation have been wholly suspended; but it is clear that a British company cannot claim to be in a more favourable position than an ordinary British

A subject, and that the fact of registration in this country would be no answer if it can be proved that its agent is acting under enemy control or holding any intercourse with alien enemies.

The second question raised by the appellants is that there was no authority in the solicitor for the company to issue the writ in the action. The question is not whether there was a retainer to the solicitor to issue the writ in the action, but whether, under the conditions consequent on the outbreak of the war, there was any representative of the company with authority to give instructions to a solicitor to commence an action on behalf of the company. The cases which decide the practice to be followed when an objection is made to the retainer of a solicitor do not apply. There is no reason why the objection raised in this case on behalf of the appellants could not be entertained at the trial as a defence to the action, and to refuse to entertain it might lead to serious injustice. In *Continental Tyre and Rubber Co., (Great Britain), Ltd. v. Thomas Tilling, Ltd.*, which was tried before LUSH, J. (and in the Court of Appeal was consolidated with the present case (see 112 L.T. 324)) in November, 1914, evidence was adduced for the purpose of proving that, prior to the outbreak of the war, the secretary had been given the necessary authority by the company. By arrangement this evidence was admitted as though it had been given on the hearing of the case under debate. The Court of Appeal agreed with LUSH, J., that, upon the evidence before him; there was sufficient ground for holding that the authority of the secretary had been established. If the secretary had the necessary authority at the outbreak of the war there is no evidence that such authority has been revoked, and there is no revocation by operation of law. LUSH, J., finds that the secretary has constantly brought such actions as the present, and that the directors have left it to him to cause a writ to be issued when necessary, and that he has done so in this case with their authority express or implied. Assuming that this finding is justified by the evidence, it does not, in my opinion, support the proposition that at the outbreak of the war the secretary had authority of the company to initiate litigation on its behalf. There is no minute conferring such authority on the secretary, and there is no satisfactory evidence of any resolution giving such authority, although not recorded in a minute. It is advisable that a resolution giving such authority should be formally recorded in a minute, but this would not be conclusive if the fact that such resolution had been passed could be proved from other sources. In my opinion, there is no evidence that any such resolution was ever passed and the finding of LUSH, J., comes to nothing more than that it was found convenient to allow the secretary to initiate litigation from time to time, whether his authority is to be regarded as conferred in each case, or as ratified by subsequent acquiescence. Counsel for the respondents argued that if the secretary had not authority he could obtain it by taking the necessary steps, and that the objection was of a technical character. It is a sufficient answer to this argument to say that, whatever steps may be necessary to confer authority on the secretary, no such steps have, in fact, been taken. As at present advised, I think that there is no way in which the necessary authority could be conferred upon the secretary. The difficulty is certainly not met by the provisions in the articles of association which purports to provide that a quorum of one is sufficient to constitute an adjourned meeting. In the main contention the respondents have succeeded. I agree in the form of the order proposed by LORD PARKER.

Appeal allowed: action struck out.

Solicitors: Andrew, Wood, Purves & Sutton, for R. A. Rotherham, Coventry; Stephenson, Harwood & Co.

[Reported by W. E. REID, ESQ., Barrister-at-Law.]

R. v. CASEMENT

[COURT OF CRIMINAL APPEAL (Darling, Bray, A. T. Lawrence, Scrutton and Atkin, JJ.), July 17, 18, 1916]

[Reported [1917] 1 K.B. 98; 86 L.J.K.B. 467; 115 L.T. 267, 277;
32 T.L.R. 601, 667; 60 Sol. Jo. 656; 25 Cox, C.C. 480, 503;
12 Cr. App. Rep. 99]

Criminal Law—Treason—Adhering to King's enemies—Adherence without the realm—Trial in the King's Bench—Treason Act, 1351 (25 Edw. 3, st. 5, c. 2)—Treason Act, 1543 (35 Hen. 8, c. 2).

By the Treason Act, 1351, the following shall be declared to be treason: "If a man do levy war against our Lord the King in his realm, or be adherent to the King's enemies in his realm, giving to them aid and comfort, in the realm, or elsewhere, and thereof be proveably attainted of open deed by the people of their condition."

The appellant, a British subject, went to reside in Germany during the early part of the war between England and Germany in 1914-1918. While there he tried to persuade Irish soldiers who had been taken prisoners and were interned in Germany to join an Irish brigade and assist Germany to fight against England. In 1916 he landed in Ireland as one of a party carrying arms and ammunition which, it was alleged, were to be supplied to Irishmen and used on behalf of Germany in the prosecution of the war. He was taken in Ireland, and later, after a trial in the King's Bench, he was convicted of an offence under the provisions quoted of the Act of 1351 and was sentenced to death. On appeal,

Held: the offence prescribed by the statute was committed by a person adhering and giving aid and comfort to the King's enemies outside his realm just as much as if the adherence had taken place and the aid and comfort been given within the realm; under the Treason Act, 1543, the offender was triable in the King's Bench; and, therefore, the appellant had been rightly convicted.

Notes. Considered: *Joyce v. D.P.P.*, [1946] 1 All E.R. 186.

As to the offence of high treason, see 10 HALSBURY'S LAWS (3rd Edn.) 555 et seq., and for cases see 14 DIGEST (Repl.) 138-141, 15 DIGEST (Repl.) 766 et seq. For the Treason Acts, 1351 and 1543 see 5 HALSBURY'S STATUTES (2nd Edn.) 452, 490.

Cases referred to:

- (1) *R. v. Cundell* (1812), 4 Newgate Calendar 62; 15 Digest (Repl.) 772, 7184.
- (2) *R. v. Story* (1571), 1 State Tr. 1087; sub nom. *Story's (Storie's) Case*, 3 Dyer 298 b., 300 b.; 73 E.R. 670, 675; 15 Digest (Repl.) 768, 7087.
- (3) *Butt v. Conant* (1820), 1 Brod. & Bing. 548; 4 Moore, C.P. 195; 129 E.R. 834; 32 Digest 191, 2350.
- (4) *Garland v. Jekyll* (1824), 2 Bing. 273; 9 Moore, C.P. 502; 3 L.J.O.S.C.P. 227; 130 E.R. 311.

Also referred to in argument:

Kynaston's Case (1401), cited in 1 Hale, P.C. at p. 156.

De Brittain's Case (1292), cited in 3 Co. Inst. at p. 10.

De Ross' Case (1305), cited in 3 Co. Inst. at p. 10.

R. v. Platt (1777), 1 Leach, 157; 14 Digest (Repl.) 175, 1394.

R. v. Lynch, [1903] 1 K.B. 444; 72 L.J.K.B. 167; 88 L.T. 26; 67 J.P. 41; 51 W.R. 619; 19 T.L.R. 163; 20 Cox, C.C. 468; 14 Digest (Repl.) 139, 1028.

R. v. Vaughan (1696), 13 State Tr. 485; Fost. cited in pp. 220, 240; 2 Salk. 634; Holt, K.B. 689; 90 E.R. 1280; 15 Digest (Repl.) 870, 8387.

Mulcahy v. R. (1868), L.R. 3 H.L. 306, H.L.; 14 Digest (Repl.) 123, 856.

Reade v. Rochforth (1556), 2 Dyer 131 b.

A **Appeal** against a conviction and sentence of death on a trial at Bar in the King's Bench Division before LORD READING, C.J., AVORY and HORRIDGE, JJ., for high treason by adhering to the King's enemies elsewhere than in the King's realm—to wit, in Germany during the war between Great Britain and Germany from 1914 to 1918.

The facts are stated in the headnote.

B A. M. Sullivan (Second Serjeant of the Irish Bar and also of the English Bar), T. Artemus Jones, and J. H. Morgan for the appellant.

The Attorney-General (Sir F. E. Smith, K.C.), The Solicitor-General (Sir George Cave, K.C.), Bodkin, Travers Humphreys and Branson for the Crown were not called on to argue.

C The judgment of the court was delivered by

DARLING, J.—The appellant was indicted for high treason in adhering to the King's enemies elsewhere than in the King's realm, that is to say, within the Empire of Germany, and his act was said to be contrary to the provisions of the statute 25, Edw. 3, c. 2, known as the Treason Act, 1351. That statute says:

D “Whereas divers opinions have been before this time in what case treason shall be said, and in what not; the King, at the request of the Lords and of the Commons, hath made a declaration in the manner as hereafter followeth . . .”

Various treasons are defined. After the treason of levying war against the King, in his kingdom, there is defined this treason:

E “ou soit aherdant as enemys nostre seigneur le Roi en le roialme, donant a eux aid ou confort, en son roialme ou par aillours.”

That has been translated, “or be adherent to the King's enemies in his realm, giving to them aid and comfort, in the realm, or elsewhere.” These few words have given rise to all the arguments addressed to the court at the trial at Bar and to this court.

F The main point raised in the exceedingly able argument of counsel for the appellant was that this statute had neither created nor declared the offence of being adherent to the King's enemies beyond the realm of the King; and that the giving of aid and comfort, “par aillours”—that is, outside the realm—did not constitute a treason which could be tried in this country unless the person who gave the aid and comfort outside the realm (in the present case in Germany) was himself within the realm at the time when he gave the aid and comfort. This argument was founded upon the difficulties which must arise owing to the doctrine of venue and the fact that people were only triable within certain districts when the venue could be alleged—that if a man committed a crime in a county he must be indicted and tried for it in that county; that if he committed a crime against the King he must be tried within the realm; and that if the aid and comfort was given outside the realm by a person being then outside the realm he could not be tried there, because it was not within the King's realm; and that, as the appellant could not be tried by the King's courts in Germany, he could not be tried in the King's courts at all for what he had done in Germany unless, when he gave the aid and comfort in Germany, he was himself actually resident in the King's realm. It was said this must be so or a case could be found where a man had, altogether outside the realm, given aid and comfort to the King's enemies, and had been indicted within the realm and tried for it. Such a case would be difficult to find, because it cannot be a very common offence. First, if a man did those things pure and simple, it is highly improbable that he would then put himself in peril by coming within the realm where what he had done might be investigated and he might be punished for it. Very few offenders would put themselves in a position where they could be charged; if they did come back it is so highly probable that they would commit some offence within the realm, such as levying war or compassing the King's death, that they would very likely be arrested and charged with some such offence which anybody within the King's realm could commit, and which would be much more easily

proved. The court is, therefore, not much impressed by the fact that there is very little precedent for a trial the nature of which we are dealing with to-day.

There is, however, considerable authority for the proposition that what the jury have found was done by the appellant is an offence triable in the King's Bench. Taking the words of the statute themselves, we do not think that the construction for which counsel for the appellant contends is the true one. He would have it said that "be adherent to the King's enemies in his realm, giving to them aid and comfort, in the realm, or elsewhere" means that the adherence must be given by a person who, being in this country, gives the aid and comfort, it may be in this country, it may be outside of it. We agree that if a person being within this country gives aid and comfort to the King's enemies in this country he is adherent to the King's enemies. We agree that if he is in this country and gives aid and comfort to the King's enemies outside this country he is adherent to the King's enemies. But we think there is another offence, and that these words must mean something more than that. We think that "giving aid and comfort to the King's enemies" are words of apposition; they are words to explain what is meant by being adherent to, and we think that, if a man be adherent to the King's enemies in his realm by giving to them aid and comfort in his realm, or if he be adherent to the King's enemies elsewhere—that is, by giving to them aid and comfort elsewhere—he is equally adherent to the King's enemies, and, if he is adherent to the King's enemies, then he commits the treason which the statute of Edward III defines. A very good reason for that opinion is that the subjects of the King owe him allegiance, and the allegiance follows the person of the subject. He is the King's liege wherever he may be, and he may violate his allegiance in a foreign country just as well as he may violate it in this country. If authority were wanted on this point it is to be found in *R. v. Cundell* (1). The only reason why that case is not decisive of the present one is that it does not dispose of the question where the person who has committed the particular treason can be tried or how he can be tried.

I have said that in the opinion of this court there is a large amount of authority for the proposition that adherence to the King's enemy's outside the King's dominions by a person who is himself outside those dominions constitutes the commission of this treason. There is a long and ancient opinion, as will be shown later on, for the proposition that it is treason to do what the appellant has been convicted of doing in the present case. A statute was passed which has been often cited before us, the Treason Act, 1543 (35 Hen. 8, c. 2), the title of which is "An Act for the trial of treasons committed out of the King's dominions." That is a distinct statement that one can commit treason out of the King's dominions; it is only a question of how the offender is to be tried; and it says:

"Forasmuch as some doubts and questions have been moved that certain kinds of treasons, misprisions, and concealments of treason done, perpetrated, or committed out of the King's Majesty's Realm of England and other his Grace's Dominions cannot by the common laws of this realm be inquired of, heard, and determined within this his said realm of England; for a plain remedy, order, and declaration therein to be had and made. Be it enacted by authority of this present Parliament that all manner of offences being already made or declared or hereafter to be made or declared by any of the laws and statutes of this realm to be treasons, misprisions of treasons, or concealments of treason, and done, perpetrated, or committed, or hereafter to be done, perpetrated, and committed by any person or persons out of this realm of England shall be from henceforth inquired of, heard, and determined before the King's justices of his Bench for pleas to be holden before himself . . ."

that is to say, tried in the King's Bench. Therefore this trial was rightly had in the King's Bench, provided that what the appellant had done amounted to treason by virtue of the statute of Edward III. If it was such a treason it was rightly tried.

A Whether it was such a treason or not depends upon the construction which this court, reading this statute, puts upon it.

We have been asked to take the statute and read it as though we had seen it for the first time. That is not altogether an acceptable view. In MAXWELL ON THE INTERPRETATION OF STATUTES (5th Edn.), chap. 11, p. 489, the following passage occurs :

B "It is said that the best exposition of a statute or any other document is that which it has received from contemporary authority. Optima est legum interpret consuetudo. Contemporanea expositio est optima et fortissima in lege. Where this has been given by enactment or judicial decision, it is, of course, to be accepted as conclusive. But, further, the meaning publicly given by contemporary or long professional usage is presumed to be the true one, even when
C the language has etymologically and popularly a different meaning. It is obvious that the language of a statute must be understood in the sense in which it was understood when it was passed, and those who lived at or near the time when it was passed may reasonably be supposed to be better acquainted than their descendants with the circumstances to which it had relation, as well as with the sense then attached to its legislative expressions. Moreover, the long acquiescence of the legislature in the interpretation put upon its enactment by notorious practice may, perhaps, be regarded as some sanction and approval of it."

This statute of 1351 has been understood long before to-day, has been understood by lawyers of great learning, has been understood by lawyers of very exceptional erudition who have been members of the King's Bench, and understood in the sense in which we have to-day said we understand it. Their authority has been attacked by counsel for the appellant. He has attacked the authority of LORD COKE; he has questioned the reasons, if there be any, for the statements which LORD COKE has made concerning the law; and if we were to accede to his argument we should have absolutely to disregard the opinion of LORD COKE, the opinion of
F SERJEANT HAWKINS, and the opinion of SIR MATTHEW HALE—all great names in the law, and persons whose opinions have long been followed in many questions of extreme difficulty which have puzzled lawyers for many generations. SIR MATTHEW HALE in his PLEAS OF THE CROWN, chap. 15, says this :

G "Touching the trial of foreign treason, viz., adhering to the King's enemies, as also for compassing the King's death without his kingdom at this day, the statute of 35 Hen. 8, c. 2, hath sufficiently provided for it."

Then he cites *Story's Case* (2) and says :

"but at common law he might have been indicted in any county of England, and especially where the offender's lands lie, if he have any."

H That is a very definite statement, and, if we were to allow this appeal, we should be bound to say that that statement did not state the law. We are not entitled to throw over the opinion of SIR MATTHEW HALE as cavalierly as we are invited to do. Then there is MR. SERJEANT HAWKINS. In his PLEAS OF THE CROWN, vol. 2, p. 306, s. 48, he says this :

I "It seems to have been a great doubt before the making of the statute 35 Hen. 8, c. 2, in what manner and in what place high treason done out of the realm was to be tried. For some seem to have holden that it was triable only upon an appeal before the constable and marshal; others that it might be tried upon an indictment, laying the offence in any county where the King pleased; and others, that it was triable by way of indictment in that county only wherein the offender had lands; but surely it cannot be reasonably doubted but that it was triable some way or other; for it cannot be imagined that an offence of such dangerous consequence, and expressly within the purview of 25 Edw. 3, should be wholly unpunishable, as it must have been if it were no way triable."

The argument before us to-day is that it was dispunishable because you could not try it, if the kind of treason alleged were what is alleged in this case. We are confessedly relying upon the authority of SIR MATTHEW HALE and of SERJEANT HAWKINS in the judgment which we are giving, and also upon the opinion of LORD COKE, to which I will come. In *Butt v. Conant* (3) DALLAS, C.J., himself no mean authority, says this (1 Brod. & Bing. at p. 570):

"We are told that we must look to the authorities, and find what we can in the books upon the subject. Now, if the authority of LORD HALE and that of MR. SERJEANT HAWKINS are to be treated lightly, we may be without any authority whatever. With respect to LORD HALE, it is needless to remind those whom I am now addressing [this was in 1820] of the general character for learning and legal knowledge of that person, of whom it was said that what was not known by him was not known by any other person who preceded or followed him; and that what he knew, he knew better than any other person who preceded or followed him. With respect to SERJEANT HAWKINS, we know his authority. There are books which are in the hand and head of every lawyer and constantly referred to on every occasion of this sort. I must therefore look to these books, and I shall proceed to examine the exposition given by text-writers of the words of those statutes and the commission of the peace."

With regard to LORD COKE, his opinion is precisely the same as that given by SIR MATTHEW HALE and MR. SERJEANT HAWKINS, but it has been said that we should not follow LORD COKE because STEPHEN in his COMMENTARIES and other writers elsewhere have spoken lightly of the authority and learning of LORD COKE. That may be so. But, although STEPHEN and others have perhaps flouted the authority of LORD COKE, he has been recognised as a great authority in these courts for centuries, and nowhere perhaps more than in the passage I am now about to read, which occurs in *Garland v. Jekyll* (4) (2 Bing. at p. 296):

"I know it has been said that LORD COKE in this case must be mistaken, for in the margin is a reference to LORD COKE's REPORTS, and upon referring to the page you find nothing to warrant his opinion. I have looked into the report and the observation is correct; but it will be found that the same observation will apply to cases relied on by the other side. It appears to me that the reference was not made by LORD COKE, but that it has been introduced by some ignorant editor who fancied something confirmatory of the opinion in 4 COKE. The fact is LORD COKE had no authority for what he states, but I am afraid we should get rid of a good deal of what is considered law in Westminster Hall if what LORD COKE says without authority is not law. He was one of the most eminent lawyers that ever presided as a judge in any court of justice, and what is said by such a person is good evidence of what the law is, particularly when it is in conformity with justice and common sense."

Those are the words of BEST, C.J.

There are other authorities who understood this matter in precisely the same way, not authorities as great as LORD COKE, but it is worth while to show what was the volume of opinion during ages when lawyers were considering this matter. There is a treatise not perhaps very commonly known by MR. FERDINANDO PULTON, a barrister of Lincoln's Inn, published in 1609 (*DE PACIS REGIS*). He says:

"These views are collected out of the reports of the common laws of this realm and of the statutes in force, and out of the painfull works of the reverend judges."

He mentions them, and then there is this passage:

"And because by the said statute of 25 Edw. 3 it is declared to be high treason to levy war against the King in his realm, or to be adherent to his enemies, aiding them in his realm, or elsewhere; therefore if a subject born of the

A realm being beyond the seas doth practice with a prince or governor of another country to invade this realm with great power, and do declare where, how, and by what means the invasion may best be made, it is high treason; for an invasion with great power cannot be, but of likelihood it will tend to the destruction or great peril of the King and hurt to the realm; moreover, the said offender hath manifested himself to be adherent to the King's enemy and to aid him with his counsel, though not in the realm, yet elsewhere, and this offence shall be tried in the King's Bench or elsewhere before such commissioners and in such county as the King by commission shall appoint according to the statute 35 Hen. 8, c. 2."

SIR JAMES FITZJAMES STEPHEN in his DIGEST OF THE CRIMINAL LAW (5th Edn.) art. 55, p. 44, says :

"Everyone commits high treason who, either in the realm or without it, actively assists a public enemy at war with the King."

A valuable opinion to the same effect was given in the year 1775. The case was exactly this case. The treason was not committed within the King's realm; it was committed elsewhere. There is no pretence that the person who committed it by being adherent, or whatever form the treason took, was within the King's realm. It is a distinct statement which covers this case exactly, and is the opinion of two such law officers as LORD THURLOW and LORD LOUGHBOROUGH, absolutely consistent with the opinion which this court is expressing to-day.

We do not think it necessary to give further reasons for the conclusion to which we have come. We purposely do not rely upon a recent case which has been questioned by counsel for the appellant, because we are of opinion that there is ample authority for the conclusion to which the court came in that case, ample authority to be found in the decisions and in the opinions of great lawyers which have already been referred to in giving the judgment of this court. It only remains to say that the appeal is dismissed.

Appeal dismissed.

Solicitors: *Gavan Duffy* (assisted by *M. F. Doyle*, of the American Bar); *Director of Public Prosecutions*.

[*Reported by R. F. BLAKISTON, Esq., Barrister-at-Law.*]

BRACKLEY v. MIDLAND RAIL. CO.

[COURT OF APPEAL (Swinfen Eady, Phillimore and Bankes, L.J.J.), May 8, 1916]

[Reported 85 L.J.K.B. 1596; 114 L.T. 1150; 80 J.P. 369; 14 L.G.R. 632]

Bridge—Railway bridge—Dedication to public as highway—Liability of railway company to maintain.

Where a way is dedicated by the owner of the land to the public, the public may accept it as a public way by using it as such, but, if they do, they must take what the grantor gives as he gives it, and cannot require him to keep it in repair or free from obstruction.

Accordingly, where a railway company built over their lines a bridge which they dedicated to the public, and, after a fall of snow ice and lumps of hard snow formed on the steps, rendering them slippery so that the plaintiff, while using the bridge to reach the company's station and go by train, fell and sustained injury,

Held: there was no duty on the company to clean the bridge, and, therefore, they were under no liability to the plaintiff.

Observations of BLACKBURN, J., in *Cooper v. Walker* (1) (1862), 2 B. & S. 770, at p. 780, applied.

Notes. Referred to: *Hillen v. I.C.I. (Alkali), Ltd.*, [1934] 1 K.B. 455; *Schlarb v. London and North Eastern Rail. Co.*, [1936] 1 All E.R. 71; *London Graving Dock v. Horton*, [1951] 2 All E.R. 1.

As to dedication of a highway, see 19 HALSBURY'S LAWS (3rd Edn.) 43 et seq., and for cases see 26 DIGEST (Repl.) 290 et seq.

Cases referred to:

- (1) *Cooper v. Walker* (1862), 2 B. & S. 770; 31 L.J.Q.B. 212; 6 L.T. 711; 26 J.P. 613; 8 Jur. N.S. 1208; 121 E.R. 1258; 26 Digest (Repl.) 277, 70.
- (2) *Indermaur v. Dames* (1866), L.R. 1 C.P. 274; Har. & Ruth, 243; 35 L.J.C.P. 184; 14 L.T. 484; 12 Jur. N.S. 432; 14 W.R. 586; affirmed (1867), L.R. 2 C.P. 311; 36 L.J.C.P. 181; 16 L.T. 293; 31 J.P. 390; 15 W.R. 434, Ex.Ch.; 36 Digest (Repl.) 46, 246.
- (3) *Cavalier v. Pope*, [1906] A.C. 428; 75 L.J.K.B. 609; 95 L.T. 65; 22 T.L.R. 648; 50 Sol. Jo. 575, H.L.; 12 Digest (Repl.) 52, 283.
- (4) *Earl v. Lubbock*, [1905] 1 K.B. 253; 74 L.J.K.B. 121; 91 L.T. 830; 53 W.R. 145; 21 T.L.R. 71; 49 Sol. Jo. 83, C.A.; 36 Digest (Repl.) 107, 532.
- (5) *Osborne v. London and North Western Rail. Co.* (1888), 21 Q.B.D. 220; 57 L.J.Q.B. 618; 59 L.T. 227; 52 J.P. 806; 36 W.R. 809; 4 T.L.R. 591, D.C.; 36 Digest (Repl.) 156, 822.
- (6) *Bede Steamship Co. v. River Wear Commissioners*, [1907] 1 K.B. 310; 76 L.J.K.B. 434; 96 L.T. 370; 10 Asp. M.L.C. 370, C.A.; 38 Digest (Repl.) 8, 20.
- (7) *Norman v. Great Western Rail. Co.*, [1915] 1 K.B. 584; 84 L.J.K.B. 598; 112 L.T. 266; 31 T.L.R. 53, C.A.; 38 Digest (Repl.) 404, 634.

Appeal by the defendant railway company from a decision of the Divisional Court (AVORY and LUSH, J.J.) affirming a decision of the learned judge sitting at the Southend County Court, who gave judgment for the plaintiff for £70.

The facts appear from the judgment of SWINFEN EADY, L.J.

Talbot, K.C., and *F. Gover* for the defendants.

F. L. Hinde for the plaintiff.

May 8, 1916. **SWINFEN EADY L.J.**—This is an appeal from an order of the Divisional Court, consisting of AVORY, and LUSH, J.J., who disagreed upon an appeal from a county court. The plaintiff brought an action for personal injuries in the

A county court, and recovered judgment for a sum of £70. Upon appeal to the Divisional Court, AVORY, J., thought that the plaintiff should retain her judgment. LUSH, J., was of a different opinion. Upon that the judgment of the court below stood, hence the appeal to this court.

The action is one for personal injuries sustained by the plaintiff, Mrs. Ada Brackley, on crossing a bridge at Leigh-on-Sea. It appears that the defendants, B the railway company, in or about the year 1897 erected a footbridge for the purpose of enabling persons to pass from one side of their line to the other. Immediately before the erection of this footbridge there was within a few yards of the place a level crossing open for full carriage traffic, with gates to protect the crossing. The railway company, in addition to the large gates for vehicular traffic, had placed there side wicket gates, which were opened and closed by the company's servants. C The railway company were bound by statute to make and maintain the level crossing, but there was no statutory obligation to maintain the wicket gates. In 1897 they effected some improvements near Leigh station. They widened the level crossing by throwing a substantial part of their land into the public thoroughfare, so as to render the level crossing across the railway substantially wider than it was before, and at the same time the crossing was protected only by the large carriage D gates. There were no wicket gates in the new gates rendered necessary by the widening of the crossing, but the railway company built, a few yards to the west, a footbridge. It passed over their line, and at each end of it communicated with the public highway. There were no gates or any fence, or any protection to prevent the public passing freely over this new footbridge. It was open to the highway at each end, and the public passed over it without let or hindrance. E No notice was ever put up prohibiting the public from so using it; the bridge was never closed; no steps were at any time taken to indicate that it was not intended to be a public footpath, and the defendants in their answers to interrogatories have admitted that the path is a public footway. I think it appears from what took place before the learned county court judge that his view was that the bridge was a public footpath. F During the course of the hearing in the county court the question arose whether the plaintiff challenged the issue that this was a public footpath, and upon the facts we intimated during the hearing of the appeal that we were unanimously of opinion on the case as it stood that this bridge was a public footbridge.

On Jan. 22, 1915, about 2 p.m., the plaintiff with a friend was passing from the north side to the south side over this public footpath intending to travel by the defendant company's railway. There had been a blizzard on that day. According G to the plaintiff's evidence it had snowed up to about one o'clock, and the snow had then ceased. She arrived on the other side of the bridge shortly after two o'clock. On the south side of the bridge there are two flights of steps separated by a landing. The plaintiff had passed down the first flight of steps, had reached the landing, and was passing down the second flight of steps to reach the street, which she would have to cross in order to get to the station, when she slipped on a mass of frozen H snow and ice and sustained a broken ankle. There is no question with regard to the amount of damages. She was awarded in that respect a sum of £70. The account which she herself gave of the conditions of the place was this: "We made our way across the bridge. I went up the steps." That is on the north side. "The steps were in a dirty condition. One of the little girls was on the top [one of her I children]. I began to descend on the other side. The steps were in the same condition as the other side. I told my little girl to be careful as the steps were in such a dirty condition. There was snow and ice on the steps. The snow was in hard lumps on the steps. The steps were covered with it. I stepped on one, . . . The steps were slippery all over. I slipped on ice. I think it was ice. There was no sand or anything sprinkled over it to prevent slipping. I was carrying a cape and muff and umbrella. I put them on my left arm. I did this to get hold of the handrail on the right side. I just got hold of it. I slipped on my left foot, and I fell. I fell over two or three steps. I was between the last [landing place] and the

bottom of the steps." Cross-examined, she said: "The gates [that is, the double gates] were closed. I could have waited till gates were open." That refers to the fact that she was going by a train at 2.45, and this was only about two o'clock; the station was near at hand, and she had no need to cross until the gates were open. "The lump was whitish colour, hard and frozen. It had been a blizzard. It wanted great care." In re-examination she said: "I call it ice [the lump on which she slipped]. I had half an hour [before the train departed]. I did see steps were risky and not safe." She noticed what was no doubt sufficiently obvious—namely, what the condition of the steps was.

LUSH, J., summarised the evidence, and counsel for the plaintiff has found fault with the accuracy of his summary of the facts. It seems to me that LUSH, J., summarised the facts quite accurately in this way. He said: "The admitted facts were these. The plaintiff admitted that she knew that there had been a blizzard, that there was snow and ice on the steps (which one of her witnesses described as trodden down and very hard), that the steps were risky and not safe, and that they were the same on both sides of the bridge. She herself warned her children of the risk. On those admissions I think that the learned judge ought to have held that there was no concealed danger, nothing in the nature of a trap." That is the way in which the learned judge summarised the facts, and it seems to me to be a very accurate statement. It was urged by the plaintiff that the bridge was obviously erected by the railway company for their own purposes, to provide a way from the up platform to the down platform or vice versa, or to enable persons to catch a train for which they were late and the large gates were closed. But that is not an inference of fact that can be drawn from any evidence adduced at the trial. It might equally be urged that it was sufficiently obvious that one of the principal reasons why the railway company erected the bridge was that there was here a level crossing in a populous and growing place, and there might have been an agitation for the removal of the level crossing or the substitution of a bridge for the level crossing for foot passengers who had been detained for any considerable time by reason of the gates being shut, and the company erected this foot-bridge and dedicated it to the public, in order to prevent any question arising with regard to the obstruction of the traffic by reason of their level crossing. It seems to me that considerations of that kind are beside the point; they are not material to the present matter. It is not necessary to consider the motive which actuated the railway company in building the bridge. They built the bridge and dedicated it to the public, throwing it open to the public to cross over at their will and pleasure; the public have accepted it and crossed over it as they pleased, and the present position is that there is a public footpath over the bridge in question.

It is well established that where a way is dedicated by the owner of the land to the public, the public must take it as they find it; that is to say the public may or may not accept it by using it as a public way. But, if it is accepted in the sense of being taken advantage of by the public so as to become a public way, they must take what the grantor gives as he gives it. There is a well known passage, which I should like to read, of BLACKBURN, J., when delivering the judgment of the court in *Cooper v. Walker* (1) (2 B. & S. at p. 780):

"It is, of course, not obligatory on the owner of land to dedicate the use of it as a highway to the public. It is equally clear that it is not compulsory on the public to accept the use of a way when offered to them. If the use of the soil as a way is offered by the owner to the public under given conditions and subject to certain reservations, and the public accept under such circumstances, there can be no injustice in holding them to the terms on which the benefit was conferred. On the other hand, great injustice and hardship would often arise if, when a public right of way has been acquired under a given state of circumstances, the owner of the soil should be held bound to alter that state of circumstances to his own disadvantage and loss, and to make

A further concessions to the public altogether beyond the scope of his original intention. More especially would this be the case when public rights of way have been acquired by mere user. For instance, the owner of the bank of a canal or sewer may, without considering the effect of what he is doing, permit passengers to pass along until the public have acquired a right of way there. It is often hard upon him that the public right should have been thus acquired; B it would be doubly so if the consequence were that he was bound to fill up or fence off his canal."

In the present case, assuming that this is a public highway, I see no obligation upon the defendant railway company to cleanse the bridge, or to repair it, or to clear the snow away. But supposing there was a duty upon the company, a duty C first towards the public, and, secondly, towards, not necessarily the public as such, but towards those persons who were passing across the bridge intending to travel by the train, what duty was it that they owed? It cannot be put higher than that the railway company must be taken to have invited intending passengers to approach their station on the south side of the way by means of this public foot-path, and, therefore, owed to those intending passengers, of whom the plaintiff was D one, the duty of an invitor to an invitee. That, shortly stated, is as it is dealt with in *Indermaur v. Dames* (2). To such a case as that the language of LORD ATKINSON in *Cavalier v. Pope* (3) is applicable. He said ([1906] A.C. at p. 432):

"It is, I think, clear that the case does not come within the principle of *Indermaur v. Dames* (2) and the cases which followed it down to *Earl v. Lubbock* (4), because one of the essential facts necessary to bring a case within E that principle is that the injured person must not have had knowledge or notice of the existence of the danger through which he has suffered. If he knows of the danger and runs the risks he has no cause of action."

Here, assuming that it was the duty of the railway company to bring to the notice of a person intending to travel the existence of an unusual or unexpected danger, F this was a risk of which the plaintiff was aware. She saw the state of the steps; she warned her little girl; she prepared herself; the conditions on the one side were the same as on the other, and she put her muff and cape and various things on her left arm and took hold of the rail by her right hand, so that she might steady herself in going down, and she had already warned her children with regard to them. [But see now the Occupiers' Liability Act, 1957, s. 2 (2) (37 HALSBURY'S STATUTES G (2nd Edn.) 834) which, in place of the common law rules relating to invitor, invitee, &c., places on an occupier of premises a duty "to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there."]

H Then it is said that the present case cannot be distinguished from *Osborne v. London and North Western Rail. Co.* (5), which was relied upon by the county court judge. That was the case of a passenger who intended to take a train at Perry Barr, and he slipped going down the steps to the station. They were stone steps, out of repair, there was ice and snow upon them, and in consequence they were slippery. At the trial the learned county court judge came to the conclusion

I "that the accident was primarily caused by the worn and defective state of the steps, which was aggravated by the frosty weather, which made them slippery in addition, that the steps had not been properly and efficiently swept and cleansed from the caked snow, which, added to the worn condition of the steps, caused the plaintiff to fall, and that there was no contributory negligence on the part of the plaintiff."

The defendants contended in the Divisional Court that, notwithstanding that the county court judge had found negligence on the part of the defendants and no

contributory negligence on the part of the plaintiff, still the railway company were entitled to judgment, and it was in such a state of things as that that WILLS, J., in his judgment, said :

"It seems to me to follow that in such a case as the present, where the existence of negligence on the part of the defendants and the absence of contributory negligence on the part of the plaintiff are specifically found as matters of fact, if the defendants desire to succeed on the ground that the maxim *volenti non fit injuria* is applicable, they must obtain a finding of fact 'that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it.' I agree with Mr. Wills that this is a question of fact, and this being so, it follows that the defendants could not succeed unless either they had a finding of fact in their favour or we had all the facts before us, so that we were in a position to decide the question. . . . In order to succeed the defendants should have gone further in cross-examination, for, unless the question of fact had been found in their favour, the application of the maxim on which they relied could not be established. The county court judge has not found the fact the defendants need; and upon the present materials I am certainly not prepared to supply the deficiency."

When the case is regarded from that point of view, it is wholly different from the case now before us. In my opinion, the plaintiff has failed to establish any cause of action against the defendant company, and under those circumstances I am of opinion that the judgment ought to be entered for the defendants.

PHILLIMORE, L.J.—I agree. This bridge had become a highway, and was none the less a highway because it was a convenient access for intending passengers who wished to go to the station on one side or other of the line to arrive at that station from the opposite side. What the purpose was for which it was originally intended seems to me to be quite unimportant. In all probability, however, it was erected for a double, if not a treble, purpose. It was erected to facilitate the access to the opposite side of the station of people living in the town. It was probably also erected to facilitate the passage across the railway from one side of the town to the other, and to take away some of the objections which might be raised, as the town grew more populous, to the existence of a level crossing. I think it likely that some consideration was also given to its usefulness as a means of transit on some occasion to the railway company's own servants from one side of the line to the other. The objects of its erection are unimportant. It had become a highway. It was also a convenient access, and it was used by the plaintiff on this occasion, not as a member of the public, but as a convenient access to the side of the railway where the station lay to which she wished to go.

What was the duty of the railway company with regard to keeping this bridge in repair? The answer is: There was none. The man who dedicates a highway to the public has no duty to keep that highway in repair, even although since the Highway Act, 1835, there is nobody who really has to keep it in repair. The public must take it as it finds it, and if nobody will undertake the repair, ultimately it will fall out of repair and the dedication will become valueless. That cannot be helped. Was there any duty on the company to repair it as an access to their station? None, because they might cut it off the next day and say: "We will not let you go this way at all." They were not bound to provide this access; they were not bound to maintain it.

But there is a further point we must consider, which was much relied upon by AVORY, J., in the court below, and, perhaps, by the county court judge. I would like to state that point in this way. As a rule there is no duty upon the occupier of business premises who invites customers to come to his premises to warn them of any peril of the highway. They must take their own chance about like other

A members of the public. But it may be, and I am prepared to decide this case on
the assumption that it may be, that a portion of the highway is so singularly and
solely an approach to the business premises that the duty of warning which arises
where there is a hidden danger on the premises may be extended to a duty to warn
them of a hidden danger on the access being approached which is not on the
business premises. I think that *Bede Steamship Co. v. River Wear Co.* (6) may
B be an instance of this, the case being one where a portion of the sea, all of which
is a highway, was the immediate access to a dock. I will assume that this is the
law, and that this bridge with its steps, although a highway, was yet so much an
approach or access to the railway station that intending passengers, not the ordinary
public, but intending passengers, were entitled to a warning against hidden perils,
such a warning as any business man must give to the customers he invites. Our
C decision in *Norman v. Great Western Rail. Co.* (7) had the effect that there is no
greater duty on a railway company in this respect than on any other business
person. Then was this lady entitled to a warning against any hidden danger?
Was there here any hidden danger? I think that there was no hidden danger here;
therefore, no duty to warn; and, therefore, no breach of duty by the railway company.
On this ground I think that the railway company is entitled to succeed. I
D will only add that *Osborne v. London and North Western Rail. Co.* (5) is clearly
distinguishable upon the grounds stated by SWINFEN EADY, L.J.

BANKES, L.J.—In this case the court is bound by the findings of the learned
county court judge on any question of fact, and among other questions before him
was whether or not this bridge was a highway. I think it must be taken that the
E learned judge did find that this bridge was a highway, and there was clearly evidence
upon which he could find that. The learned judge also found that this bridge formed
part of the railway accommodation. If it were necessary to come to a decision
on that point, I am not at all sure that there was evidence to support that finding,
but it is not necessary to come to any decision upon that part of the case. It has
been strenuously contended before us that because this footbridge was a public
F highway the railway company could be under no duty whatever to any person
passing over it, whether he was an intending passenger or not. LUSH, J., and
AVORR, J., took a different view of the law applicable to such a case. LUSH, J., said
that, in the peculiar circumstances of this case, he considered that the footbridge
was a highway and something else. That seems to me to raise a very important
G question, upon which again it is not necessary to come to any conclusion, and I
do not propose to express any opinion about it, for I am prepared to deal with this
case upon the assumption, without deciding it, that there was an invitation by the
railway company to the plaintiff to use this footbridge as an access to the platform
to which she desired to go. Under those circumstances, what was the duty of the
railway company to the plaintiff? A great many expressions have been used in
H different cases with regard to that duty, but I cannot help thinking that the way
in which the duty was expressed in *Norman v. Great Western Rail. Co.* (7) and
in *Cavalier v. Pope* (3) is the best and the simplest way to regard that duty—that
is, that the duty which arises out of the relationship of an invitor and an invitee
is a duty in respect of any danger which was known to the defendants or ought to
have been known to the defendants and of which the plaintiff had either no
I knowledge or notice [see now s. 2 of Occupiers' Liability Act, 1957, noted supra].
If that is a correct statement of the law, it follows that in any case when the proper
conclusion upon the evidence is either that the defendants did not know or ought
not to have known the danger, or that the plaintiff did not know or had notice of
the danger, the defendants' duty is not established, and the duty not being
established, no question can arise of any breach of their duty, and no question
will arise as to any necessity for a defence on the part of the defendants arising
out of contributory negligence or otherwise. In the present case the conclusion

to which I come upon the evidence is that, whatever the position might be with regard to the defendants' knowledge of the condition of the bridge, or whether, if they did not know, they ought to have known of its condition, the plaintiff knew fully and completely the condition of these steps. Under those circumstances she failed to establish the duty which arises in the case of herself and the railway company, she being the invitee and the railway company being the invitor.

Appeal allowed.

Solicitors: *Martin & Nicholson*, for *Walter G. Beecroft*, Leigh-on-Sea; *Beale & Co.*

[Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.]

LEVY v. GOLDHILL & CO.

[CHANCERY DIVISION (Peterson, J.), June 15, 18, 19, 25, 1917]

[Reported [1917] 2 Ch. 297; 86 L.J.Ch. 693; 117 L.T. 442;
33 T.L.R. 479; 61 Sol. Jo. 630]

Agent—Commission agent—Contract for indefinite time—Termination—Agent's right to notice—"Repeat" orders received after contract terminated from customers previously introduced by agent—Liability to pay commission on repeat orders—Measure of damages.

The plaintiff while travelling about the country for his own business obtained orders for other traders on commission. By a letter dated May 5, 1915, and written by the defendant to the plaintiff the defendant stated: "I agree to pay you half profits on receipt of orders (provided the customer is good) . . . Same applies to repeats on any accounts introduced by you." The plaintiff obtained orders for the defendant, but disputes arose between the parties, and, on Mar. 7, 1916, without giving the plaintiff notice, the defendant terminated the agreement and repudiated liability to make any payment to the plaintiff in respect of repeat orders from customers introduced by the plaintiff received by the defendant after that date.

Held: (i) since the plaintiff was not in the employment of the defendant, in the sense that he was not his servant, he was not entitled to notice of termination of the agreement and could not recover damages for wrongful dismissal: *Joynson v. Hunt* (1) (1905), 93 L.T. 470, applied; (ii) on the true construction of the agreement, the plaintiff was entitled to commission on all orders received by the defendant after termination of the agreement from customers introduced by the plaintiff during the subsistence of the agreement, and, accordingly, the defendant was in breach of contract for which the plaintiff was entitled to damages: *Bilbee v. Hasse & Co.* (2) (1889), 5 T.L.R. 677, applied; *Faulkner v. Cooper & Co., Ltd.* (3) (1899), 4 Com. Cas. 213, applied as to the measure of damages.

Notes. Followed: *Cramb v. Goodwin* (1919), 35 T.L.R. 314. Considered: *Crocker Horlock, Ltd. v. Lang & Co.*, [1949] 1 All E.R. 526; *Sellers v. London Counties Newspapers*, [1951] 1 All E.R. 544. Referred to: *British Bank for Foreign Trade, Ltd. v. Novimex, Ltd.*, [1949] 1 All E.R. 155.

As to commission on transactions after termination of agency see 1 HALSBURY'S LAWS (3rd Edn.) 200, and as to termination of the agency agreement see *ibid.* 240, 241. For cases on when commission is payable after dismissal of the agent see 1 DIGEST (Repl.) 608 et seq., and for cases on dismissal of an agent see *ibid.* 633 et seq.

A Cases referred to :

- (1) *Joynton v. Hunt & Son* (1905), 93 L.T. 470; 21 T.L.R. 692, C.A.; 1 Digest (Repl.) 637, 2151.
- (2) *Bilbee v. Hasse & Co.* (1889), 5 T.L.R. 677; affirmed (1890), Times, Jan. 16, C.A.; 1 Digest (Repl.) 608, 1974.
- (3) *Faulkner v. Cooper & Co., Ltd.* (1899), 4 Com. Cas. 213; 1 Digest (Repl.) 635, 2144.
- (4) *Salomon v. Brownfield and Brownfield Guild Pottery Society, Ltd.* (1896), 12 T.L.R. 239; 1 Digest (Repl.) 609, 1979.
- (5) *Wilson v. Harper* [1908] 2 Ch. 370; 77 L.J.Ch. 607; 99 L.T. 391; 1 Digest (Repl.) 610, 1985.
- (6) *Morris v. Hunt & Co.* (1896), 12 T.L.R. 187; 1 Digest (Repl.) 608, 1978.
- (7) *Barrett v. Gilmour & Co.* (1901), 17 T.L.R. 292; 6 Com. Cas. 72; 1 Digest (Repl.) 637, 2154.
- (8) *Weare v. Brimsdown Lead Co., Ltd.* (1910), 103 L.T. 429; 1 Digest (Repl.) 609, 1982.
- (9) *Alexander v. Davies & Co.* (1885), 2 T.L.R. 142; 1 Digest (Repl.) 637, 2149.
- (10) *Henry v. Lowson* (1885), 2 T.L.R. 199; 1 Digest (Repl.) 637, 2150.
- (11) *Motion v. Michaud* (1892), 8 T.L.R. 447, C.A.; 1 Digest (Repl.) 636, 2147.

Also referred to in argument :

Naylor v. Yearsley (1860), 2 F. & F. 41; 1 Digest (Repl.) 608, 1973.

Witness Action.

The plaintiff carried on various businesses of his own, and also obtained orders for other traders on terms of commission. The defendant, Shirley Goldhill, traded as Goldhill & Co., in sponges, brushes, and hardware. In May, 1915, it was agreed between the plaintiff and the defendant that the plaintiff should travel and obtain orders for the defendant, and on May 5, 1915, the defendant wrote the following letter to the plaintiff: "Dear Sir,—I agree to pay you half profits on receipt of orders (provided the customer is good)." Then there was a list of various articles with the prices attached to them, and a note against them: "These are our cost prices, and profits are based upon these terms," and the letter concluded as follows: "Same applies to repeats on any accounts introduced by you.—Yours truly, SHIRLEY GOLDHILL." The plaintiff obtained and transmitted orders to the defendant under this agreement. Subsequently disputes arose between the parties, and on Mar. 7, 1916, the defendant wrote to the plaintiff a letter determining the contract.

The plaintiff contended that it was an implied term of the contract that, after the determination thereof, the defendant should continue to pay to the plaintiff commissions on all repeat orders received from customers introduced by him to the defendant, and also that he was entitled to reasonable notice of the determination of the contract, and, therefore, to damages for wrongful dismissal. In this action the plaintiff claimed to have an account taken of the profits made by the defendant on all orders and repeat orders given to the defendant by customers introduced by the plaintiff, and of the commission payable to him in respect thereof.

T. R. Hughes, K.C., and *E. G. Rand (J. Rutherford with them)* for the plaintiff.
Samuel J. Duncan for the defendant.

Cur. adv. vult.

June 25, 1917. **PETERSON, J.**, having stated the facts and referred to the letter of May 5, 1915, continued: The meaning of that document is this, as I understand it: "You are to be entitled to half the profits ascertained in the manner stated in the document, but, of course, if there are no profits at all, the result would be that you would not be entitled to any commission." I think that involves this, that it must be open to the defendant to accept or refuse any particular order that is presented. The agreement is that half the profits shall be ascertained in the way which is specified in the document, and shall be paid on receipt of the orders,

provided the customer is good—that is to say, provided the customer is recognised to be a person of credit. Then there comes at the end of the document a clause which has raised one of the questions in this case: "The same applies to repeats on any accounts introduced by you." That appears to me to be equivalent to a provision that the plaintiff is to be entitled to one-half of the profits derived from any repeat orders given by customers who have been introduced by him. The question is whether that agreement extends to orders by customers introduced by the plaintiff given after the termination of the relationship between the plaintiff and the defendant.

Now, the agreement is not for a definite period. It is for an indefinite term. There are various cases to which my attention has been directed. The chief of them is one which went to the Court of Appeal, *Bilbee v. Hasse & Co.* (2). The plaintiff in that case had a very large connection in London and the home counties, and the defendants gave the plaintiff a letter which contained this provision:

"As regards your commission, we hereby agree to allow you $1\frac{1}{2}$ per cent. upon all orders executed by us and paid for by the customers arising from your introduction."

There the agreement was also for an indefinite period. There was a quarrel, the relationship was determined, and the action was tried by LOPES, L.J., who was sitting on this occasion in the Queen's Bench Division as a judge of first instance. LOPES, L.J., in giving judgment said (5 T.L.R. at p. 678):

"It was contended by the plaintiff that the true construction of the agreement was that he was to receive commission in respect of all orders executed by the defendants and paid for by their customers arising from his introduction, not only during the time he was in their employment, but afterwards. The defendants, on the other hand, said that this agreement only applied to the time he was in their employment, and that as soon as that employment was terminated they were no longer liable to pay commissions, even although the orders arose from the introduction of the plaintiff. He thought the view the plaintiff put upon it was the correct one. He was impressed at first by the view that when the agreement terminated it would be a hardship for the defendants to have to account to the plaintiff. Mr. Finlay had said, however, that no such hardship existed, because they were not obliged to execute those orders which arose from his introduction. That suggestion was weighty and cogent, and in the result he had come to the conclusion that the plaintiff was entitled to commission, provided the order arose from his introduction, although the employment had terminated."

That case went to the Court of Appeal, and the decision was confirmed. As BOWEN, L.J., put it:

"The measure of his [that is, the plaintiff's] payment was to be calculated, not by the work done by him, but by the fruits of that work, and those fruits might very well accrue to the defendants after the determination of the agency."

There is a case that came before MATHEW, J. (*Salomon v. Brownfield and Brownfield Guild Pottery Society, Ltd.* (4)). There the agreement was of a somewhat similar nature. The plaintiff was to travel for the defendants in Australia on terms that he was to get

" $7\frac{1}{2}$ per cent. upon the net amount of cash in payment of goods, orders for which were obtained through him, also $7\frac{1}{2}$ per cent. upon all orders from customers introduced by him, on payment being made by them, whether such orders were obtained through the plaintiff's representation or not."

MATHEW, J., said

"No period was put to the duration of the contract, the reason being that payment should be made upon all orders received from customers introduced

A by the plaintiff. It was said the contract was only to last a reasonable time or until it was ended by a reasonable notice. "He saw no reason to import that into the contract. It was open to the defendants to cease to deal with the customers introduced."

Accordingly he gave judgment for the plaintiff. *Faulkner v. Cooper & Co., Ltd.* (3) was a similar case in which COLLINS and MATHEW, JJ., arrived at a similar conclusion. In *Wilson v. Harper* (5) a similar result was reached, but the agreement in that case was clearer and more definite in its terms.

B For the defendant three cases were cited. One was *Morris v. Hunt & Co.* (6), which came before COLLINS, J., with a common jury. I cannot, however, derive any assistance from it. There was a contract by which the defendants stated that they should be pleased to allow the plaintiff five per cent. discount on all orders received from the firms named—that is to say, in a list which the defendants inclosed for the purposes of the plaintiff's work—"and on any fresh ones you can introduce. You will keep a record of your calls and send us particulars from time to time, for which purpose we send you a manifold book." The relations between the parties were severed, and litigation ensued. The learned judge, according to the report, held in the first instance that "with regard to new customers introduced by the plaintiff the case was governed by the case in the Court of Appeal"—that is to say, *Bilbee v. Hasse & Co.* (2). At a later stage he appears to have left the following questions to the jury: "(1) Was it an implied term of the contract that the plaintiff's right to commission should continue after his dismissal in respect of all orders accepted by the defendants from customers from whom he had obtained orders before his dismissal (a) from persons not named in the original list"—that means all customers introduced by the plaintiff himself—" (b) from persons named therein"—that is to say, from customers whose names were supplied by the defendants? The jury answered the questions in the negative, and, accordingly, judgment was given on their finding in favour of the defendants. The result, therefore, is simply this, that, whether rightly or wrongly, it was left to the jury to determine whether there was in the contract an implied term under which the plaintiff was entitled to commission on orders given, after his dismissal, by customers previously introduced by him, and the jury took the view that there was not. *Barrett v. Gilmour & Co.* (7) is, owing to the extraordinary brevity of the judgment, as reported (6 Com. Cas. 72), somewhat difficult to understand. In that case there was the following offer to the plaintiff, which was accepted by him:

G "We hereby offer you our representation in the towns in margin of this note on the following terms—viz.: 1. Commission at the rate of four per cent. on all business done either through your own sheets, spot sales, or letter orders. 2. No commission to be paid on bad debts."

Then the relations between the parties came to an end and litigation followed, and, the plaintiff claimed

H "a declaration that he was entitled to be paid by the defendants commission on all orders which they should thereafter receive from customers in the towns specified who were customers between April, 1896 and December, 1899, or, alternatively, who were customers introduced by the plaintiff";

I and he asked also for damages for breach of contract and illegal dismissal. Witnesses were called as to the length of notice which should be given in the case of a traveller; and PHILLIMORE, J., held that on the evidence the agreement could be terminated by notice, and that the notice given was a sufficient notice. Then the learned judge went on, and disposed of the rest of the case in one sentence (*ibid.* at p. 73):

"The plaintiff is not entitled to the declaration asked for, because by the terms of the agreement the commission is payable, not on customers, but on custom."

I have difficulty in understanding exactly what the learned judge meant; but it may be that the view which he took was that commission under the agreement was payable on all business done either through the plaintiff's own sheets, spot sales, or letter orders, and that that amounted to a provision that commission was to be payable on all business done by the plaintiff in any of these three ways, and that, consequently, orders which came in from customers introduced by the plaintiff after the termination of the relationship were not included.

There is only one other case, *Weare v. Brimsdown Lead Co., Ltd.* (8). There the plaintiff was employed by the defendants for twelve months as agent for the sale of white lead manufactured by them upon the terms that he was to receive $2\frac{1}{2}$ per cent. commission upon all sales, direct or indirect. The agreement was entered into in August, 1899, and after the expiration of twelve months the plaintiff remained in the defendants' service upon the same terms, so far as they were applicable. AVORY, J., with whom PHILLIMORE, J., agreed, said:

"I think the question in this case is simply whether the parties contracted either that the plaintiff should be employed for all time or that he should be paid commission after he had left the defendants' service on orders given by customers previously introduced by him. The authorities which have been cited may all be reconciled in this way; in some of them the court has construed the contract as implying a term that the plaintiff is to be employed for all time, or as implying a term that the plaintiff is to be paid commission after he has left his service. Applying that test to this case, I can find nothing in the terms of this contract importing either that the plaintiff was to be employed for all time, or that he was to be paid commission on orders given by customers after he had left the defendants' service."

In that case the agreement of employment was for a fixed term, and the learned judge came to the conclusion that the remuneration was only payable to the plaintiff in respect of orders obtained during the term of the employment.

The question in this case is one of construction, and I have come to the conclusion that under his agreement the plaintiff is entitled to commission on orders whenever received, if they come from customers who have been introduced by the plaintiff. Now, that being so, the only question is as to the exact form of relief. There has been a repudiation by the defendant of his obligation to pay in respect of repeat orders; accordingly there has been a breach of the contract, and, as was held by MATHEW, J., damages can be obtained for the breach of the contract. In *Faulkner v. Cooper & Co., Ltd.* (3), which was a similar case, MATHEW, J., held that the plaintiff was entitled to damages for breach of contract. He then proceeded to state what the measure of damages was in the following terms (4 Com. Cas. at p. 215):

"The question in this case must therefore, in my opinion, be treated solely as a question as to what sum is to be paid to the plaintiff by the defendant company as damages for the breach of contract. In deciding that question, I have to consider what amount of commission would have been earned by the plaintiff if the relations between him and the defendant company had not been broken off, and, in arriving at a conclusion upon that point, I must take into account the chances of human life, the vicissitudes of trade, the probability of the plaintiff's customers ceasing to deal with the defendant company, and various other considerations."

It appears to me that all those considerations, with one exception, ought to be taken into account in ascertaining the amount of damages. The exception is this. As the result of my judgment, the relationship between the plaintiff and the defendant has been properly determined, and the plaintiff is not entitled to commission on fresh customers whom he now seeks to introduce; and therefore it appears to me that it is impossible to say in the present case that any person who assesses the damages payable by the defendant ought to consider what amount

A of commission would have been earned by the plaintiff if the relations between him and the defendant had not been broken off, because that would necessarily let in the possibility of the plaintiff introducing fresh customers. What was to be ascertained is the present value of the probability or the possibility of the defendant receiving orders in the future from customers who were introduced by the plaintiff before the relations between him and the defendant were terminated.

B Part of the plaintiff's claim in the present action is for damages for wrongful dismissal, on the ground that he was entitled to reasonable notice. It was not attempted to prove a custom of the trade, but it was said the plaintiff was entitled to reasonable notice. Now, in this case there was, in my opinion, no employment in the strict sense of the term. The plaintiff was not the servant in any way of the defendant; he was not bound to do any work whatever. The agreement merely
C provided that if the plaintiff introduced customers, and if the orders were accepted by the defendant, then the plaintiff should be entitled to half of any profits which were derived from those orders. There was no obligation on the part of the plaintiff to do work for the defendant, nor was there any obligation on the part of the defendant to provide work for the plaintiff, but there was merely a provision that the defendant would, in a certain event, pay certain remuneration to the plaintiff.
D In those circumstances *Joynson v. Hunt & Son* (1) appears to me to be very much in point. That was a case which came before the Court of Appeal. The defendants wrote a letter to the plaintiff in these terms :

E "In reply to your favour, I beg to say we will give you the 2½ per cent. commission on all business you do for us in London, whether you send the buyers to buy or orders come through the post, or you take them and send them direct. You let us know to whom you show our samples, and, if business results from the transaction, we will forward your commission quarterly as you suggest. This refers to orders executed."

The question in that case was whether the plaintiff was entitled to notice. The plaintiff tendered the evidence of witnesses to prove that there was a custom in
F the glove trade that six months' notice must be given to terminate the agency of a commission agent. The learned judge held that the defendants were entitled to terminate the agency without notice, and rejected the evidence of the alleged custom. The plaintiff appealed, and the Court of Appeal held the learned judge was right in rejecting the evidence as to custom, on the ground that the custom would be inconsistent with the terms of the written agreement. COLLINS, M.R.,
G said this (93 L.T. at p. 471) :

H "Having examined carefully the terms of this particular contract, I have come to the conclusion that the learned judge was right in excluding evidence of the alleged custom. I think that the pleading in the statement of claim is somewhat misleading, inasmuch as it suggests an agreement between principal and agent to employ the agent, and sets up a custom in that employment. It seems to me to allege an employment of the plaintiff by the defendants as their agent, carrying with it the usual incidents of that employment. Then the defence set out the exact terms of the bargain, which are admitted. It seems to me that those terms exclude the essential factor of employment by the defendants of the plaintiff as their agent as part of the agreement. Those terms are contained in a letter from the defendants to the plaintiff as follows [then he reads the letter] : Now that letter, it seems to me, does not import any requirement by the principal to the agent to do anything, or any undertaking that the agent shall be employed or that the agent shall do anything to obtain orders. It is contended that by custom this arrangement cannot be terminated except by notice. It seems to me that would be inconsistent with the terms of the express agreement. The written agreement excludes any employment by the defendants of the plaintiff, and any obligation on the plaintiff to do any work at all. An implied term as to notice would be quite inconsistent, the terms
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of the express contract being such as to negative any added obligation to give notice to terminate the arrangement. The letter only expresses willingness to pay a certain commission if the defendants choose to accept any orders which the plaintiff may choose to obtain for them."

ROMER and MATHEW, L.JJ., came to the same view. There are earlier cases to the same effect—namely, *Alexander v. Davis & Co.* (9), *Henry v. Lowson* (10), and *Motion v. Michaud* (11). In my opinion, therefore, on this part of the case the plaintiff is wrong as he was not entitled to any notice whatever. There was no case of employment of the plaintiff, and therefore no wrongful dismissal.

Solicitors: *Isadore Goldman*, for *Sydney W. Price*, Liverpool; *Humphreys, Phillips & Co.*

[Reported by J. L. DENISON, Esq., Barrister-at-Law.]

HOLLIDAY v. LOCKWOOD

[CHANCERY DIVISION (Astbury, J.), April 26, 27, 30, May 1, 1917]

[Reported [1917] 2 Ch. 47; 86 L.J.Ch. 556; 117 L.T. 265;
61 Sol. Jo. 525]

Sale of Land—Sale by lots—Purchase at auction of two lots by separate contracts—Rescission as to one lot for innocent misrepresentation by vendor—Right of purchaser to rescind as to other lot—Interdependence of contracts. Specific Performance—Refusal of decree—Discretion of court—Exercise according to equitable rules.

Where a purchaser acquires two lots by separate contracts at an auction and there is rescission as to one lot for innocent misrepresentation on the part of the vendor, the purchaser is entitled to rescind the purchase of the other lot if, to the knowledge of both the purchaser and the vendor, the two contracts were interdependent. The mere fact that one lot is contiguous to the other or that the purchaser in his own mind acquired the two lots with the intention of occupying them together or to enhance the value of one lot by the acquisition of the other is not sufficient to make the contracts interdependent.

Casamajor v. Strode (1) (1834), 2 My. & K. 706 and *Dykes v. Blake* (2) (1838), 4 Bing. N.C. 463, explained and applied.

At a sale by auction of the vendor's estate lot 2 was described in the particulars of sale as a farm and lot 3 as a sporting estate. The two lots adjoined each other and the boundary of lot 2 intersected parts of lot 3. Before the sale the auctioneer told the purchaser, in accordance with a statement made to him by the vendor, that the bag of grouse on lot 3 was about 100 brace. The auctioneer also told the purchaser that he would be wise to buy lot 2 if he was purchasing lot 3 for sporting purposes. The sale took place on July 18, 1916, when the purchaser bought lot 2 and lot 3 by separate contracts. Later, owing to an innocent misrepresentation by the vendor as to the bag of grouse on lot 3, the sale of that lot was rescinded by the vendor and the purchaser's deposit on the lot returned. The purchaser now claimed to rescind the purchase of lot 2, but the vendor contended that the transactions regarding the two lots were independent transactions and he counterclaimed for specific performance of the contract to purchase lot 2.

Held: (i) in the circumstances of the case the purchases of lot 2 and lot 3 were not sufficiently complicated as to make them interdependent transactions since the statement of the auctioneer as to the wisdom of buying lot 2 with lot 3 was a mere expression of opinion which did not enable the purchaser to say

that the enjoyment of either lot depended on the other; accordingly, the purchaser could not rescind his contract to purchase lot 2; (ii) the court would exercise its discretion to grant or refuse a decree of specific performance according to equitable rules, and in the present case would refuse specific performance of the contract to purchase lot 2 since it was probable that the innocent misrepresentation as to lot 3 had induced the purchaser to buy lot 2 and there was no evidence that damage would be suffered by the vendor.

Notes. Referred to: *A.-G. v. Cohen*, [1937] 1 All E.R. 27.

As to repudiation by a purchaser for misrepresentation see 34 HALSBURY'S LAWS (3rd Edn.) 327; and as to specific performance see *ibid.*, 330, 331. For cases on sale in lots see 40 DIGEST (Repl.) 277, 278; and for cases on specific performance see *ibid.*, 279 et seq.

Cases referred to:

- (1) *Casamajor v. Strode* (1834), 2 My. & K. 706; Coop. temp. Brough. 510; 47 E.R. 181, L.C.; 40 Digest (Repl.) 278, 2313.
- (2) *Dykes v. Blake* (1838), 4 Bing. N.C. 463; 6 Scott, 320; 1 Arn. 209; 7 L.J.C.P. 282; 132 E.R. 866; 40 Digest (Repl.) 114, 883.
- (3) *Chambers v. Griffiths* (1794), 1 Esp. 149; 170 E.R. 309, N.P.; 40 Digest (Repl.) 277, 2312.
- (4) *Drewe v. Hanson* (1802), 6 Ves. 675; 31 E.R. 1253, L.C.; 42 Digest 571, 1358.
- (5) *Tamplin v. James* (1880), 15 Ch.D. 215; 43 L.T. 520; 29 W.R. 311, C.A.; 40 Digest (Repl.) 281, 2343.
- (6) *Clowes v. Higginson* (1813), 1 Ves. & B. 524; 35 E.R. 204; 42 Digest 481, 488.

Also referred to in argument:

Roots v. Lord Dormer (1832), 4 B. & Ad. 77; 1 Nev. & Mk. B. 667; 100 E.R. 384; 39 Digest 260, 436.

James and Chapman v. Shore (1816), 1 Stark. 426; 171 E.R. 518, N.P.; 40 Digest (Repl.) 313, 2577.

Re Scott and Alvarez Contract, Scott v. Alvarez, [1895] 2 Ch. 603; 64 L.J.Ch. 821; 73 L.T. 48; 43 W.R. 694; 11 T.L.R. 471; 39 Sol. Jo. 621; 12 R. 488, C.A.; 40 Digest (Repl.) 83, 629.

Van Praagh v. Everidge, [1903] 1 Ch. 434; 72 L.J.Ch. 260; 88 L.T. 249; 51 W.R. 357; 19 T.L.R. 220; 47 Sol. Jo. 318, C.A.; 42 Digest 482, 500.

Gibson v. Spurrier (1795), Peake, Add. Cas. 49; 170 E.R. 190, N.P.; 40 Digest (Repl.) 148, 1135.

Witness Action.

In July, 1916, the defendant advertised his estate near Huddersfield for sale by auction in three lots. Of the two material to this action lot 2 was described as a farm, with farmhouse and buildings, and as being of about 91 acres. Lot 3, which comprised over 191 acres, was chiefly moorland, with a shooting box, and was described in the particulars as a sporting estate. These two lots adjoined each other for practically their entire length, being only separated by a narrow roadway. Prior to the sale the plaintiff called upon the auctioneer and inquired as to the sporting possibilities of lot 3. He was told that the yearly bag of grouse was about 100 brace. The defendant had in fact made this statement to the auctioneer, but had forgotten that this total included birds shot upon an adjoining piece of moor subsequently leased to the Territorial Association, and also a few birds shot upon lots 1 and 2. On July 18 the sale took place, and the plaintiff purchased lot 2 for £2,000, the auctioneer having stated that birds had been shot upon it. When lot 3 was put up, the auctioneer repeated the statement that the average bag of grouse was about 100, and the lot was knocked down to the plaintiff for £3,000. Next day the plaintiff visited the property for the first time, and discovered that the statement as to the bag of grouse obtainable was incorrect; upon which he wrote

to the defendant, who replied regretting the error, rescinding the purchase of lot 3, and returning the deposit paid.

The plaintiff claimed to rescind the purchase of lot 2 and for the return of his deposit. The defendant contended that the two lots formed separate and independent contracts, and counterclaimed for specific performance of the agreement to purchase lot 2. In his evidence the plaintiff stated that he had intended to purchase lot 2 in order that he might enjoy the occupation of it while shooting over lot 3, using the farmhouse as a residence. He alleged that in his interview with the auctioneer prior to the sale he had made this fact known, and that the auctioneer had told him that birds were also shot upon lot 2, and that a purchaser of lot 3 for sporting purposes should also buy lot 2. The auctioneer stated that he was unwilling to deny the statements of the plaintiff, but he did not remember stating the latter fact, and, so far as he could recollect, had not looked upon the plaintiff as a likely buyer of lot 2 at all.

Russell, K.C., and *Owen Thompson* for the plaintiff.

Micklem, K.C., and *W. A. Peck* for the defendant.

ASTBURY, J., stated the facts, and continued: The plaintiff claims to rescind the purchase of lot 2, on the ground that lots 2 and 3 are so complicated together, as stated in a large number of old authorities, as to form in fact only one contract. Curiously enough, the authority on this point is contained in a number of cases bordering on antiquity. Practically the whole of these authorities, with the exception of *Dykes v. Blake* (2), are referred to by LORD BROUGHAM in *Casamajor v. Strode* (1). In that case the purchaser bought lots 25 and 30, and, the vendor being unable to make title to one, the purchaser refused the other. LORD BROUGHAM, after stating that the matter could not be disposed of on the motion before him, said (2 My. & K. at p. 724):

"LORD KENYON is reported to have held at nisi prius that where a party purchases several distinct lots at a sale, . . . and a title to one of the lots cannot be made, the purchaser is at liberty to repudiate the whole, so that he shall be loose as to the other lots, while the seller is fast; and this upon the supposition that the whole contract is necessarily entire; *Chambers v. Griffiths* (3). That this is not a sound doctrine at law any more than in equity, I hold to be very clear. LORD ELDON is said to have expressed a similar opinion in *Drewe v. Hanson* (4), but if so, it has escaped the reporter."

Then he says (*ibid.* at p. 730):

"It may therefore be concluded, that in determining whether a purchaser who fails to obtain a good title to one lot, shall be let off from his contract for another, the whole circumstances may be examined in order to prove that the two contracts are one, by showing that the two parcels are complicated together, and that upon the whole transaction the court will determine as a jury would, the question did or did not the party purchase the one with reference to the other; would he or would he not have taken the one, had he not reckoned upon also having the other."

In my view, having given the best attention I can to the case, the mere fact that one lot is contiguous to the other, or that the purchaser in his own mind had formed an intention to buy the two lots for his own convenience in occupying them both together, is not sufficient to complicate the two lots within the meaning of the old authorities. Of course, if the parties agreed to treat the two lots as one it might be different, or if, by reason of situation or description or circumstances known to both parties, a court is able to draw the inference that one transaction is dependent on the other, then there is such a complication as to make one contract rather than two. But if not, then the summing up of LORD BROUGHAM must mean, I think, that the two contracts, within the knowledge of both parties, are one in the sense that there is an interdependence between the lots. I think

A he must have intended to refer to circumstances in which there was enough to make the two lots complicated, and not merely so by the motives of one party. In *Dykes v. Blake* (2), which in some respects is the nearest authority to the present case, the plaintiff purchased lots 12 and 13, intending to enhance the building value of 13 by doing away with a right of way, and the question was whether he was entitled to rescind the purchase of 12 through a misdescription in regard to 13.

B TINDAL, C.J., said (4 Bing. N.C. at p. 477):

C "although it has been argued that the objection can apply at most to lot 13, and that the purchaser of lot 12 can have no right to rescind that purchase by reason of the misdescription in the lot 13, we answer that in this case the seller has been contented to treat the two purchases as one contract, by entering into one agreement for the sale of both at once at the aggregate price; and secondly, that the purchaser of lot 12, upon the facts of this case, may be reasonably understood to have purchased lot 12 in order that he might, by unity of seisin, extinguish the right of way over lot 13, and thereby render lot 13 more valuable as building ground."

D Now, the question arises whether TINDAL, C.J., intended to define two grounds for rescission, or whether he was describing a composite objection. On the whole, I think the latter is a rather better construction. If, on the other hand, the court defined a second and independent ground upon which relief might be granted, then it is very like the present case. If this be the true construction, it seems to me that the principle underlying it requires careful consideration, and possibly it goes beyond LORD BROUGHAM's view in *Casamajor v. Strode* (1). It is, in my

E opinion, quite clear that a mere determination or motive on the part of the purchaser that he will buy one lot in order to enhance the value of another is not enough to complicate the purchases within the meaning of the authorities. It may be that the second ground was intended to be limited to a case where the court could infer that, in regard to the representations and descriptions of the property

F given by the vendor, an ordinary and not very particular purchaser would be led to the view that to enjoy one lot for the purpose for which it was sold it was desirable to purchase the other. In other words, if you can find that the lots are complicated through the description or misdescription of the vendor, then the contract can be regarded as one within the meaning of *Casamajor v. Strode* (1).

G There is no doubt that at a sale by auction there is, unless the case comes within the exceptions, a distinct transaction in respect of each lot. This may be important, both as to the question of rescission and of a claim for specific performance. If the properties are not complicated by reason of facts known to both parties, then the right to rescission does not arise. If, on the other hand, the purchaser's decision to buy one lot in order to enjoy another has arisen through the representations of the vendor, though only as to one lot, then, in my view, it may be a defence

H to an action for specific performance. In the ordinary way the motive of contract is irrelevant unless expressed or assented to by the other party. As was said in *Tamplin v. James* (5), there is no injustice in holding a man to a contract which specifically describes the property sold in a way not calculated to mislead. Now, before I pass to apply as best I can the law in this case, I desire to refer to the way

I the authorities are treated by certain authors. In SUGDEN ON VENDORS AND PURCHASERS (14th Edn.) p. 319, it is stated:

"When an estate is sold by auction, or by the court, in lots, and the vendor has not a title to all the lots sold, equity will compel the purchaser to take the lots to which a title can be made, if they are not complicated with the rest, and will allow him a compensation pro tanto."

In FRY ON SPECIFIC PERFORMANCE (5th Edn.) p. 404, the authority of *Dykes v. Blake* (2) is referred to, and the author says:

"After some vacillation in the older cases, it has been decided at common law that where property is sold in distinct lots there is a separate contract for each lot, each buyers having a complete right of action after he is declared the purchaser of each lot. And in equity the same is *prima facie* the case, so that, in the absence of special circumstances, a vendor is entitled to compel the purchaser of two lots to complete his purchase of the one, though he may fail in making out a title to the other. But where from the nature of the contract, or the property that is the subject of it, or upon matters known to both parties, one of them can prove that the one transaction was dependent on the other, the two form one contract, although there may be no express statement to that effect."

On the whole, my own leaning is to approve the way the matter is put by FRY rather than by SUGDEN. That being so, the question I have to decide is—Were these lots so complicated, by circumstances known to both parties, and so interdependent as to justify the court in rescinding the purchase of lot 2 because lot 3 has gone? In the first place, as far as the particulars of sale are concerned, there is no ground for so holding. The one is described as a farm, the other as a sporting estate. Nor is the fact that the properties are contiguous, and that the boundary of lot 2 intersects portions of lot 3, sufficient to "complicate" within the meaning of the authorities. But it is contended that by what took place between the plaintiff and the auctioneer a sufficient complication was recognised by the vendor's agent, and that the plaintiff was induced to form the opinion he did by the auctioneer's statement. It is not at all clear that, apart from the representations as to the shooting, the plaintiff would have bid for either lot, and he may have been induced, on the whole, by the innocent misrepresentation as to lot 3. It may be true that the auctioneer said that the lots were contiguous, that there was shooting on both lots, and that the purchaser of lot 3 should also buy lot 2. The first two statements are not very important, as they are sufficiently obvious from the plan, but the difficulty is that the defendant's agent, knowing that the plaintiff desired a shooting estate, may have said that the purchaser of lot 3 should also buy lot 2. It seems to me, however, that, on the whole, there was not sufficient to "complicate" the purchase of the two lots. The statement that the purchaser of lot 3 would be wise in buying lot 2 seems to me a mere expression of opinion by the auctioneer, and does not enable the plaintiff to say that there was a complication of the purchases, and that the enjoyment of either lot depended on the other. It was, in my view, quite clear that shooting on this small moor could be enjoyed without buying lot 2, and the farming on lot 2 could be carried on without lot 3. It was also quite clear that for a gentleman desiring a combined property the purchase of both lots was essential. But I do not think the court ought to attach too much importance to the language used by an auctioneer. I accept both his evidence and the plaintiff's, and I think that in substance I ought to infer that there was a discussion between them about the lots, but more in regard to lot 3 than lot 2, and I think that the auctioneer did express the view that the purchaser of lot 3 would be well advised in buying lot 2. On the whole, however, I am of opinion that there is not a sufficient complication and interdependence between the lots for the plaintiff to succeed, and that he fails in his claim for rescission.

The next matter is the counterclaim for specific performance of the contract to purchase lot 2. In *FRY ON SPECIFIC PERFORMANCE* (5th Edn.) p. 19, the author says:

"There is an observation often made with regard to the jurisdiction in specific performance which remains to be noticed. It is said to be in the discretion of the court. The meaning of this proposition is not that the court may arbitrarily or capriciously perform one contract and refuse to perform another, but that the court has regard to the conduct of the plaintiff and to circumstances outside the contract itself, and that the mere fact of the existence of a valid

A contract is not conclusive in the plaintiff's favour. 'If the defendant,' said PLUMER, V.-C. [in *Clowes v. Higginson* (6), 1 Ves. & B. at p. 527], 'can show any circumstances dehors, independent of the writing, making it inequitable to interpose for the purpose of a specific performance, a court of equity, having satisfactory information upon that subject, will not interpose'."

B That means, I think, as has been pointed out in many cases, that though a discretion exists it should be exercised according to settled rules. Here, the fact that the purchaser wanted a joint estate for farming and shooting, and that it might be a hardship to make him take one without the other, is not conclusive, but, on the whole, I think that the fairest way is to refuse the claim for specific performance as I have refused the claim for rescission. It is not at all clear that, apart from the representation as to the shooting on lot 3, the plaintiff would have bought either lot. There is no evidence of the defendant having suffered any damage, and, on the whole, I think I will exercise my discretion in favour of the plaintiff, and that justice will best be done by dismissing claim and counterclaim without costs.

D *Judgment for the defendant on the claim for rescission without costs; judgment for the plaintiff on the counterclaim for specific performance without costs.*

Solicitors: Rawle, Johnstone & Co., for Ramsden, Sykes & Ramsden, Huddersfield; Iliffe, Henley & Sweet, for Laycock, Dyson & Laycock, Huddersfield.

[Reported by G. HAYES, ESQ., Barrister-at-Law.]

E

BRODIE v. BRODIE

F [PROBATE, DIVORCE AND ADMIRALTY DIVISION (Horridge, J.), June 29, July 13, 1917]

[Reported [1917] P. 271; 86 L.J.P. 140; 117 L.T. 542; 33 T.L.R. 525; 62 Sol. Jo. 71]

Contract—Illegality—Public policy—Husband and wife—Pre-marital agreement not to cohabit after marriage—Confirmation of agreement after marriage.

G By an agreement in writing dated Dec. 19, 1913, the parties agreed that it should be lawful at all times for the husband to live separate and apart from the wife and that the wife should not require or endeavour to compel him to live with her. The parties were married on Dec. 20, 1913, and on that date an agreement was indorsed on the document of Dec. 19 by which each party purported to confirm the agreement of Dec. 19. The parties never lived together, and in 1917 the wife petitioned for a decree for restitution of conjugal rights.

H **Held:** the two documents of Dec. 19 and 20 formed an agreement entered into before marriage for future separation, and, as such, were against public policy and void; the second agreement was bad as being merely a confirmation of a void and illegal agreement; and, therefore, the wife was entitled to the decree she sought.

I **Notes.** Considered: *Davies v. Elmslie*, [1937] 4 All E.R. 68; *Silver (otherwise Kraft) v. Silver*, [1955] 2 All E.R. 614. Referred to: *Papadopoulos v. Papadopoulos*, [1929] All E.R. Rep. 310; *H. (otherwise D.) v. H.*, [1953] 2 All E.R. 1229; *Scott v. Scott (otherwise Fone)* [1959] 1 All E.R. 531; *Morgan v. Morgan (otherwise Ransom)*, [1959] 1 All E.R. 539.

As to contracts for future separation, see 19 HALSBURY'S LAWS (3rd Edn.) 877, 878, and *ibid.*, vol. 12, p. 253. For cases see 27 DIGEST (Repl.) 215 et seq.

Cases referred to:

- (1) *Cocksedge v. Cocksedge* (1844), 14 Sim. 244; 13 L.J.Ch. 384; 3 L.T.O.S. 374; 8 Jur. 659; 60 E.R. 351; 27 Digest (Repl.) 217, 1727.
- (2) *Marlborough v. Marlborough*, [1901] 1 Ch. 165; 70 L.J.Ch. 244; 83 L.T. 578; 49 W.R. 275; 17 T.L.R. 137; 45 Sol. Jo. 116, C.A.; 40 Digest (Repl.) 642, 1339.
- (3) *Wilson v. Carnley*, [1908] 1 K.B. 729; 77 L.J.K.B. 594; 98 L.T. 265; 24 T.L.R. 277; 52 Sol. Jo. 239, C.A.; 12 Digest (Repl.) 298, 2298.
- (4) *Brook v. Hook* (1871), L.R. 6 Exch. 89; 40 L.J.Ex. 50; 24 L.T. 34; 19 W.R. 508; 12 Digest (Repl.) 289, 2221.

Also referred to in argument:

Fisher v. Bridges (1854), 3 E. & B. 642; 1 Jur. N.S. 157; 118 E.R. 1283; sub nom. *Bridges v. Fisher*, 23 L.J.Q.B. 276; 23 L.T.O.S. 223; 18 J.P. 599; 2 W.R. 706; 2 C.L.R. 928, Ex.Ch.; 12 Digest (Repl.) 310, 2387.

Petition by a wife for restitution of conjugal rights.

The facts appear in the headnote.

B. Welford (for *Tristram de la P. Beresford*, serving with His Majesty's forces) for the petitioner.

The husband appeared in person.

Cur. adv. vult.

July 13, 1917. **HORRIDGE, J.**—The wife seeks a decree for restitution of conjugal rights, in answer to which the husband relies on a written agreement drawn up and signed by the parties before the marriage, whereby it was agreed that he and the wife should live apart, and confirmed by them after the marriage. By her reply the wife alleges that the agreement is contrary to public policy, and, therefore, void in law.

HIS LORDSHIP stated the facts and continued: I find as a fact that the confirmatory agreement formed part of, and was in no way distinct from, the agreement signed before the marriage, and that the two documents formed an agreement entered into before marriage for future separation. Such an agreement is void and against public policy, vide *Cocksedge v. Cocksedge* (1) and the judgment of RIGBY, L.J., in *Marlborough v. Marlborough* (2), and the judgment of KENNEDY, L.J., in *Wilson v. Carnley* (3). I, therefore, hold that the plea of the husband is no answer to the petition. If the second agreement is to be treated as a confirmatory agreement, I think it was bad in law as being merely a confirmation of a previous illegal and void agreement. In *Brook v. Hook* (4) KELLY, C.B., in delivering the judgment of himself, CHANNELL, B., and PIGOTT, B., said (L.R. 6 Exch. at p. 99):

“Although a voidable act may be ratified by matter subsequent, it is otherwise when an act is originally and in its inception void.”

For these reasons there must be a decree of restitution of conjugal rights.

Solicitors: *Castle & Co.*

[Reported by D. COTES-PREEDY, ESQ., Barrister-at-Law.]

CHEATER v. CATER

[COURT OF APPEAL (Pickford and Banks, L.JJ., and Sargant, J.), November 30, 1917]

[Reported [1918] 1 K.B. 247; 87 L.J.K.B. 449; 118 L.T. 203;

34 T.L.R. 123; 62 Sol. Jo. 141]

Landlord and Tenant—Tree on landlord's land overhanging tenant's land—Poisonous leaves—Death of tenant's mare after eating leaves—Tree overhanging at commencement of tenancy—Liability of landlord.

The defendant leased a farm to the plaintiff retaining in his occupation adjacent land on which was a shrubbery containing two yew trees. The branches of the trees overhung the boundary fence so as to be within reach of the plaintiff's horses, and the plaintiff's mare ate of the branches, was poisoned, and died. The yew trees overhung the boundary fence to the same degree at the commencement of the tenancy as when the plaintiff's mare ate of them.

Held: the plaintiff took the farm as it existed at the date of the lease, and, as the yew trees were overhanging the boundary at that date so as to be within the reach of horses, the defendant was not liable for the death of the mare.

Judgment of MELLISH, L.J., in *Erskine v. Adeane* (1), (1873) 8 Ch. App. at p. 671, applied.

Quære: whether the plaintiff would have been entitled to recover if a condition of safety had existed at the date of the demise, and the condition of danger arose afterwards.

Notes. Considered: *Shirvell v. Hackwood Estates Co.*, [1938] 2 All E.R. 1; *Taylor v. Liverpool Corpn.*, [1939] 3 All E.R. 329.

As to overhanging trees, see 1 HALSBURY'S LAWS (3rd Edn.) 263, and for cases see 2 DIGEST (Repl.) 88 et seq.

Cases referred to:

- (1) *Erskine v. Adeane, Bennett's Claim* (1873), 8 Ch. App. 756; 42 L.J.Ch. 835; 29 L.T. 234; 38 J.P. 20; 21 W.R. 802, L.JJ.; 2 Digest (Repl.) 90, 549.
- (2) *Sutton v. Temple* (1843), 12 M. & W. 52; 13 L.J.Ex. 17; 2 L.T.O.S. 150; 7 Jur. 1065; 152 E.R. 1108; 2 Digest (Repl.) 50, 255.
- (3) *Lemmon v. Webb*, [1894] 3 Ch. 1; 63 L.J.Ch. 570; 70 L.T. 712; 58 J.P. 716; 10 T.L.R. 467, C.A.; affirmed [1895] A.C. 1; 64 L.J.Ch. 205; 71 L.T. 647; 59 J.P. 564; 11 T.L.R. 81; 11 R. 116, H.L.; 36 Digest (Repl.) 305, 519.
- (4) *Crowhurst v. Amersham Burial Board* (1878), 4 Ex.D. 5; 48 L.J.Q.B. 109; 39 L.T. 355; 27 W.R. 95; 2 Digest (Repl.) 90, 545.
- (5) *Smith v. Giddy*, [1904] 2 K.B. 448; 73 L.J.K.B. 894; 91 L.T. 296; 53 W.R. 207; 20 T.L.R. 596; 48 Sol. Jo. 589; 2 Digest (Repl.) 89, 537.
- (6) *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 282, 334.

Also referred to in argument:

Humphries v. Cousins (1877), 2 C.P.D. 239; 46 L.J.Q.B. 438; 36 L.T. 180; 41 J.P. 280; 25 W.R. 371; on appeal 46 L.J.Q.B. at p. 442, C.A.; 36 Digest (Repl.) 288, 361.

Firth v. Bowling Iron (1878), 3 C.P.D. 254; 47 L.J.Q.B. 358; 38 L.T. 568; 42 J.P. 470; 26 W.R. 558; 2 Digest (Repl.) 303, 104.

Wilson v. Newbury (1871), L.R. 7 Q.B. 31; 41 L.J.Q.B. 31; 25 L.T. 695; 36 J.P. 215; 20 W.R. 111; 2 Digest (Repl.) 90, 547.

Paradine v. Jane (1647), Aleyn, 26; Sty. 47; 82 E.R. 897; 31 Digest (Repl.) 278, 4124.

Arden v. Pullen (1842), 10 M. & W. 321; 11 L.J.Ex. 359; 152 E.R. 492; 31 Digest (Repl.) 343, 4744.

Wilson v. Waddell (1876), 2 App. Cas. 95; 35 L.T. 639; 42 J.P. 116, H.L.; 34 Digest 725, 1071.

Ponting v. Noakes, [1894] 2 Q.B. 281; 63 L.J.Q.B. 549; 70 L.T. 842; 58 J.P. 559; 42 W.R. 506; 10 T.L.R. 444; 38 Sol. Jo. 438; 10 R. 265; 2 Digest (Repl.) 90, 548.

Sutton v. Temple (1848), 12 M. & W. 52; 13 L.J.Ex. 17; 2 L.T.O.S. 150; 7 Jur. 1065; 152 E.R. 1108; 2 Digest (Repl.) 50, 255.

Hart v. Windsor (1844), 12 M. & W. 68; 13 L.J.Ex. 129; 2 L.T.O.S. 440; 8 J.P. 233; 8 Jur. 150; 152 E.R. 1114; 31 Digest (Repl.) 133, 2716.

Chappell v. Gregory (1863), 34 Beav. 250; 55 E.R. 631; on appeal (1864), 2 De G.J. & Sm. 111, L.J.J.; 31 Digest (Repl.) 194, 3258.

Giles v. Walker (1890), 24 Q.B.D. 656; 59 L.J.Q.B. 416; 62 L.T. 933; 54 J.P. 599; 38 W.R. 782; 2 Digest (Repl.) 4, 3.

Appeal by the plaintiff from a judgment of the Divisional Court (LORD COLERIDGE and ROWLATT, JJ., LORD COLERIDGE, J., dissenting), affirming a decision of the county court judge of Gloucestershire, sitting at Cirencester, reported [1917] 2 K.B. 516.

The defendant let to the plaintiff a farm on a yearly tenancy from September, 1914. The defendant retained in his own possession land bordering on one of the fields of the farm, and separated from the farm by a fence. On this land was shrubbery containing yew trees. On Jan. 4, 1917, the plaintiff's mare, being in the plaintiff's field, ate of the branches of the yew trees, which overhung the fence to the extent of 3 ft., was poisoned thereby, and died. The plaintiff's evidence was that he was not aware of the existence of the yew trees, or that they were dangerous to horses. The county court judge, on the authority of the judgment of MELLISH, L.J., in *Erskine v. Adeane* (1) (8 Ch. App. at p. 761), held that the plaintiff was not entitled to recover. In the Divisional Court Rowlatt, J., approved the judgment of the county court judge, LORD COLERIDGE, J., dissenting. The judgment of the county court judge therefore stood, and the appeal was dismissed. The Court of Appeal, after considering the evidence given in the county court, assumed the fact that the yew trees overhung the fence substantially to the same degree at the date of the letting and at the date when the plaintiff's mare ate of them. The plaintiff appealed.

Vachell, K.C., A. F. Clements and H. W. Samuel for the plaintiff.
J. B. Matthews, K.C., and Rayner Goddard for the defendant.

PICKFORD, L.J.—This action was brought to recover damages for the death of a mare, which ate of some branches of yew trees which were growing on the defendant's land. The question is whether the plaintiff is entitled to succeed. It is unnecessary to consider many of the arguments put forward. In the Divisional Court the learned judges disagreed, but, as it seems to me, the difference between them was on the view taken on the facts and not of the law. LORD COLERIDGE, J., who thought that the plaintiff was entitled to recover, stated the facts ([1917] 2 K.B. at p. 518) to be that

“at the time of the demise the tree, although it overhung the demised premises, was harmless. It could not be reached by cattle or horses, but during the tenancy it grew and came within reach of horses”;

and when dealing with *Erskine v. Adeane* (1) he said (ibid. at p. 520):

“I do not think MELLISH, L.J., meant to say that the tenant when he took the lease was bound to guard himself against dangers other than those existing at the date of the lease; he was not bound to assume that the landlord would omit to do what was proper for him to do, that he would neglect to cut the yew tree and would suffer it to become a danger.”

A Therefore the basis of his judgment is that at the time of the demise the tree could not be reached by horses, and that the liability of the defendant arose because he allowed the condition of things, at first harmless, to become harmful. ROWLATT, J., who took another view of the facts, held that the case was governed by the judgment of MELLISH, L.J., in *Erskine v. Adeane* (1), but he went on to say (*ibid.* at p. 521):

B "I am not clear how the case would stand if the landlord had on his own land a yew tree which at the time of the demise did not overhang the boundary, but afterwards during the tenancy grew over the boundary. MELLISH, L.J., seems to have contemplated such a case when he spoke of 'negligence in allowing the branches of the yew trees to grow over the hurdles,' and said that a claim would, if maintainable at all, be by personal action. But that case is much stronger than the present. In this case the land was taken with the tree already overhanging it, though no doubt it has grown since."

C I think that if ROWLATT, J., had taken the same view of the facts as COLERIDGE, J., he would probably have come to the same conclusion as that learned judge; and if COLERIDGE, J., had taken the same view of the facts as ROWLATT, J., he would have held the case governed by the judgment of MELLISH, L.J. It becomes therefore necessary to consider the facts as shown by the evidence.

D The case was argued for the plaintiff on the broad ground that, even though the yew trees overhung the plaintiff's land at the date of the demise, or even, as I understood the argument, overhung it so as to be then accessible to horses on the demised land, the defendant would be liable upon the ground that it was his duty to see that the trees existing at the date of the demise were not harmful to the tenant of the demised land. I do not think that proposition well founded. It is not necessary to go through the authorities. *Erskine v. Adeane* (1) is sufficient authority against that wide proposition. The first sentence in the headnote does not perhaps represent the facts quite accurately. It states (8 Ch. App. 756):

E "There is no implied warranty on the part of a lessor who lets land for agricultural purposes that no noxious plants are growing on the demised premises."

F That seems to indicate that the trees were growing on the demised premises. The facts were that the tenant took a lease of a farm which contained a plantation. The landlord reserved the plantation, which was therefore not included in the demise. Yew trees were growing in the plantation, and the branches extended over the land demised so as to be within reach of the cattle on that land. The trees therefore which occasioned the damage were not growing on the land demised. The suit in which the claim was made was for the administration of the estate of the deceased landlord. The court held that the claim was not maintainable against the deceased's estate. JAMES, L.J., said that the claim did not rest on warranty, but upon a wrongful act, that is, negligence, of the landlord, and that no such claim could be made at common law against the estate of a deceased person, the cause of action having died with him. That does not throw any light on the present case. MELLISH, L.J., said (*ibid.* at pp. 760, 761):

G "Now it is clear that this claim, so far as it goes to negligence in keeping up the fences, or negligence in allowing the cuttings from the yew trees to be placed where the cattle could get at them, or the negligence of allowing the branches of the yew trees to grow over the hurdles, would all, if they were maintainable at all, be by personal action."

H So far he is affirming the view of JAMES, L.J. But he went on to say:

I "I may say, however, that, in my opinion, as far as regards the yew trees growing over the hurdles, no such claim could be sustained at all. With respect to what the Master of the Rolls seems to have rested his judgment upon, namely, that there was a warranty that no noxious trees should grow on the demised premises, I have never heard of any such warranty. The law

of this country is that a tenant, when he takes a farm, must look and judge for himself what the state of the farm is. Just as in the case of a purchaser of a business the rule is caveat emptor, so in the case of taking the lease of property the rule is caveat lessee; he must take the property as he finds it. I never heard that the landlord warranted that the sheep should not eat his yew trees."

That is a distinct statement of the law and not merely a dictum. It is the second ground given by the lord justice for his judgment. If a judge states two grounds for his judgment and bases his decision upon both, neither of those grounds is a dictum. The law so stated by MELLISH, L.J., is in accordance with a series of cases of which *Sutton v. Temple* (2) is an early instance. In a case of this kind the tenant takes the land demised as it is, and therefore if the tenant here took the land with the yew trees growing over it so that his horses could eat of the branches and they did eat, he cannot recover. Therefore the broad proposition argued on behalf of the plaintiff cannot be maintained.

Next, has the plaintiff established his second proposition, namely, that the condition of things so changed during the tenancy that what was a condition of safety at the date of the demise became a condition of danger during the tenancy? I can see no evidence of this. At the time when the mare ate of the yew tree its branches overhung the plaintiff's field so as to be within her reach. To what extent it overhung the field is left in doubt. If the plaintiff says that the condition of things was safe at the date of the demise, but became unsafe afterwards, the onus is on him to prove it. If he does not make it out he does not establish his cause of action. If there had been any miscarriage at the trial I should say that the case should be sent back to the county court. But it seems to me that the plaintiff rested his case in the county court, as here, upon this, that, whether the trees were safe at the date of the demise or not, they were a source of danger when the mare ate of them and died, and that therefore the defendant was liable. If the question of the trees being safe at the date of the demise was dealt with at all in the county court, it was decided against the plaintiff. The learned judge said that he was bound by the decision of MELLISH, L.J., in *Erskine v. Adeane* (1), and if so he must have come to the conclusion that the trees were overhanging the plaintiff's field at the date of the demise so as to be a source of danger. I do not say what the rights of the party might be if the plaintiff had proved that the trees were safe at the date of the demise. There was, however, no evidence of any material change of circumstances between the date of the demise and the date when the mare ate of the yew tree and died. It was the simple case of a demise to the plaintiff of land over a portion of which yew trees, growing on the defendant's land, extended so as to be within reach of horses, and the plaintiff's mare ate of the branches and died. That is insufficient to establish liability in the defendant. The appeal must be dismissed, and in saying this I do not think that I am differing from COLERIDGE, J., on the law.

BANKES, L.J.—I agree. The point argued before us is important and interesting, and may be briefly stated thus: What is the duty of a landlord on whose land trees grow and overhang the adjoining land which he has demised and cause damage? It is unnecessary to decide some of the questions raised before us. It seems to me upon the authorities that a clear distinction must be drawn between disputes between adjoining owners and disputes between landlord and tenant. Between adjoining owners the law is clear. *Lemmon v. Webb* (3), *Crowhurst v. Amersham Burial Board* (4), and *Smith v. Giddy* (5) are cases of adjoining owners, and they establish that no real distinction can be drawn between damage caused by trees innocuous in themselves and damage caused by yew trees which may be poisonous. In *Lemmon v. Webb* (3) the injury was caused by the overhanging branches of oaks and elms. KEKEWICH, J., in giving judgment, said ([1894] 3 Ch. at p. 5):

A "It is too late for counsel or judge to say that a neighbour's trees overhanging my land is not a nuisance. It is a nuisance of omission—that is to say, it is negligence on the part of the owner of the tree to allow the branches to overhang the land."

KAY, L.J., said (*ibid.* at p. 24):

B "The result of the authorities seems to be this: The encroachment of the boughs and roots over and within the land of the adjoining owner is not a trespass or occupation of that land which by lapse of time could become a right. It is a nuisance. For any damage occasioned by this an action on the case would lie."

C That is exactly followed in *Smith v. Giddy* (5), the authority of which was challenged by the learned counsel for the defendant. The only substantial difference between those three cases is that in *Crowhurst v. Amersham Burial Board* (4) the tree was a yew, a poisonous tree. In that case KELLY, C.B., in delivering the judgment of the court, rested the decision not so much on nuisance as on the principle of *Rylands v. Fletcher* (6). There is, however, not much, if any, difference in the result. In either case liability for damage from overhanging branches is

D clearly established.

I pass to the case of landlord and tenant, where the considerations are very different. I accept fully the statement of MELLISH, L.J., in *Erskine v. Adeane* (1), which is in accordance with a long line of cases. He said:

E "The law of this country is that a tenant, when he takes a farm, must look and judge for himself what the state of the farm is. Just as in the case of a purchaser of a business the rule is caveat emptor, so in the case of taking the lease of property the rule is caveat lessee; he must take the property as he finds it."

In the present case the plaintiff was unable to show that there was any material difference between the condition of the yew trees at the date of the demise and at the date when his mare ate of the branches. No attempt was made to show that there was any such difference. Upon that ground the plaintiff fails. It is therefore unnecessary to consider the interesting question whether, if it had been proved that a condition of safety existed at the date of the demise and a condition of danger arose afterwards, the defendant would be liable. In that case it would have to be decided—first, whether the rule stated by MELLISH, L.J., in *Erskine v. Adeane* (1) applies to the natural growth of the yew trees from a condition of safety to a condition of danger; and, secondly, if that were not so, what would be sufficient to constitute a breach of duty in the landlord towards his tenant—whether the tenant ought to bring the condition of things to the notice of the landlord so as to make him liable for negligence. Both these matters may fall to be decided some day; they do not arise here, and I mention them only to show that we are giving

H no decision upon them. The appeal therefore fails.

SARGANT, J.—I agree. I am not sure that the difference of view between LORD COLERIDGE, J., and ROWLATT, J., as to the facts is quite so great as PICKFORD, L.J., suggests. LORD COLERIDGE, J., said ([1917] 2 K.B. at p. 518):

I "At the time of the demise the tree, although it overhung the demised property, was harmless. It could not be reached by cattle or horses, but during the tenancy it grew and came within reach of horses."

ROWLATT, J., said (*ibid.* at p. 521):

"In this case the land was taken with the tree already overhanging it, though no doubt it has grown since."

I think that ROWLATT, J., was drawing the distinction between the case of a yew tree overhanging the land at the date of the demise and its branches afterwards growing down so as to come within reach of the cattle on the demised

land and the case of a yew tree not overhanging the land at all at the date of the demise, but which afterwards during the tenancy grew over the boundary. If the learned judge meant to say that there would be a distinction between those two states of things for the purpose of legal liability I do not know that I should agree with him. For the purpose of legal liability they seem to me to be identical. It is not, however, necessary to consider that distinction. We have not to deal with the question which would arise if the yew trees were harmless by their position at the date of the demise but afterwards became noxious and in consequence the plaintiff's mare died from eating them. The effect of the evidence is to show that there was no substantial difference between the state of the trees at the date of the demise and their state at the date when the mare ate of them. The case is therefore the simple one of a landlord letting land to a tenant with a yew tree on the adjoining land in the occupation of the landlord overhanging the land demised to such an extent as to be dangerous to the tenant's horses. To that state of things the reasoning of MELLISH, L.J., in *Erskine v. Adeane* (1) applies. The tenant could have seen that the yew trees overhung the demised land in such a way as to be accessible to cattle, and having taken the land in that state he cannot afterwards complain of damage arising from his mare having eaten of the branches. If the damage had arisen from the subsequent growth of the yew trees, I should have reserved my decision upon that state of facts, but I am not, as I have said, prepared to assent to what I understand to be the view of ROWLATT, J., that in that case there could be no liability. If trees on the adjoining property of the landlord subsequently grow so as to become dangerous to the tenant's cattle on his own land, it may be that the rights and obligations arising therefrom would be regulated by those applicable between adjoining landowners rather than by those between landlord and tenant. I notice in the second part of *Erskine v. Adeane* (1) some observations of JAMES, L.J., at the end of his judgment which bear upon this.

Appeal dismissed.

Solicitors: *Helder, Roberts, Giles & Walton*, for *F. Treasure*, Gloucester; *Peacock & Goddard*, for *Sewell & Rawlins*, Cirencester.

[*Reported by* EDWARD J. M. CHAPLIN, Esq., *Barrister-at-Law.*]

A

ATTORNEY-GENERAL FOR NEW ZEALAND v. BROWN AND OTHERS

[PRIVY COUNCIL (Lord Buckmaster, Lord Parker of Waddington and Sir Walter Phillimore), March 23, 27, 1917]

B

[Reported [1917] A.C. 393; 86 L.J.P.C. 132; 116 L.T. 624; 33 T.L.R. 294]

Charity—Uncertainty—Gift “for such charitable, benevolent religious and educational institutions, societies, associations and objects” as trustees select.

C

A testator by his will gave the residue of his estate to trustees to be held by them in trust “for such charitable, benevolent, religious and educational institutions, societies associations and objects as they in their uncontrolled discretion shall select.” An investment clause in the will empowered the trustees to invest money in certain securities “or by depositing the same or any part thereof with any . . . corporation or public body or institution, commercial, municipal, religious, charitable, educational, or otherwise.”

D

Held: the gift must be construed as if the word “and” meant “or”; having regard to the use of the word “or” in the investment clause the word “charitable” could not be read as covering each of the three following words; and, therefore, the gift failed for uncertainty.

E

Notes. Considered: *Chesterman v. Federal Taxation Comr.* (1925), 42 T.L.R. 121; *Re Diplock, Wintle v. Diplock*, [1941] 1 All E.R. 193. Referred to: *Chichester Diocesan Fund and Board of Finance (Incorporated) v. Simpson*, [1944] 2 All E.R. 60.

As to alternative charitable or other purposes, see 4 HALSBURY'S LAWS (3rd Edn.) 269 et seq., and for cases see 8 DIGEST (Repl.) 394 et seq.

Case referred to:

F

(1) *James v. Allen* (1817), 3 Mer. 17; 36 E.R. 7; 8 Digest (Repl.) 391, 339.

(2) *Morice v. Bishop of Durham* (1804), 9 Ves. 399; affirmed (1805), 10 Ves. 522; 32 E.R. 947, L.C.; 8 Digest (Repl.) 390, 336.

(3) *Re Jarman's Estate, Leavers v. Clayton* (1878), 8 Ch.D. 584; 47 L.J.Ch. 675; 39 L.T. 89; 42 J.P. 662; 26 W.R. 907; 8 Digest (Repl.) 395, 372.

(4) *Ellis v. Selby* (1836), 1 My. & Cr. 286; 5 L.J.Ch. 214; 40 E.R. 384, L.C.; 8 Digest (Repl.) 395, 371.

G

(5) *Williams v. Williams, Williams v. Kershaw* (1835), 5 Cl. & Fin. 111, n.; 1 Keen 274, n.; 5 L.J.Ch. 84; 7 E.R. 346; 8 Digest (Repl.) 398, 399.

(6) *Clarke v. A.-G. and Pritchard* (1914), 33 N.Z.L.R. 963; 8 Digest (Repl.) 398, *288.

(7) *Moule v. A.-G.* (1894), 20 V.L.R. 314.

Also referred to in argument:

H

Bruce v. Deer Presbytery (1867), L.R. 1 Sc. & Div. 96, H.L.; 8 Digest (Repl.) 406, 975.

Weir v. Crum-Brown, [1908] A.C. 162; 77 L.J.P.C. 41; 98 L.T. 325; 24 T.L.R. 308; 52 Sol. Jo. 261, H.L.; 8 Digest (Repl.) 390, 333.

Cobb v. Cobb's Trustees (1894), 21 R. (Ct. of Sess.) 638.

I

Whicker v. Hume (1858), 7 H.L. Cas. 124; 28 L.J.Ch. 396; 31 L.T.O.S. 319; 22 J.P. 591; 4 Jur. N.S. 933; 6 W.R. 813; 11 E.R. 50, H.L.; 8 Digest (Repl.) 389, 326.

Income Tax Special Purposes Comrs. v. Pemsel, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 7 T.L.R. 657; 3 Tax Cas. 53, H.L.; 8 Digest (Repl.) 312, 1.

Re Carter (1897), 16 N.Z.L.R. 431.

Appeal from a judgment of the majority of the Court of Appeal for New Zealand (DENNISTON, EDWARDS, COOPER, and CHAPMAN, JJ., SIR ROBERT STOUT, C.J.,

dissentiente), dated Sept. 27, 1915 (reported at [1916] N.Z.L.R. 83), relating to the validity of a bequest for charitable purposes.

The Court of Appeal held by a majority that the gift in question was invalid. The Attorney-General submitted that that decision was wrong. The trustees of the will took out an originating summons to have the question decided, and an order was made that the summons should be dealt with in the Court of Appeal. The testator, Edward William Knowles, who was domiciled in New Zealand and died at Napier on April 29, 1915, by his will, which was duly made and proved there, directed as follows :

"The residue of my residuary estate shall be held by my trustees in trust for such charitable, benevolent, religious, and educational institutions, societies, associations, and objects as they in their unconditional discretion shall select."

The will empowered the trustees to invest money in certain securities

"or by depositing the same or any part thereof with any . . . corporation or public body or institution, commercial, municipal, religious, charitable, educational, or otherwise."

Romer, K.C., and *Austen-Cartmell* for the appellant.

Clauson, K.C., and *Northcote* for the respondents (the next of kin).

Percy Wheeler for the respondents (the trustees).

Mar. 27, 1917. **LORD BUCKMASTER.**—The difficulty in this case lies in determining the exact values to be given to a series of words which follow each other in the bequest of the testator's residuary estate. The appellant contends that these words constitute a valid charitable gift, and, as representing the public, the Attorney-General for the Dominion of New Zealand has brought this appeal from the judgment of the Court of Appeal of New Zealand, where by a majority of four judges to one it was decided that the gift was void and that the residue passed to the next of kin, who are represented by the third and fourth respondents. The will containing the bequest, dated Sept. 12, 1914, is that of Edward William Knowles, who died on April 23, 1915, domiciled at Napier, in the said Dominion; by its terms the first three respondents were appointed executors and trustees, and by them the will was duly proved on May 13, 1915. The material part of the clause in question is in these words :

"I direct and declare that the residue of the residuary trust funds (into which shall fall all bequests and legacies that may have lapsed) shall be held by my trustees in trust for such charitable, benevolent, religious, and educational institutions, societies, associations, and objects as they in their uncontrolled discretion shall select. And I leave it entirely to the discretion of my trustees to decide upon the amounts to be given and paid to any such institutions, societies, associations, and objects, and also, at their discretion, to decide whether to make periodical payments or one single payment to any such institutions, societies, associations, or objects."

It is obvious that the real obstacle that lies in the appellant's path is due to the word "benevolent." In accordance with a well-established series of authorities, beginning at least as early as *James v. Allen* (1), a gift for benevolent purposes is bad, because such purposes go beyond the legal definition of charities—a word which, in the construction of wills, has always possessed a limited and technical meaning. It is far too late to question the soundness of these authorities at the present day. It may well be that in the minds of people unversed in the subtlety of legal phrases "benevolent" and "charitable" are equivalent terms. But in the courts the meaning of "charitable" has been influenced by the preamble to the statute 43 Eliz. c. 4, and charitable purposes have been regarded as those which that statute enumerates, or which by analogy are deemed within its spirit and intendment: see *Morice v. Bishop of Durham* (2), 9 Ves. at p. 405. From

A this it follows that a gift for charitable or benevolent purposes is void for uncertainty, because it is impossible to divide the gift between the two objects, or to determine to which it should be given, and consequently the good cannot be separated from the bad, and the gift fails: see *Re Jarman's Estate* (3) and *Ellis v. Selby* (4). If, therefore, the words of the gift in the present case are to be read disjunctively, and the word "benevolent" in New Zealand has, for legal purposes, the same meaning as that which it possesses here, the gift in the present instance would be bad. But the appellant contends that neither of these conditions is involved in the true interpretation of the words. He says, first, that the word "charitable" governs, or at least explains, all the words that follow, and that, as religious and educational purposes are proper subjects of charitable bequests, the introduction of the words "religious and educational" show that all the words following "charitable" are covered by its mantle, and that, consequently, "benevolent" objects must be read as though it meant such benevolent objects as are in their nature the proper subject of a charitable gift. This argument derives some force from the fact that there is no need for defining two classes of charities such as religious and educational when they are all included in the first word of the bequest. But the terms of the investment clause in the will really destroy the effect of this contention, for there the testator directs his moneys to be invested by depositing them "with any firm, bank, company or corporation, or public body or institution, commercial, municipal, religious, charitable, educational, or otherwise"; and, in their Lordships' opinion, this shows that the meaning of the word "charitable" in the testator's mind was something that did not embrace religious or educational purposes, and that it ought rather to be regarded as eleemosynary, an interpretation which at once prevents tautology and gives a sensible meaning to each of the words.

E So construed, however, the gift must fail, subject to the appellant's argument as to the meaning in New Zealand of the word "benevolent," for it is, in their Lordships' opinion, impossible to use the word "and" as a link intended to join all the words together and make the gift available only for such institutions or objects as satisfied each one of the conditions represented by each of the separate words. Apart from the fact that such a restriction would all but render the gift inoperative, it is plain from the use of the word "and" in the phrase "institutions, societies, associations, and objects," which occurs twice in immediate succession to the words in question, that "and" must be regarded as "or." In *Williams v. Kershaw* (5), where a gift to "benevolent charitable and religious purposes" was held bad by LORD COTTENHAM, the same principle of construction must have been applied, and it is, in their Lordships' opinion, impossible to distinguish the principle upon which that case was decided from the principle that ought to govern the present dispute.

G There remains the consideration of the true meaning to be attached in this will to the word "benevolent," owing to the fact that it is used in a New Zealand will by a testator having a New Zealand domicil. It is, of course, quite possible that an English word might be used in New Zealand with a meaning different from that which it possesses here, and it may well be that "benevolent institutions and organisations" are, for the reasons pointed out by STOUT, C.J., charitable institutions in New Zealand according to the strict meaning of the phrase. Indeed, it seems so to have been regarded in *Clarke v. A.-G. and Pritchard* (6), and also in the State of Victoria, in *Moule v. A.-G.* (7). But, even upon this assumption, the appellant's difficulties are not removed, for this reasoning would not endow the word "benevolent" with the same signification, when it is—as it must be in the present will—attached to the word "objects," and their Lordships cannot accept the appellant's argument that if benevolent institutions and benevolent associations in New Zealand are properly regarded as charitable, this involves the conclusion that benevolent objects, where the adjective has no such local limitation of meaning, are necessarily charitable also.

Their Lordships consequently are of opinion that the judgment of the Court of Appeal was correct, and that this appeal should be dismissed. The trustees will have their costs as between solicitor and client out of the estate. As to the costs of the real litigant parties, their Lordships think that, in the circumstances of this case, the Attorney-General ought not to pay the costs of this appeal, but, on the other hand, they do not think that he ought to receive his costs out of the estate. As to the other respondents, it is possible that it will make no difference in the ultimate incidence of the expense whether their costs are included in the order or no; but it may simplify matters of administration if a formal order be made that their costs as between solicitor and client should come out of the estate, and their Lordships will humbly advise His Majesty accordingly.

Solicitors: *Mackrell, Maton, Godlee & Quincey; Murray, Hutchins, Stirling & Co.; Williamson, Hill & Co.*

[Reported by W. E. REID, Esq., Barrister-at-Law.]

STEBBING v. LIVERPOOL AND LONDON AND GLOBE INSURANCE CO., LTD.

[KING'S BENCH DIVISION (Lord Reading, C.J., Ridley and Avory, JJ.), May 18, 1917]

[Reported [1917] 2 K.B. 433; 86 L.J.K.B. 1155; 117 L.T. 247; 33 T.L.R. 395]

Insurance—Arbitration clause in policy—"All differences arising" under policy to be referred—Allegation by insurers of untrue answers by assured in proposal form—Reference to arbitration—Jurisdiction of arbitrator—Burden of proof of untruth.

The applicant made a proposal to the respondents for insurance against burglary and the truth of his answers to the questions on the proposal form formed the basis of the contract. A policy was issued to him which contained a condition that if a claim be made which was in any respect fraudulent or if any false declaration be made or used in support thereof all benefit under the policy would be forfeited. The policy also provided that "all differences arising thereunder" should be referred to arbitration. The applicant made a claim which was referred to arbitration. Before the arbitrator the respondents disputed the claim on the ground that the applicant had suppressed material facts and had made untrue answers in the proposal form. The applicant contended that the defence set up by the respondents called in question the validity of the policy, and, therefore, was not within the arbitration clause in the policy.

Held: (i) the respondents were not seeking to avoid the policy, but were relying upon the provision in it that the truth of the answers in the proposal should be the basis of the contract, and whether or not a statement was true was a difference arising under the policy to be referred to the decision of an arbitrator; (ii) the burden of proving the untruth of the answers in the proposal lay on the respondents.

Notes. Applied: *Woodall v. Pearl Assurance Co., Ltd.*, [1918-19] All E.R. Rep. 544. Followed: *Bond Air Services, Ltd. v. Hill*, [1955] 2 All E.R. 476. Referred to: *Macaura v. Northern Assurance Co., Ltd.*, [1925] A.C. 619; *Stevens & Sons v. Timber and General Mutual Accident Insurance Association, Ltd.*, [1933] All E.R.

- A Rep. 806; *Toller v. Law Accident Insurance Society, Ltd.*, [1936] 2 All E.R. 952; *Heyman v. Darwins, Ltd.*, [1942] 1 All E.R. 337.

As to arbitration clauses in policies, see 22 HALSBURY'S LAWS (3rd Edn.) 255-258; and for cases see 2 DIGEST (Repl.) 443, 444, and 29 DIGEST 54.

Case referred to :

- B (1) *Anderson v. Fitzgerald* (1853), 4 H.L. Cas. 484; 21 L.T.O.S. 245; 17 Jur. 995; 10 E.R. 551, H.L.; 29 Digest 354, 2859.

Special Case stated for opinion of the court under s. 19 of the Arbitration Act, 1889.

- C 1. The respondents issued to the applicant a policy of insurance, dated July 21, 1915, indemnifying the applicant against loss or damage by or in connection with burglary. The policy recited that "Whereas Sydney Stebbing (hereinafter called 'the insured') has submitted to the Liverpool and London and Globe Insurance Co., Ltd. (hereinafter called 'the company') a proposal and declaration with certain written statements and particulars as the basis of this contract," and provided that "compliance with the conditions indorsed on this policy shall be a condition precedent to any liability on the part of the company." Condition No. 2 indorsed on the policy was as follows :

- E "On the happening of any loss or damage, the insured must forthwith give notice thereof in writing to the company, and must within thirty days or such further time as the company may allow deliver to the company a claim with such particulars and details as are reasonably practicable, and if the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, all benefit under this policy shall be forfeited."

The policy also provided that "all differences arising under this policy" should be referred to arbitration. The proposal was in writing, signed by the applicant, and was dated July 7, 1915, and therein the applicant declared as follows :

- F "I declare that the answers in this proposal are full and true, that I have withheld no information whatever that might tend in any way to increase the company's risk or to influence their decision regarding this proposal. . . . I agree that this proposal and declaration shall be the basis of the contract between me and the company, and I agree to accept a policy subject to the usual conditions indorsed thereon and to pay the premium when called upon to do so.

- G 2. By a letter dated May 3, 1916, the applicant notified the respondents that he had sustained a loss by burglary on the night of May 2, and claimed that by the terms of the policy he was entitled to be indemnified by the respondents against his loss. The applicant's claim was not admitted by the respondents, and they required that the dispute between them should be referred to arbitration in accordance with the conditions of the policy. 3. On Aug. 11, 1916, a letter was written on the applicant's behalf stating that the applicant did not know why his claim was repudiated, and asking that the respondents should state more definitely the grounds on which the claim was refused. On Aug. 18, 1916, a further letter was written on the applicant's behalf. The letter contained the following passage :

- I "So far as I can gather from your assessors, you are going to charge my client with fraud or something similar. I think you ought specifically to state what it is you charge my client with. He is anxious to meet it. In an action you would have to give full particulars of such a charge."

The respondents replied by a letter, dated Aug. 22, stating that they did not make any charge against the applicant, that sufficient proof had not been furnished of a loss as the result of a burglary, and that if the matter had to go further it had better be referred to arbitration in the terms of the policy. On Sept. 6, 1916, the applicant's solicitor again wrote to the respondents saying :

"I should like, if possible, to arrive at a statement of the differences between us. If the company is going to set up anything which impeaches my client's bonâ fides and honesty, I think in fairness full information with regard thereto should be given to my client."

On Sept. 7, 1916, the respondents' solicitors replied :

"Our clients do not make any charge against your client. They are, however, not satisfied with the proof furnished of loss resulting from burglary. We are rather at a loss to understand what further information we can give you. The onus is surely on your client to prove his loss and its extent in the ordinary way."

On Sept. 8, 1916, the applicant's solicitor wrote :

"You do not answer my questions as to a statement of the differences between our clients for the purpose of any arbitration."

On Oct. 13, 1916, the applicant's solicitor wrote to the respondents inclosing a draft agreement which set out that the matters in difference were as follows :

"(i) Did the said Sydney Stebbing on or about May 2, 1916 suffer any loss or damage by or in connection with burglary, housebreaking, and larceny, or any attempt thereat, within the risks insured against by the said policy, to the property described in the schedule hereto?

"(ii) If so, what is the amount of such loss and damage?"

The draft agreement was returned by the respondents on Oct. 17, 1916, accompanied by a letter of that date. In this letter the respondents stated :

"We think there is perhaps some slight misunderstanding between us in reference to the form of submission necessary. If you will refer to your letter of Oct. 7 last you will see that you suggested that there should be a formal appointment of Mr. Shakespeare as sole arbitrator, and to this we agreed. No other submission is necessary, for the reference is under the contract in the policy. All questions of practice and procedure are, of course, provided for by the Arbitration Act. Apart from this, we cannot agree to restrict the scope of the arbitration in any way. We return the draft in order that it may be altered into an appointment of Mr. Shakespeare as sole arbitrator."

The applicant's solicitor replied by a letter, dated Oct. 18, 1916, saying :

"I observe that you cannot agree to restrict the scope of the arbitration in any way, and you must not be surprised if I point out to you that this is the attitude not only of yourselves, but of your clients and of Messrs. F. Dodd & Co. The policy appears to be to put my client to as much expense as possible to prove his claim, and at the same time there is a refusal to state the company's grounds for refusing to pay. You must excuse me if I am of opinion that this course is oppressive and unfair."

On Oct. 18, 1916, the respondents' solicitor sent to the applicant's solicitor a "joint appointment of a single arbitrator" for signature, and on Oct. 20 the applicant's solicitor wrote :

"Since you decline to define what are the disputes and differences in this case, I will advise my client to sign the appointment."

The joint appointment was subsequently signed by the applicant.

4. On Dec. 1, 1916, the parties appeared before the arbitrator, and an application was made on behalf of the applicant for an order that points of claim and of defence should be delivered. It was then contended by the respondents that the arbitrator had no power to make the order asked for. They, however, stated in the presence of the arbitrator the grounds on which they resisted the applicant's claim, and thereupon the application for an order for delivery of points of claim and defence was withdrawn. The grounds stated were : (i) That it was not admitted

A that the goods were lost by burglary. (ii) That the policy was void because of the suppression of material facts and because the applicant had made untrue answers in the proposal form. The respondents' solicitor was then informed by the applicant's counsel that at the hearing he should contend that in the circumstances set out in the preceding paras. 1, 2, and 3 the questions whether the applicant had suppressed material facts or had made untrue answers in the proposal form, and whether the policy was void for these or other reasons, were not disputes or differences in the arbitration, and that it was not open to the respondents to seek to resist payment on any ground which called in question the validity of the policy.

B 5. At the hearing before the arbitrator the respondents contended (i) that the applicant was not entitled to an indemnity in respect of a loss in fact occasioned by or in connection with a burglary, if (a) the applicant failed to prove affirmatively that the answers made in the proposal form were true, or (b) it was established that any of the answers in the proposal form were in fact untrue; and (ii) that they were entitled to rely on (a) or (b) as a defence to the applicant's claim. It was contended on behalf of the applicant (i) that the question whether the answers contained in the proposal form were true or untrue was not a dispute or difference in the arbitration, and that the arbitrator had no power to determine whether the answers were true or not, or to determine any matters which called in question the validity of the policy; and (ii) that the applicant's claim to be indemnified against a loss by burglary did not require the applicant to prove affirmatively that the answers in the proposal form were true.

D 6. The questions for the opinion of the court were (i) whether the truth or untruth of the answers in the proposal form was a matter which had been referred to the arbitrator. (ii) Whether the applicant's claim to be indemnified in respect of a loss by burglary necessarily failed unless he proved affirmatively that the answers in the proposal form were true.

E *H. L. Tebbs* for the applicant.

Swift, K.C. (C. Herbert-Smith with him) for the respondents.

F **LORD READING, C.J.**—The applicant was insured against burglary under a policy issued by the respondents, and he claimed to recover from them the value of the property insured. The policy is the contract between the parties, and it recites that the proposal and declaration and certain written statements and particulars are the basis of the contract. In the proposal form, which is thus incorporated in the contract, there is a clause containing a declaration by the applicant that the answers to the questions in the proposal form are true, that he has withheld no information, and that he agrees that the proposal and declaration shall be the basis of the contract between himself and the company. It is asserted in answer to his claim that the declaration and answers were not true, and it is contended that the agreement between the parties is on the basis (i) that each of the statements is true, (ii) that each of the statements is material, and (iii) that each of the statements induced the company to enter into the contract. That is the effect of the statement that the declaration and answers formed the basis of this contract. There is also a condition, forming part of the policy, that all differences arising out of the policy shall be referred to the decision of an arbitrator. An arbitrator was nominated and appointed under the policy to ascertain and determine the disputes and differences arising out of the policy. When the matter came before the arbitrator, it was contended on behalf of the respondents that one or other of the statements was untrue, and the objection was taken on behalf of the applicant that that question was not open to the arbitrator because, as was said, it was not for the arbitrator to determine the truth or untruth of the statements, this not being a difference arising out of the policy and therefore not being the subject of reference to the arbitrator. To make the question involved in this dispute a little plainer, the argument is that inasmuch as the company only raised this point for the purpose of avoiding the policy, it cannot be open to the arbitrator to

determine whether the policy is void, since the reference is under the policy, and therefore, as the company has agreed to a reference under the policy, and has agreed to refer all disputes arising under the policy to the arbitrator, it is only such questions as do arise under the policy that can be for him.

I think that for this purpose the real question is whether the truth or untruth of the answers in the proposal form is a difference arising out of the policy, and indeed that is not in dispute. That is the real question. If the effect of the company's contention was that the policy was void, and if that was the true way of expressing their contention and their object was to avoid the policy, I think there would be very great force in the argument for the applicant. The expression "avoid the policy" is used a little loosely in this matter, for a little consideration shows that the company cannot be seeking to avoid the policy, but are really relying upon it in order to set up a defence which prevents the applicant from enforcing any obligation under the policy against the company. I say that for this reason. If a material statement is made inducing the contract and is untrue, it entitles the other party to repudiate the contract; but the essential matters to be proved are (i) that the statement was untrue, (ii) that it was material, and (iii) that it induced the contract. Each of those matters would be a question for a jury, subject to the direction of the judge, if the case was tried by a judge and jury, and often the questions whether a statement was material and whether it induced the contract become very difficult questions. By the terms of this policy, which is the contract between the parties, in order to settle disputes as to whether a statement is material and whether it has induced the contract, the parties have agreed that the declarations and statements in the proposal form should form the basis of the contract. As soon as the parties have agreed to that, it is no longer open to the applicant to say either that the statement, if untrue, was not material, or that it did not induce the contract. If the contract is void, the result would be that when the company sets up this defence, the questions would have to be tried as to whether the statement is material and whether it induced the contract. The company, to get the benefit of the clause, instead of endeavouring to set aside the policy, rely upon it and say that if one looks at the contract one can see that they have agreed that every one of these statements is material and induced the contract, and therefore the policy itself prevents the denial of these matters. The company is not endeavouring to avoid the policy, but is relying upon it. Therefore the answer to the question whether the truth or untruth of the answers in the proposal has been referred to the arbitrator is in the affirmative. It is a matter referred to the arbitrator because when it is clear that the company is relying on a clause in the contract before him, the question whether the statement is true is a matter in difference arising out of the policy.

The second question is whether the applicant's claim to be indemnified in respect of a loss by burglary necessarily fails unless the applicant proves affirmatively that the answers in the proposal form are true. The question so stated is very wide and could only admit of one answer, namely, in the negative; but we have had the advantage of a discussion before us which has explained the real point of the question. The applicant has been challenged by the company as to the answer given by him in the proposal form that he has not insured with any other company. He has been asked about this, and he has given an explanation. The arbitrator apparently is in doubt about the matter, and in order to help him to decide this point, he has asked the court to state, what I understand both parties agree is the question: Upon whom is the burden of proof of establishing that the statement or statements challenged is or are untrue? The answer to it clearly is: Upon the company, and it is for them to establish, and if they have not satisfied the arbitrator that the statements are untrue, why then that defence fails. The test of it is the very simple proposition, which is an answer to so many of these questions which are raised, which may be expressed in these words: that the burden of proof lies at first on the party against whom judgment would be given if no evidence

A at all were adduced. The moment one realises that that is the test, and assumes in this case the proof of the loss by the burglary, the policy put in evidence, and that is the claimant's case, if no other evidence is given, it follows as a matter of course that the claimant would be entitled to recover. And if he is to be met by the defence that the statement is not true—that one of the statements is not true—then the burden is upon the defence—that is, the company—to establish that it is not true, and if they cannot establish it, then they fail in the defence.

B The answer, therefore, to the first question is Yes, and the answer to the second question is No. I would just say in reference to *Anderson v. Fitzgerald* (1), which was cited to us, that it is important to observe that in that case the term of the policy was that if the questions were not accurately answered the policy should be void. The term there was that the contract was void at once, not, as in this

C case, merely that it formed the basis of the contract between the parties. The costs, of course, will be dealt with by the arbitrator in the usual way.

RIDLEY, J.—I agree with my Lord in the answers to both questions. One must remember that there is a distinction in cases of this kind. There may be a case in which, on the ground of fraud, the insurance company attack the policy, and say that the policy is void. For instance, that would be the case if the insured were to set up that there had been a burglary and that he had had goods which had been stolen or destroyed, when he had had nothing of the sort. In such a case the result of proving a false statement by the insured is to avoid the policy. Now, it might be supposed that that applied to all cases where fraud is set up as having been committed, or where false statements are alleged to have been made by the insured, but I think that is not so. There is a great distinction between that case and the present one where it is made a preliminary to the policy of insurance that upon the proposal form certain questions should be answered, which answers are to be taken as the basis of the contract to be made between the insured and the company. In such a case as that where the company seek to say that the answers made to the questions have been untrue, so that the contract gives them the right to say that they are not liable in that case, they do not avoid the contract. They set up as between themselves and the insured a term of the contract which absolves them from the liability of paying. Now, that, I think, is a different position, and it seems to me that although in the first case that I was putting it would not be a part of the policy on which they came before the arbitrator, and therefore the arbitration clause would not apply, in the other case it does, it is still in existence, although by one of its conditions it is set up by the company that they are not liable. They are still affirming the contract under which the arbitration takes place. I therefore agree with my Lord, and think that the first answer must be in the affirmative. With regard to the second question, I do not propose to add anything. I quite agree with what my Lord has said.

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AYORY, J.—I agree as to the answers to both questions.

Solicitors : *B. Webb ; Hair & Co.*

[*Reported by J. F. WALKER, ESQ., Barrister-at-Law.*]

RHYMNEY IRON CO. v. GELLIGAER URBAN DISTRICT COUNCIL

[KING'S BENCH DIVISION (Viscount Reading, C.J., Ridley and Lord Coleridge, J.J.),
January 26, 30, 1917]

[Reported [1917] 1 K.B. 589; 86 L.J.K.B. 564; 116 L.T. 339;

81 J.P. 86; 33 T.L.R. 185; 15 L.G.R. 240]

Nuisance—Statutory nuisance—Abatement notice—Service on owner of premises—Person in default “cannot be found”—Public Health Act, 1875 (38 & 39 Vict., c. 55), s. 94.

The appellants were owners of houses occupied by separate tenants and each house had a separate drain which emptied into a sewer vested in the respondents, the local authority. The drains became stopped up, but there was nothing to show what caused the stoppage, and the respondents served a notice on the appellants under s. 94 of the Public Health Act, 1875, to abate the nuisance, with which notice the appellants failed to comply. The magistrate found that the person by whose act, default or sufferance the nuisance arose could not “be found” within s. 94 of the Act of 1875 and that the respondents were entitled to proceed against the appellants as the owners.

Held: the words “cannot be found” in s. 94 of the Act of 1875 meant that the person causing the nuisance could not be found in the then state of knowledge; when satisfied, on inspection, that a nuisance had arisen, the respondents as local authority were under no obligation to take steps to ascertain the cause of the nuisance and thereby the person in default, before serving a notice on the appellants; and, therefore, the decision of the magistrate was right.

Notes. Section 94 of the Public Health Act, 1875, has been replaced by s. 93 of the Public Health Act, 1936, see 19 HALSBURY'S STATUTES (2nd Edn.) 380.

As to summary abatement of nuisances, see 31 HALSBURY'S LAWS (3rd Edn.) 374; and for cases see 36 DIGEST (Repl.) 332 et seq.

Cases referred to :

- (1) *Gebhardt v. Saunders*, [1892] 2 Q.B. 452; 67 L.T. 684; 56 J.P. 741; 40 W.R. 571; 36 Sol. Jo. 524, D.C.; 36 Digest (Repl.) 335, 781.
- (2) *Andrew v. St. Olave's Board of Works*, [1898] 1 Q.B. 775; 67 L.J.Q.B. 592; 78 L.T. 504; 62 J.P. 328; 46 W.R. 424; 42 Sol. Jo. 381, D.C.; 36 Digest (Repl.) 339, 804.

Also referred to in argument :

Thames Conservators v. Port of London Sanitary Authority, [1894] 1 Q.B. 647; 63 L.J.M.C. 121; 69 L.T. 803; 58 J.P. 335; 10 T.L.R. 160; 38 Sol. Jo. 153, D.C.; 36 Digest (Repl.) 333, 765.

Russell v. Shenton (1842), 3 Q.B. 449; 2 Gal. & Dav. 573; 11 L.J.Q.B. 289; 6 Jur. 1083; 114 E.R. 579; 36 Digest (Repl.) 318, 642.

Richmond Union Guardians v. Dean and Chapter of St. Paul's (1868), 18 L.T. 522; 33 J.P. 53; 11 Digest (Repl.) 41, 563.

Case Stated by the stipendiary magistrate for Merthyr Tydfil.

At a petty sessions held at Merthyr Tydfil on May 12, 1916, a complaint was preferred by the Gelligaer Urban District Council (hereinafter called the “respondents”) under s. 94 of the Public Health Act, 1875, against the Rhymney Iron Co., Ltd. (hereinafter called the “appellants”) for that the appellants, being the owners of premises known as No. 14, Queen Street, and Nos. 3 and 6, Bute Terrace, Pontlotlyn, upon which a certain nuisance existed—namely, a stopped drain—did unlawfully fail to comply with a notice to abate the nuisance, which notice expired on Nov. 13, 1915. On the hearing of the complaint the following

A facts were proved or admitted. The premises were owned by the appellants and occupied by separate tenants. Each house was drained by a separate drain emptying into a sewer vested in the respondents. The drain from No. 14, Queen Street, carried the slop waters therefrom and sewage from a water-closet at the bottom of the garden. The drain had become clogged up so that the slop water and sewage would not pass through. There was nothing to show what caused the stoppage. In the past the drain had been cleansed by the appellants. The last time it was cleansed by them was about twelve months before the hearing of the complaint and after a notice had been served upon them by the respondents. The facts with regard to Nos. 3 and 6, Bute Terrace, were similar except that there were no water-closets there. On Nov. 10, 1915, the sanitary inspector of the respondents served notices upon the appellants calling upon them to abate the nuisance. On Nov. 16, 1915, a letter was written on behalf of the appellants to the respondents suggesting that the respondents should open the drain in order to ascertain whether there was any structural defect. The same suggestion was repeated by the appellants' solicitors in a letter of Dec. 9, 1915, and an intimation was thereby conveyed that if the stoppage was found to be due to any structural defect, the appellants were prepared to pay the reasonable costs of abating the nuisance. This suggestion was not accepted by the respondents. The appellants failed to comply with the notice of Nov. 10, 1915.

The respondents relied on s. 94 of the Public Health Act, 1875, and contended that it was impossible to ascertain the person by whose act or default the nuisance arose, and that the section gave the respondents a choice of serving a notice either on the owner or on the occupier, because the person responsible could not be found. E The appellants contended that the fact that no person had ascertained whether the nuisance arose or continued by reason of the act, default, or sufferance of the owner, or of the occupier, did not render the person by whose act, default, or sufferance the nuisance in fact arose or continued incapable of being found, that therefore the section did not entitle the respondents in the circumstances to serve the notice on the appellants only, and that, the notice being for this reason invalid, F the summons should be dismissed. The magistrate found on the facts that the person by whose act, default, or sufferance the nuisance arose or continued could not be found within the meaning of the section, and held that the respondents were entitled to proceed against the appellants as owners. The questions of law for the opinion of the court were: (i) Whether there was evidence to support the finding of fact; (ii) whether the magistrate was right in his interpretation of s. 94 G of the Act.

The Public Health Act, 1875, s. 94, provided:

"On the receipt of any information respecting the existence of a nuisance the local authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act, default, or sufferance the nuisance arises or continues, or, if such person cannot be found, on the owner or occupier of the premises on which the nuisance arises, requiring him to abate the same within a time to be specified in the notice, and to execute such works and do such things as may be necessary for that purpose. Provided—First, that where the nuisance arises from the want or defective construction of any structural convenience, or where there is no occupier of the premises, notice I under this section shall be served on the owner . . ."

Macmorran, K.C., and *Randolph Glen* for the appellants.
C. Herbert-Smith for the respondents.

VISCOUNT READING, C.J.—The question in this case is one of some importance to the owners and the occupiers of property. The appellants are the owners, but not the occupiers, of certain premises, and the respondents, the local authority, having ascertained that the drains were stopped and that there was

nothing to show what caused the stoppage, served on the appellants notice under s. 94 of the Public Health Act, 1875, to abate the nuisance. The appellants contend that it was a condition precedent to any obligation upon them to obey the notice that it should be established that the person causing the stoppage could not be found, and that, in order to establish this, the local authority must show that they had at least taken reasonable steps to discover the cause of the stoppage. The section provides that if the person by whose act, default, or sufferance the nuisance arises or continues "cannot be found," the notice to abate the nuisance is to be served on the owner or occupier, and the appellants contend that before serving the notice on them it was essential that the respondents should have taken some such step as passing a pipe through the drain, or ascertaining the cause of the stoppage by an inspection of the chamber if there is one, or by opening up the street. The appellants do not particularise the steps to be taken, but merely contend that the local authority must show that they have taken reasonable steps before the magistrate can find as a fact that the person causing the nuisance could not be found. If that contention is right, the appellants are entitled to succeed. On the other hand, it is said for the respondents that the true meaning of the words "cannot be found" is that the person causing the nuisance "cannot be found in the then state of knowledge," i.e., that the local authority are unable to determine whether the nuisance has arisen through a misuse of the drains by the occupier or whether it has arisen through a structural defect, and it is contended that, although under various sections of the Act of 1875, the local authority have power to take such steps as may be necessary to ascertain the cause of the nuisance, there is no obligation upon them to do so before serving a notice on the owner or on the occupier and seeking to make him liable.

The question really depends on whether the Act of 1875 imposes upon the local authority an obligation to take such reasonable steps as I have indicated for the purpose of ascertaining the person who caused the nuisance. There is great force in the argument used by counsel for the appellants that the owner ought not to be put under this liability and ought not to be called upon to defend his failure to obey the notice unless a *prima facie* case has been established against him. With that we agree, but when he adds that on the facts of this case we must decide in favour of the owners, because the local authority have not taken such steps as I have referred to, he goes further than the language of the section warrants. One must bear in mind the aim and purpose of the Public Health Acts. They were designed to protect the public and to safeguard them against nuisances which might cause illness or, at any rate, serious discomfort, and it was determined that the local authority should have power to step in at once, provided that they are satisfied of the existence of a nuisance, and that in their then state of knowledge they are not able, without putting in operation the powers given to them by these Acts, of entering and searching and opening up the drains, to ascertain who is responsible. If the aim and purpose of the Acts are kept in mind it follows, as was said by DAY, J., in *Gebhardt v. Saunders* (1) and approved by LORD RUSSELL OF KILLOWEN, C.J., in *Andrew v. St. Olave's Board of Works* (2), that common sense and the necessity of the case make it necessary for something to be done forthwith, and in my opinion that is the key to this Act and to the powers given under the various Public Health Acts.

We have been pressed in argument with the hardship that would be imposed upon owners if we affirmed the decision of the magistrate, and at first sight that argument had some weight with me, because we are not entitled, even if we wished, to extend obligations resting upon owners, but on further consideration I do not think that there is any hardship. If the owner is served with the notice and the defect is caused by some misuse for which the occupier is liable and is not a structural defect for which the owner is liable, the mere fact of the service of the notice on the owner does not create any liability upon him. He may decline to obey the notice, and the next step is to summon the owner and ask for an order

A upon him to abate the nuisance. The owner may prove that the nuisance is not caused by a structural defect, or he may prove other circumstances showing that it is not he, but the occupier, who is liable. In that event an order to abate the nuisance could not be made upon him. If the owner pays no attention and allows an order to be made against him, no doubt a penalty could be imposed upon him under s. 96 of the Act of 1875. But if an order has been made upon him because he has not resisted it, and if it turns out that he is not liable, he can still recover from the person who ex hypothesi is liable, as was done in *Gebhardt v. Saunders* (1) and in *Andrew v. St. Olave's Board of Works* (2). I agree that one cannot put upon the owner the necessity of having to sue his tenant, for in many cases the owner would not be able to recover the fruits of his judgment. But the owner's remedy is to prevent the order from being made against him, by showing facts which entitle him to succeed. For these reasons I am of opinion that the magistrate was right in the view which he expressed, and that upon the facts as stated, more particularly that there was nothing to show what caused the stoppage, there was evidence in law to support the finding of fact that the person causing the nuisance "could not be found" within the meaning of s. 94 of the Act of 1875. Therefore the appeal must be dismissed.

D **RIDLEY, J.**—I am of the same opinion. In construing s. 94 of the Act of 1875 one must not forget that its real object is, not to put upon the local authority the duty of ascertaining upon whom the ultimate responsibility for the nuisance will rest, but that they should procure the abatement of the nuisance. They have the duty of inquiry only up to a certain point. If they are satisfied of the existence of a nuisance, they may serve on the person causing it a notice to abate it. That is the first alternative. That refers to a case in which on going and looking it is apparent by whose act the nuisance was caused and there is no structural defect. The amount of examination required to be made by the local authority must be limited in some way. It cannot be contended that they have the duty of pushing rods through the drain or of taking the other steps which inspectors of nuisances have to take in order to find out where the defect is. I cannot think that that is the intention of s. 94. I am satisfied that it means that if on going and looking it is possible to see who is the person causing the nuisance, then he is the person on whom the notice must be served. Then comes the second alternative, where on such an inspection as I have described it is not possible to discover who caused the nuisance, and where the question whether it was caused by a structural defect or by a misuse of the drains cannot be determined without an examination which may be lengthy and difficult. In such a case the statute has given the local authority the right to serve notice on the owner or occupier as they think fit. Indeed, the local authority might serve notice on both. *Gebhardt v. Saunders* (1) is an authority for saying that it could be given, not nominatim, but generally, to the owner or occupier. On the other hand, it may be given to the owner by name or to the occupier by name. It might be regarded as a hardship that the notice may be given to a person who may ultimately be found not to be liable to obey it. But the hardship is modified by the fact that the owner may appear and show by evidence that not he, but the occupier, is responsible. Even then it is possible that the magistrate may give a wrong decision, and the owner, when he proceeds to do the work necessary to abate the nuisance, may ascertain that it was not due to any structural defect for which he was responsible, but was merely due to a misuse of the drains by the occupier. In such a case the owner could ultimately recover from the occupier. The owner may regard that as an insufficient remedy, but, in view of the object of the statute, this hardship cannot be helped. For these reasons I agree that the appeal should be dismissed.

LORD COLERIDGE, J.—The whole case turns on the meaning of the words "cannot be found" in s. 94 of the Act of 1875. I do not think that the opening of the drain or the other examination which the statute enables the local authority

to make is a condition precedent to their inability to find the person causing the nuisance. The object of the Act is to give power to bring about in the public interest the abatement of nuisances with as much dispatch as possible, and it leaves the liability, which is not concluded by the service of the notice, to be determined by the magistrate on the application of the local authority. The words "cannot be found" are sufficiently satisfied if, to use the language of CHARLES, J., in *Gebhardt v. Saunders* (1), the cause of the nuisance cannot be found on inspection. That does not imply the execution of any work by the local authority. If on an inspection it is not possible to see clearly whether it is the owner or the occupier who is responsible, the local authority may serve the owner or the occupier with notice to abate the nuisance. If the question of ultimate liability is disputed, it can be raised before the magistrate, and the person who has been served with the notice can obtain his remedy against the local authority if he succeeds. If he does not dispute his liability, but some other person is ultimately found to be liable, he can then recover against that person. It is true that in the case of a stopped drain the occupier is *primâ facie* responsible, but to hold that this means that the person causing the nuisance "can be found" within the meaning of the section would make s. 94 futile. For these reasons I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Beamish, Hanson, Airy & Co.*, for *Gwilym James, Charles & Davies*, Merthyr Tydfil; *Wrentmore & Son*, for *Frank James & Sons*, Merthyr Tydfil.

[*Reported by J. F. WALKER, Esq., Barrister-at-Law.*]

Re EDWARDS. NEWBERY v. EDWARDS

[CHANCERY DIVISION (Astbury, J.), November 30, 1917]

[*Reported* [1918] 1 Ch. 142; 87 L.J.Ch. 248; 18 L.T. 17; 34 T.L.R. 135; 62 Sol. Jo. 191]

Will—*Apportionment*—*Tenant for life and remainderman*—"Whole of the income . . . shall be applied as from my death as income"—*Stipulation to the contrary*—*Apportionment Act*, 1870 (33 & 34 Vict., c. 35), s. 7.

The testator devised the whole of his estate to trustees on trust for sale and directed the proceeds of such sale to be invested and held on trust to pay the income to his wife for life with remainder to his children. The trustees were given power to postpone sale with a direction that pending such sale the whole of the income of property actually producing income should be applied as from the testator's death as income. On the question whether the direction was within s. 7 of the *Apportionment Act*, 1870, so as to preclude application of the Act,

Held: the direction was not an express stipulation within s. 7 of the *Apportionment Act*, 1870, that no apportionment should take place, and, accordingly, dividends on shares paid after the testator's death in respect of periods wholly or partially before his death were apportionable.

Notes. As to apportionment in respect of time, see 34 HALSBURY'S LAWS (3rd Edn.) 634, and for cases see 40 DIGEST (Repl.) 737. For s. 7 of the *Apportionment Act*, 1870, see 13 HALSBURY'S STATUTES (2nd Edn.) 869.

A Cases referred to :

- (1) *Re Lysaght, Lysaght v. Lysaght*, [1898] 1 Ch. 115; 67 L.J.Ch. 65; 77 L.T. 637, C.A.; 9 Digest (Repl.) 634, 4227.
- (2) *Re Meredith, Stone v. Meredith* (1898), 67 L.J.Ch. 409; 78 L.T. 492; 20 Digest 282, 413.

B Also referred to in argument :

- Jones v. Ogle* (1872), 8 Ch. App. 192; 42 L.J.Ch. 334; 28 L.T. 245; 21 W.R. 236, L.C. & L.J.J.; 40 Digest (Repl.) 738, 2259.
- Howe v. Earl of Dartmouth, Howe v. Aylesbury* (1802), 7 Ves. 137; 32 E.R. 56, L.C.; 44 Digest 197, 265.
- Macdonald v. Irvine* (1878), 8 Ch.D. 101; 47 L.J.Ch. 494; 38 L.T. 155; 26 W.R. 381, C.A.; 44 Digest 198, 274.

C

Adjourned Summons to determine whether certain dividends which were declared and paid after the testator's death in respect of periods wholly or partially before his death were apportionable or whether the testator's widow was entitled to the whole of them as tenant for life of the income of the trust fund.

D

- H. M. Broughton* for the trustees other than the wife.
Baden Fuller for the wife.
Bovill for the infant daughters.

E

ASTBURY, J.—The question raised by this summons is whether or not certain dividends which were declared and paid after the testator's death ought to be apportioned in respect of the periods for which they were declared; that is, whether all the dividends are payable to the testator's widow, who is entitled to the income of the residuary estate, or whether they are apportionable. The testator gave all his property to the trustees on trust for sale, and subject to the payment of his debts, funeral and testamentary expenses, legacies, and any duties payable on legacies free of duty, directed them to invest the proceeds, which he called the residuary trust fund, on trust to pay the income to his wife for life, with remainder to his children. By a subsequent clause, which has nothing to do with the operative gift, the testator authorised his trustees to retain in its then state of investment for such period as they should think fit such part of his estate as at his decease was invested in rubber shares, and he then provided :

G

"I further declare that my trustees may postpone the sale, calling in, and conversion of any part of my real or personal estate for such period as they may in their absolute discretion deem fit, notwithstanding that it may be of wasting, speculative, or reversionary nature, and that, pending such sale, calling in, and conversion, the whole of the income of property actually producing income shall be applied as from my death as income, and, on the other hand, on such sale, calling in, and conversion, or on the falling in of any reversionary property, no part of the proceeds of such sale, calling in, and conversion of such property shall be paid or applied as part income."

H

It is on this provision that the whole question turns. The wife, who is the tenant for life, says that this is a direction that all the dividends, whether they accrued before or after the testator's death, which were paid on the investments after the testator's death are free from the provisions of the Apportionment Act, 1870, and are payable as income. Two cases are relied on—namely, *Re Lysaght, Lysaght v. Lysaght* (1) and *Re Meredith, Stone v. Meredith* (2). I accept, as an accurate statement of the law, the statement founded on these cases in *THEOBALD ON WILLS* (7th Edn.) p. 187 [see (11th Edn.) p. 170] :

I

"The Act does not extend to any case in which it is expressly stipulated that no apportionment shall take place (see s. 7). It does not, therefore, apply if there is a direction that every share given by the will shall carry the dividend

accruing thereon at the testator's death; *Re Lysaght* (1); or if the gift is of the whole of the income derived under a particular deed: *Re Meredith* (2)."

I am content to rest my judgment on that statement as to the effect of those two cases. I may add that in *Lysaght's Case* (1) there was a provision in the will that "every share in the said company hereby bequeathed shall carry the dividend accruing thereon at my death." The Court of Appeal held that the meaning and effect of that clause was that so much of the dividend as but for the clause would have gone to the residuary legatees was not to go to them, but to the legatees of the shares. The effect was to exclude the Apportionment Act, 1870, and to give to the legatees of the shares the dividends accrued thereon at the date of the testator's death. In *Meredith's Case* (2) the testator had assigned to trustees of a separation deed certain shares, out of the dividends and annual income of which they were to pay to his wife the annual sum of £500 and then hand over any balance to him. By his will the testator, after reciting the settlement, and that he himself was entitled to any balance of the income arising from the settled shares and subject to the trusts of the said indenture to the said shares, declared that "the whole of the income derived under the said indenture shall, after my decease, be paid to my said wife during her life." There was nothing to discuss there, for the income under the trust was income received by the trustees on the trusts I have mentioned, and the testator directed that the whole should be paid to his wife. But in this case there is nothing to exclude the application of the Apportionment Act, and the dividends are therefore apportionable.

Solicitors: *Culross & Holt*.

[Reported by J. B. B. MACMAHON, ESQ., Barrister-at-Law.]

HARTLEY v. ELLNOR

[KING'S BENCH DIVISION (Lord Reading, L.C., Ridley and Avory, JJ.), April 30, 1917]

[Reported 86 L.J.K.B. 938; 117 L.T. 304; 81 J.P. 201; 15 L.G.R. 775;
26 Cox, C.C. 10]

Criminal Law—Vagrancy—Suspected person—Loitering with intent to commit felony—Several acts on same date—No previous convictions or bad character—Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 4—Prevention of Crimes Act, 1871 (34 & 35 Vict., c. 112), s. 15.

By s. 4 of the Vagrancy Act, 1824: "Every suspected person . . . frequenting any . . . street . . . with intent to commit a felony . . . shall be deemed a rogue and vagabond . . ." By s. 15 of the Prevention of Crimes Act, 1871, amending the Vagrancy Act, 1824: "In proving the intent to commit a felony it shall not be necessary to show that the person suspected was guilty of any particular act or acts tending to show his purpose or intent, and he may be convicted if from the circumstances of the case, and from his known character as proved to the . . . court . . . it appears . . . that his intent was to commit a felony . . ." On Aug. 27, 1916, the respondent was kept under observation by the police in a certain street for a period of about forty minutes. During that time he was observed to push himself among several people who were attempting to board a stationary tramcar and to tap the pockets of several of them. He made no attempt to board the tramcar himself although there was plenty of room on it. A second and third tramcar arrived and on each occasion the respondent repeated his actions. He was then observed to go to another terminus where he pursued the same course of conduct on four separate occasions after which

A he returned to the place where he had first been under observation and was seen to loiter there. He was then arrested and charged under s. 4 of the Vagrancy Act, 1824, with being a suspected person. He had not been previously convicted and there was no evidence of previous bad character.

B **Held:** the respondent could be convicted as a rogue and vagabond under s. 4 of the Vagrancy Act, 1824, without it being shown that he had previously been convicted or that he had been a suspected person or reputed thief or had been known to have been of bad character before the day on which the conduct leading to his arrest took place.

C **Notes.** Considered: *Ledwith v. Roberts*, [1936] 3 All E.R. 570. Followed: *Rawlings v. Smith*, [1938] 1 All E.R. 11. Considered: *Bridge v. Campbell* (1947), 63 T.L.R. 470; *R. v. Fairbairn*, [1949] 2 K.B. 690.

C As to suspected persons, see 10 HALSBURY'S LAWS (3rd Edn.) 700; and for cases see 15 DIGEST (Repl.) 925-928. For the Vagrancy Act, 1824, see 18 HALSBURY'S STATUTES (2nd Edn.) 202 and for the Prevention of Crimes Act, 1871, see *ibid.*, vol. 5, p. 865.

Case referred to:

D (1) *Cowles v. Dunbar and Callow* (1827), 2 C. & P. 565; Mood. & M. 37, N.P.; 14 Digest (Repl.) 195, 1599.

Also referred to in argument:

Clark v. R. (1884), 14 Q.B.D. 92; 52 L.T. 136; 49 J.P. 246; 15 Cox, C.C. 666; sub nom. *R. v. Clark*, 54 L.J.M.C. 66; 33 W.R. 226; 1 T.L.R. 109, D.C.; 15 Digest (Repl.) 926, 8879.

E **Case Stated** by the justices of Birmingham.

F At a court of summary jurisdiction sitting at Birmingham on Aug. 31, 1916, the respondent, Robert Ellnor, was charged under s. 4 of the Vagrancy Act, 1824, with being a suspected person frequenting a certain street in Birmingham—namely, Martineau Street—at 3.40 p.m. on Aug. 27, 1916, with intent to commit a felony. From the evidence of the appellant, Hartley, a police constable, adduced at the hearing before the justices, it appeared that the appellant, who was in the company of another police constable, saw the respondent near a tram terminus in Martineau Street, Birmingham, at about 3 p.m. on Sunday, Aug. 27, 1916. A number of people were about to board a stationary tramcar, and the respondent pushed his way amongst them. He had his hands before him, and he was seen to tap the pockets of several persons. He did not attempt to board the tramcar himself, although there was plenty of room upon it, and when the tramcar started he stepped back on to the footpath. A second and a third tramcar arrived at the terminus, and on each occasion the respondent repeated his actions. After the departure of the third tramcar he went down Martineau Street to High Street, where there was another tram terminus. Here he pursued the same course as at the Martineau Street tram terminus on four separate occasions, after which he returned to the place where he had first been under observation. There was at that time no tramcar standing at the Martineau Street terminus, but the respondent loitered on the footpath. Altogether he was under observation for about forty minutes, when the appellant arrested him. There was no other evidence to show that the respondent was a suspected person, and no previous offence was proved against him.

I It was contended on behalf of the appellant that the respondent became a suspected person within the meaning of s. 4 of the Vagrancy Act, 1824, when he had been seen loitering and tapping the pockets of various persons at different places during the period of forty minutes whilst he was under observation. The attention of the justices was called to *Cowles v. Dunbar and Callow* (1). It was contended on behalf of the respondent that the court could not find that he was a suspected person within the meaning of s. 4 of the Act of 1824 in the absence of evidence that he had been previously convicted, or that he was a person of bad character.

The justices came to the conclusion that the charge was not made out, and dismissed the respondent.

By s. 4 of the Vagrancy Act, 1824, it is provided (*inter alia*):

"Every suspected person or reputed thief frequenting any river, canal, or navigable stream, dock, or basin, or any quay, wharf, or warehouse near or adjoining thereto, or any street, highway, or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street, highway, or place adjacent, with intent to commit felony . . . shall be deemed a rogue and vagabond within the true intent and meaning of this Act. . . ."

By s. 15 of the Prevention of Crimes Act, 1871, it is provided, amending the provisions of s. 4 of the Vagrancy Act, 1824 (*inter alia*):

"In proving the intent to commit a felony it shall not be necessary to show that the person suspected was guilty of any particular act or acts tending to show his purpose or intent, and he may be convicted if from the circumstances of the case, and from his known character as proved to the justice of the peace or court before whom or which he is brought, it appears to such justice or court that his intent was to commit a felony. . . ."

Willes for the appellant.

Sadler for the respondent.

The judgment of the court was delivered by

AYORY, J.—In this case the respondent, Robert Ellnor, was charged before the justices of Birmingham, under s. 4 of the Vagrancy Act, 1824, with being a suspected person, frequenting a certain street in Birmingham—namely, Martineau Street—with intent to commit a felony. The justices dismissed the charge on the ground that, in the absence of any evidence before them showing that the respondent had been previously convicted or that he was a person of previous bad character, they were not entitled to find that he was a suspected person within the meaning of the section under which the charge was made against him. It was upon the narrow point that I have mentioned that the justices dismissed the charge, and the only question which we are called upon to decide is whether they were right in coming to the conclusion that there must be evidence of a previous conviction or of previous bad character in order to render an individual a suspected person within the meaning of the section of the statute under which these proceedings were taken.

It will be seen, then, that the whole case turns upon the use of the words "suspected person or reputed thief." It seems that the justices considered the phrases "suspected person" and "reputed thief" to be synonymous, but it is quite clear to us that these words have not the same meaning. A person may be a suspected person even though he is not a reputed thief, and a person may be a suspected person on a particular day, even though he has not been previously convicted, or even though he has not had a reputation for bad character in the past. When one examines the facts of the present case there can be no doubt whatever that the respondent was a suspected person on the day in question. For a period of about forty minutes he had been kept under observation by police officers, and during the whole of that time he was engaged on and off in doing acts which, to say the least, gave rise to a reasonable suspicion that he was attempting to pick the pockets of various passengers who were boarding trams. He was seen to be acting in a suspicious manner on no less than seven separate occasions in different parts of the city of Birmingham during the forty minutes that he was being watched by the police, and, as a matter of fact, the respondent was, on the day in question, irrespective of anything in the past, a suspected person. But it has been contended on the respondent's behalf that a different construction and a limited meaning must be placed upon the construction of s. 4 of the Vagrancy Act, 1824, by reason of the provisions of s. 15 of the Prevention of Crimes Act, 1871, which is a statute

amending the Act of 1824. The contention is that a person cannot be convicted as a suspected person unless there is evidence before the court either that he is a reputed thief or that he is a person of known bad character, and was known to be such previous to the day upon which he is charged with being a suspected person. In our opinion this contention is not a sound one. The Act of 1871 has no such limiting effect upon the Act of 1824. The whole object of the later statute is to enlarge the powers of courts of summary jurisdiction, and to enable them to infer from the known character of the individual who is brought before them that he was in a particular place with the intention of committing a felony, although there is no direct evidence adduced of any particular act or acts done by him which can be directly pointed to as proving the alleged intent.

In the present case no reliance was placed by the prosecution on this later statute. It was never suggested that the respondent was a person from whose known character an inference might be drawn that he was in a certain place with the intention of committing a felony. Reliance was placed, however, upon the evidence of the particular acts done by him on the day in question from which the court might be asked to infer that he was in the particular place with the intention of committing a felony. A suggestion has been put forward that the justices were led to arrive at their decision that the respondent could not be convicted of being a suspected person by a consideration of the judgment of ABBOTT, C.J., in *Cowles v. Dunbar and Callow* (1). That case, in our opinion, has no application whatever to the case which is now before us. The decision in *Cowles v. Dunbar and Callow* (1) was not given upon the Vagrancy Act, 1824, but upon a different statute, and the words of that statute are quite different from those of the Act of 1824. Moreover, the statute which was then in question applied only to the City of London and to the limits of the weekly bills of mortality. That statute provided that constables might arrest any suspected person or reputed thief if it appeared from the oath of one or more credible witnesses that such person was of evil fame and a reputed thief, and if such person should not be able to give a satisfactory account of himself or of his way of living, and if it should also appear that there was good ground for believing that he was in the street with the intention of committing a felony. Then in such a case he might be arrested and brought up as a rogue and vagabond. The present proceedings, however, were taken under the Vagrancy Act, 1824, and this statute does not require proof that the person who is charged as a suspected person is a person of ill fame and a reputed thief unless, as counsel for the respondent has contended, the mere use of the words "suspected person or reputed thief" imply that before he can be convicted of the offence there must be evidence that, prior to the day in question, he had the reputation of being a thief, or had been suspected before that day, when he could be properly described as a suspected person. By whom must he have been suspected before the day in question? Would the suspicion of one individual before the day in question be sufficient to show that he was a suspected person? We have not been enlightened upon these points? but we are clearly of opinion that in the present case there was ample evidence before the justices to show that the respondent was in fact a suspected person, and also that there was ample evidence to render it possible for the inference to be properly drawn that the respondent was frequenting Martineau Street on the day in question with the intention of committing a felony.

We are of opinion that the justices did not fully and properly consider the evidence adduced before them, and the case must be remitted to them for their consideration and for their determination whether the offence charged is made out.

Case remitted.

Solicitors: Capron & Co., for J. Ernest Hill, Birmingham; H. Tyrrell & Son, for A. J. Hatwell, Birmingham.

[Reported by J. A. SLATER, ESQ., Barrister-at-Law.]

TURNER v. COATES

[KING'S BENCH DIVISION (Lush and Bailhache, JJ.), November 23, 1916]

[Reported [1917] 1 K.B. 670; 86 L.J.K.B. 321; 115 L.T. 766;
33 T.L.R. 79]

Animal—Horse—Negligence of owner—Unbroken colt uncontrolled on highway at night—Injury to person using highway.

On a dark night on a highway an unbroken colt belonging to the defendant was following, uncontrolled, a mare which was led by a boy. Behind the colt came a trap driven by the defendant. The plaintiff was bicycling in the opposite direction and the colt, possibly startled by the light of the bicycle, ran into the bicycle, and injured the plaintiff. No warning was given to the plaintiff of the presence of the colt on the highway.

Held: the colt acted in precisely the way in which it was to be expected that such a colt would act, and, therefore, the defendant had put on the highway an animal likely to cause damage and was guilty of negligence.

Notes. Considered: *Deen v. Davies*, [1935] All E.R. Rep. 9. Referred to: *Lathall v. Joyce & Son*, [1939] 3 All E.R. 854; *Toogood v. Wright*, [1940] 2 All E.R. 306; *Searle v. Wallbank*, [1947] 1 All E.R. 12; *Wright v. Callwood* (1950), 66 (pt. 2) T.L.R. 72.

As to the liability of owners of animals, see 1 HALSBURY'S LAWS (3rd Edn.) 663 et seq.; and for cases see 2 DIGEST (Repl.) 309 et seq.

Cases referred to :

- (1) *Heath's Garage, Ltd. v. Hodges*, [1916] 2 K.B. 370; 85 L.J.K.B. 1289; 115 L.T. 129; 80 J.P. 231; 32 T.L.R. 570; 60 Sol. Jo. 554; 14 L.G.R. 911, C.A.; 2 Digest (Repl.) 321, 196.
- (2) *Ellis v. Banyard* (1911), 106 L.T. 51; 28 T.L.R. 122; 56 Sol. Jo. 139, C.A.; 2 Digest (Repl.) 320, 195.
- (3) *Cox v. Burbridge* (1863), 13 C.B.N.S. 430; 1 New Rep. 238; 32 L.J.C.P. 89; 9 Jur. N.S. 970; 11 W.R. 435; 143 E.R. 171; 2 Digest (Repl.) 319, 187.
- (4) *Hadwell v. Righton*, [1907] 2 K.B. 345; 76 L.J.K.B. 891; 97 L.T. 133; 71 J.P. 499; 23 T.L.R. 548; 51 Sol. Jo. 500; 5 L.G.R. 881; 2 Digest (Repl.) 320, 191.
- (5) *Pinn v. Rew* (1916), 32 T.L.R. 451; 2 Digest (Repl.) 322, 202.

Also referred to in argument :

- Fletcher v. Rylands* (1866), L.R. 1 Exch. 265; 35 L.J.Ex. 154; 14 L.T. 523; 30 J.P. 436; 12 Jur. N.S. 603; 14 W.R. 799, Ex.Ch.; affirmed sub nom. *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 328, 215.
- Filburn v. People's Palace and Aquarium Co., Ltd.* (1890), 25 Q.B.D. 258; 59 L.J.Q.B. 471; 55 J.P. 181; 38 W.R. 706; 6 T.L.R. 402, C.A.; 2 Digest (Repl.) 329, 219.
- Bradley v. Wallaces, Ltd.*, [1913] 3 K.B. 629; 82 L.J.K.B. 1074; 109 L.T. 281; 29 T.L.R. 705; 6 B.W.C.C. 706, C.A.; 2 Digest (Repl.) 327, 211.
- Smith v. Cook* (1875), 1 Q.B.D. 79; 45 L.J.Q.B. 122; 33 L.T. 722; 40 J.P. 247; 24 W.R. 206; 2 Digest (Repl.) 338, 272.
- Catchpole v. Minster* (1913), 109 L.T. 953; 30 T.L.R. 111; 12 L.G.R. 280; 2 Digest (Repl.) 322, 201.
- Milne v. Garratt* (1906), Times, March 6, unreported.
- Higgins v. Searle* (1909), 100 L.T. 280; 73 J.P. 185; 25 T.L.R. 301; 7 L.G.R. 640, C.A.; 2 Digest (Repl.) 320, 192.
- Jones v. Lee* (1911), 106 L.T. 123; 76 J.P. 137; 28 T.L.R. 92; 56 Sol. Jo. 125; 2 Digest (Repl.) 320, 193.

- A** *Mason v. Keeling* (1699), 1 Ld. Raym. 606; 12 Mod. Rep. 332; 91 E.R. 1305; 2 Digest (Repl.) 382, 566.
- R. v. Huggins* (1730), 17 State Tr. 309; 2 Ld. Raym. 1574; 1 Barn. K.B. 396; Fitz-G. 177; 2 Str. 883; 92 E.R. 518; 2 Digest (Repl.) 328, 214.
- Tillett v. Ward* (1882), 10 Q.B.D. 17; 52 L.J.Q.B. 61; 47 L.T. 546; 47 J.P. 438; 31 W.R. 197; 2 Digest (Repl.) 310, 138.
- B** *Osborne (Osborn) v. Chocquet*, [1896] 2 K.B. 109; 65 L.J.Q.B. 534; 74 L.T. 786; 44 W.R. 575; 12 T.L.R. 437; 40 Sol. Jo. 532; 2 Digest (Repl.) 384, 578.
- Hudson v. Roberts* (1851), 6 Exch. 697; 20 L.J.Ex. 299; 17 L.T.O.S. 158; 155 E.R. 724; 2 Digest (Repl.) 334, 242.
- Clinton v. J. Lyons & Co., Ltd.*, [1912] 3 K.B. 198; 81 L.J.K.B. 923; 106 L.T. 988; 28 T.L.R. 462; 2 Digest (Repl.) 327, 210.
- C** *Blyth v. Birmingham Waterworks Co.* (1856), 11 Exch. 781; 25 L.J.Ex. 212; 26 L.T.O.S. 261; 20 J.P. 247; 2 Jur. N.S. 333; 4 W.R. 294; 156 E.R. 1047; 36 Digest (Repl.) 5, 1.

Appeal by the defendant from a judgment of HIS HONOUR JUDGE TOBIN, K.C., sitting at Leominster.

D The facts are set out in the judgment of LUSH, J.

A. Brooke for the defendant.

Harold Brandon for the plaintiff.

Hawke, K.C., as amicus curiae.

E **LUSH, J.**—In this case the plaintiff brought an action for damages against the defendant for negligence, which was tried before the learned judge at Leominster County Court without a jury, and he gave judgment for the plaintiff. The defendant appeals.

The defendant went out for a drive one very dark night, and was driving in his trap, which was going at a walking pace or a jog-trot pace, and in front of him was a boy in charge of a mare belonging to a neighbour. The boy was leading the mare by a halter, the boy being on the mare's near side. Behind the mare—at least, this is how the party apparently started from the defendant's house—was a colt, eighteen months old, not broken in, under no control of any sort or kind. The plaintiff was riding her bicycle; her lamp was lit, and, as she approached the trap, she saw its lights in the distance; she came up to the boy leading the mare, and, according to her evidence, which the learned judge accepted, she had no warning from the boy, or from anybody, of the presence of the colt in the road; but when she came up more or less alongside the trap, the colt—whether it had been in front of the trap or behind the trap just before the occurrence one does not know—possibly startled by the light, and probably not being able to run away because of the trap's position in the road, darted back, ran into the bicycle, and caused damage to the plaintiff. It has been said here that the animal kicked the plaintiff; I see no evidence of it. One does not know exactly what it was that the colt did, beyond the fact that it ran into the bicycle. Evidence was called at the trial on behalf of the plaintiff to prove that a colt of that age, unbroken, will be a source of danger to passers-by on the highway because of its tendency to dart backwards and forwards on a highway. The defendant called the rebutting evidence of a veterinary surgeon, who said that it was common usage to turn out animals like this colt, but he would not do it himself. It had been objected that that evidence is not admissible, but certainly with the aid of that evidence—and I should think without it the learned judge would have come to the same conclusion—he held that, having regard to the necessary or natural propensity of an animal like this colt, the defendant was guilty of a want of care in sending it out on the highway not under proper control and he held also that there was negligence on the part of the defendant and his servant, the boy, in not giving proper warning to the plaintiff.

Although cases like this have raised difficult questions, and although I do not think myself it is very easy to reconcile them all, especially the judgment in *Heath's Garages, Ltd. v. Hodges* (1), with the earlier judgment in the Court of Appeal in *Ellis v. Banyard* (2), I do not think that this case presents any real difficulties. There is no doubt that a person is entitled to use the highway reasonably. A man is entitled to drive a flock of sheep at night without carrying a light. There is no doubt also that, if a man possesses or owns ordinary domestic animals, the mere fact that such an animal or bird strays from his premises and causes some damage does not necessarily make the owner liable because some mischief has been done by it on a highway. But we are here dealing with an animal of a particular class and propensities. It was not an animal which witnesses said was not likely to do harm to passers-by, but which nobody who owned it could fail to know was likely to do harm to passers-by. It has been said that that evidence ought not to have been admitted; I do not agree. I do agree that the court has to take notice itself of the ordinary propensities of the domestic animals, but I see no objections to giving evidence to show that, under special and peculiar circumstances, a particular domestic animal exhibits habits which are dangerous to mankind. As I say, I should have thought that without this evidence the learned judge would have taken notice of the fact that a colt like this, especially in the dark, would be likely to do what this colt did. Assuming that to be the natural propensity of this animal under these circumstances, was there any negligence on the part of the defendant? To answer that question one must ask oneself: Is there any duty on the part of the defendant to take reasonable care when he turns an animal like this colt on to the highway without control? Negligence being a breach of duty, one must get at the solution of the problem by asking oneself: Is there a duty? In my opinion, there clearly is. There is that duty on the part of a person who owns a domestic animal, which under certain circumstances is likely to do harm if he turns it on to the highway, to take reasonable precautions to prevent the animal doing harm. LORD COZENS-HARDY, M.R., said so by implication in his judgment in *Heath's Garage, Ltd. v. Hodges* (1) ([1910] 2 K.B. at p. 376). That was a case not of a man turning an animal on to the highway, but of a farmer negligently allowing gaps in his fence through which his sheep strayed on to the highway and caused damage to a motor car. The Master of the Rolls says this:

"I am prepared to hold that in ordinary circumstances, in an ordinary highway, it is no breach of duty not to prevent harmless animals like sheep from straying on to the highway, and that it makes no difference whether the action is sought to be based on negligence or on a nuisance to the highway. An animal like a sheep, by nature harmless, cannot fairly be regarded as likely to collide with a motor car, and the owner of the sheep cannot be held liable on that footing."

The Master of the Rolls implies, therefore, that, if the animal, having regard to its propensities under such circumstances as these, is likely to come into collision with a person on a bicycle, or with a motor car, what he said does not apply; and in that case, if there is an absence or omission of duty to take reasonable care, a cause of action lies. I do not think it is necessary for us to say more than this. This colt was likely, on a dark night like this, at all events if not under control, to do exactly what it did; therefore, the defendant, without taking, as the judge found, reasonable care, turned out on the highway an animal likely to cause damage; the animal caused damage, not by doing something mischievous, of which tendency the owner was ignorant, but by doing exactly that which a colt under these circumstances was likely to do. If so, there is the negligence, and there is no want of connection between the negligent act and the damage; the damage flowed immediately from the negligence. I think that the learned judge was perfectly right in his judgment, and that this appeal ought to be dismissed.

A **BAILHACHE, J.**—I am of the same opinion. It seems to me that, in this case, this colt did exactly the damage which the owner of the colt must have anticipated that it would do if the circumstances arose which did in fact arise. Here is a colt, not led by a halter, not secured in any way, driven along a highway at night. In order to induce it to go quietly in the direction in which it was desired, an old mare, with which the colt had been brought up and was familiar, was led in front, and the natural tendency of the colt was to follow the mare, and that was relied on. The defendant came behind in a cart; no doubt the reason, or one of the reasons, of that was that, if the colt was startled, it was sure to dart back, and the defendant, the night being dark, did not want it to run away too far and give trouble to find again. It was being driven along a highway where it was to be anticipated that people would come with lights. The plaintiff came along riding a bicycle, with her lamp alight. It is common knowledge, and was proved, if it was necessary to be proved, that one thing more than another that will frighten an unbroken animal on a highway at night is an unexpected light, such as the bicycle light. The light did frighten the colt. It rushed back, was headed back by the cart, and, rushing about in the road, ran into and knocked down and injured the plaintiff. It seems to me, apart from authority, impossible to hold in those circumstances that there was no negligence on the part of the defendant in driving this colt in that way along this road in the dark. I attach a good deal of importance to the fact that it was dark, because it is perfectly right and proper to use the highway for driving cattle, whatever sort of cattle they are, or colts, along it, but the precautions that ought to be taken in the dark are quite different from those which need to be taken in the light. In the light people can see what there is, and can take some care of themselves. In the dark it is quite impossible to see, unless there is warning, and the learned judge finds that the plaintiff had not any warning.

E It seems to me that the test to be applied in all these cases is the test which was laid down by **ERLE, C.J.**, in *Cox v. Burbridge* (3). The Chief Justice says (13 C.B.N.S. at p. 436):

F "I take the well-known distinction to apply here, that the owner of an animal is answerable for any damage done by it, provided it be of such nature as is likely to arise from such an animal, and the owner knows it."

G Applying that test, it seems to me that this colt acted in precisely the same way in which a colt ought to be expected to act under the circumstances of this case, and did precisely the damage which such a colt, under such circumstances, ought to be expected to do. In *Hadwell v. Righton* (4) **BRAY, J.**, said this ([1907] 2 K.B. at p. 349):

"In the absence of anticipated danger, there is no room for the suggestion of negligence."

H If that be a proper test to apply, I ask myself this question: Ought there to have been an anticipation of danger? To my mind, that can only be answered in one way. Certainly there ought to have been an anticipation of danger, given the circumstances which arose in this case; and the circumstances of this case were circumstances which were quite likely to arise. There are other ways of getting a colt along a highway at night, and witnesses of experience say that a proper way is to lead it by a halter.

I It seems to me that it is impossible to say that the learned judge was wrong in law in saying that there was negligence in this case, and, once one arrives at the conclusion that it is impossible to say that he was erroneous in law, then the question becomes a question of fact, and from that question of fact there is, of course, no appeal to this court. On that ground alone, the learned judge's judgment must be upheld, but my own view is that the learned county court judge was absolutely and entirely right in the decision at which he arrived.

LUSH, J.—I should like to add that there has been handed up to me a report of the case, which was mentioned during the argument, of a man employing a drover to drive a cow and a calf: (*Pinn v. Rew* (5)). The judgment of the Divisional Court seems precisely in accord with the judgments which have just been delivered.

Appeal dismissed.

Solicitors: *Andrews, Fisher & Ogilvie*, for *W. P. Levick*, Leominster; *Metcalfe & Sharpe*, for *T. A. Mathews*, Hereford.

[*Reported by W. V. BALL, Esq., Barrister-at-Law.*]

KING v. DAVID ALLEN & SONS, BILLPOSTING, LTD.

[HOUSE OF LORDS (Lord Buckmaster, L.C., Earl Loreburn and Lord Atkinson), February 14, 1916]

[Reported [1916] 2 A.C. 54; 85 L.J.P.C. 229; 114 L.T. 762]

Licence—Breach of agreement—Performance impossible through licensor's own act—Licence to place advertisements on wall of premises to be built—Lease to company of premises by licensor—No term obliging lessees to give effect to licence—Refusal by lessees—Liability of licensor.

By an agreement, not under seal, dated July 1, 1913, entered into between the appellant (described as the licensor) and the respondents (described as the licensees), the appellant gave to the respondents permission to affix advertisements to the flank wall of a picture house, proposed to be erected by a company about to be formed, for a term of four years from November, 1913, or the first day the picture house should be opened for business, whichever should happen first, at a rent of £12 per annum. The picture house was built, but the lease from the appellant to the company contained no reference to the agreement of July 1. The company having refused to allow the respondents to use the wall, they brought an action for damages for breach of the agreement of July 1 against the appellant.

Held: the agreement did not create an interest in land, but it created merely a personal obligation on the part of the appellant to allow the respondents to use the wall for advertising purposes; he had put it out of his power to fulfil his obligation; and, therefore, he was liable in damages for breach of contract.

Decision of the Court of Appeal in Ireland ([1915] 2 I.R. 448), affirmed.

Notes. Referred to: *Walton Harvey, Ltd. v. Walker and Homfrays, Ltd.*, [1931] 1 Ch. 145; *Bendall v. McWhirter*, [1952] 1 All E.R. 1307.

As to licences in relation to land, see 23 HALSBURY'S LAWS (3rd Edn.) 427 et seq.; and for cases see 30 DIGEST (Repl.) 526 et seq.

Case referred to:

- (1) *Wilson v. Tavenor*, [1901] 1 Ch. 578; 70 L.J.Ch. 263; 84 L.T. 48; 30 Digest (Repl.) 541, 1753.

Also referred to in argument:

Tulk v. Moxhay (1848), 2 Ph. 774; 1 H. & Tw. 105; 18 L.J.Ch. 83; 13 L.T.O.S. 21; 13 Jur. 89; 41 E.R. 1143, L.C.; 40 Digest (Repl.) 342, 2774.

L.C.C. v. Allen, [1914] 3 K.B. 642; 83 L.J.K.B. 1695; 111 L.T. 610; 78 J.P. 449; 12 L.G.R. 1003, C.A.; 40 Digest (Repl.) 328, 2698.

James Jones & Sons, Ltd. v. Earl of Tankerville, [1909] 2 Ch. 440; 78 L.J.Ch. 674; 101 L.T. 202; 25 T.L.R. 714; 39 Digest 679, 2657.

- A** *Werderman v. Société Générale d'Electricité* (1881), 19 Ch.D. 246; 45 L.T. 514; 30 W.R. 33, C.A.; 36 Digest (Repl.) 821, 1783.
- Roffey v. Henderson* (1851), 17 Q.B. 574; 18 L.T.O.S. 154; 16 Jur. 84; 117 E.R. 1401; sub nom. *Ruffey v. Henderson*, 21 L.J.Q.B. 49; 31 Digest (Repl.) 225, 3622.
- B** *Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.*, [1902] 1 Ch. 146; 71 L.J.Ch. 158; 85 L.T. 652; 50 W.R. 177; 18 T.L.R. 161; 46 Sol. Jo. 121; 9 Mans. 56; 19 R.P.C. 69, C.A.; 36 Digest (Repl.) 833, 1862.
- Wickham v. Hawker* (1840), 7 M. & W. 63; 10 L.J.Ex. 153; 151 E.R. 679; 30 Digest (Repl.) 528, 1660.
- Kerrison v. Smith*, [1897] 2 Q.B. 445; 66 L.J.Q.B. 762; 77 L.T. 344; 30 Digest (Repl.) 539, 1732.
- C** *Perry v. Fitzhove* (1846), 8 Q.B. 757; 15 L.J.Q.B. 239; 7 L.T.O.S. 180; 10 J.P. 600; 10 Jur. 799; 115 E.R. 1057; 36 Digest (Repl.) 305, 509.
- A.-G. of Southern Nigeria v. John Holt & Co. (Liverpool), Ltd.*, [1915] A.C. 599; 84 L.J.P.C. 98; 112 L.T. 955, P.C.; 19 Digest 19, 56.
- North British Rail. Co. v. Park Yard Co., Ltd.*, [1898] A.C. 643; 25 R. (H.L.) 47; 35 Sc.L.R. 950; 6 S.L.T. 82; 19 Digest 31, p.
- D** **Appeal** by the defendant from an order of the Court of Appeal in Ireland (O'BRIEN, L.C., and RONAN and MOLONY, L.JJ.), affirming a judgment of the Divisional Court (DODD and MADDEN, JJ., KENNY, J., dissenting), which affirmed a judgment of GIBSON, J., awarding the respondents £80 damages for breach of contract.
- E** The facts are set out in the opinion of LORD BUCKMASTER, L.C.
- The Solicitor-General for Ireland (James O'Connor) and St. L. Devitt (Lardner with them)* (all of the Irish Bar) for the appellants.
- Denis Henry, K.C.*, and *J. Martin Whitaker* (both of the Irish Bar) for the respondents.

F **LORD BUCKMASTER, L.C.**—It is impossible to approach the consideration of this case without feeling and expressing great regret for the unfortunate position in which the appellant, Mr. King, has found himself. He seems to me to have acted throughout the whole of these transactions with perfect straightforwardness and with a sincere and anxious desire to discharge the obligation which he undertook towards the respondents; but, by circumstances which have passed beyond his control, there has, in my view, been a breach of his obligation to the respondents, and for that breach he must be made responsible.

G It appears that Margaret King, the mother of the appellant, had in 1889 entered into an agreement with a man named Dillon for the use by him of a certain space for billposting. The terms of that agreement have been referred to, and counsel for the appellant directed your Lordships' attention to the fact that those terms are of such a nature that they are in themselves applicable to the constitution of the relationship of landlord and tenant. It is not, however, necessary to determine what was the true legal effect of that contract, and for these reasons. While that contract was on foot the appellant, in whom the property had vested, was approached, apparently by a Mr. Farrell, who was anxious to establish a picture palace company in the district. For this purpose, he desired to obtain possession of the site on which the respondents had, in succession to Mr. Dillon, the billposting rights under the previous agreement. It was desirable, therefore, that this agreement should be ended and that a new agreement should be set on foot to give the respondents the rights that they desired in respect of premises that were then about to be built. I think it is plain that the respondents were well acquainted with the circumstances that then existed with regard to the use of this site, and that they knew quite well that it was intended that the company should be formed for the purpose of building on it, thus creating a new structure to which their bills might be affixed. With this knowledge, they entered into an agreement with the

appellant of July 1, 1913, on which the whole of the present dispute depends. It is an agreement which was made between the appellant of the one part and the respondents of the other, and, as part of the arrangement leading up to its execution, the previous agreement which had been made between the predecessor in title of the appellant and the predecessor in title of the respondents was cancelled and the new agreement took its place. In the new agreement, the appellant is referred to as licensor and the respondents as licensees. I only mention that fact for the purpose of making quite plain that I attach no importance whatever to these descriptions; they are nothing but a method of reference, and the names might just as well have been lessor and lessee as licensor and licensee. It is not on the use of those phrases that my view of this contract in any way depends.

The agreement itself is quite short, and begins with a clause which says that the appellant will grant to the respondents "permission to affix bills, posters, and advertisements to the flank wall" of the picture palace which is to be erected at the Royal Canal Bank "for a term of four years from Nov. 1, 1913, or the first day the said picture house shall be opened for business," and after that period of four years the document is to be capable of termination by either party on six months' written notice. The next clause provides that the respondents will pay a rent at the rate £12 per annum "so long as this licence remains in force." I attach some considerable importance to this phrase; it is the description in the body of the document of what the parties intended that the document should be, and it is stated in plain language that the description of the document is that of a licence. It is not a letting or a tenancy or anything of the kind, but a licence. And the same phrase is used in a similar connection later on in the agreement, in cl. 5. I have looked anxiously and carefully through this document to see whether it was possible to derive from its construction anything except the creation of a personal obligation between the appellant and the respondents with regard to the use of this wall, and I am unable to find it. There are two circumstances to which attention has been quite properly called by the appellant's counsel, which are, no doubt, important in considering what the agreement effected. The first is the fact of the rent reserved, and the next that there is a term of years granted and that arrangements are introduced into the agreement to prevent other people having competing rights with the respondents on this wall. Those considerations do not, in my opinion, necessarily conflict with the view that this is nothing but a licence—a licence for a fixed term of years, but a licence which creates no estate or interest in the land on which the palace is going to be built, nor an easement to which the land would be thereafter subject.

The subsequent history of the matter is this. A company was duly incorporated on Sept. 2, 1913, and, shortly afterwards, a meeting took place at which the appellant and other directors were present, and there was a discussion and consideration as to what should be done for the purpose of carrying out the arrangement on which the whole future of the company depended, the main part of which was that a lease should be granted to the company of the site on which the building was to stand. At that meeting, a resolution was passed which adopted a prior agreement dated Aug. 29, 1913, made by the appellant with a trustee for the company, that agreement being one by which the company were to take a lease of the premises and to take an assignment of the billposting agreement of July 1. It appears that the lease was executed; it was in proper form, but it contained no reference whatever to the rights of the respondents under the billposting agreement, and no reservation indicating on the face of the document that any rights whatever were reserved out of the demise. In the view that I take of the document of July 1, 1913, I do not think any such reservation was necessary, for the simple reason that no such estate or interest had been created in favour of the respondents; and, indeed, it is plain when the documents are considered that the whole arrangement was intended to be made complete, not by any reservation in the lease, but by an assignment to the company of the benefit of the billposting agreement together

A with its obligation, and, for reasons which are not material, that assignment has never been completed. Had that been done, all the trouble caused by this litigation would have been at an end. It undoubtedly would have bound the company not to interfere with the respondents' rights to put up their bills, and would also have rendered the company directly responsible to the appellant for any breach of their obligations not to interfere. I desire to say no more about that matter for this reason, that it may well be that there are yet rights between the appellant and the company which will enable him to obtain against them either the execution of such further document or a declaration that they are liable to indemnify him for the wrongful act which has taken place. For what has occurred is this. The company, having entered into possession of the premises under the lease and having built the picture palace, forthwith refused to permit the respondents to post their bills, although the company had known throughout that the lease which they had taken of the premises was a lease which had been granted by the appellant, who had contracted with the respondents that they should possess the right of posting their bills against this wall. It is obviously a very undesirable thing to say any words by way of criticism of persons who are not represented before your Lordships' House, and I will, therefore, pass by the temptation to comment on this action of the company, an action which appears to have been insufficiently and, indeed, inaccurately explained in some of their letters.

The matter, then, is left in this way. There is a contract between the appellant and the respondents which creates nothing but a personal obligation. It is licence given for good and valuable consideration and to endure for a certain time. But I fail to see—although I have done my best to follow the many authorities which E counsel for the appellant has thought it right to place before our consideration—that there is any authority for saying that any such document creates rights other than those I have described. *Wilson v. Tavener* (1) was, indeed, referred to, but it really affords no assistance, for there the right conferred was to erect a hoarding on the defendant's ground, while in the present case the sole right is to fix bills against a flank wall, and it is unreasonable to attempt to construct the relationship of landlord and tenant or grantor and grantee of an easement out of such a transaction, and I find it difficult to see how it can be reasonably urged that anything beyond personal rights was ever contemplated by the parties. Those rights have undoubtedly been taken away by the action on the part of the company, who have been enabled to prevent the respondents from exercising their rights owing to the lease granted by the appellant, and he is, accordingly, liable in damages, although it was certainly not with his will, and, indeed, against his own express desire, that the company has declined to honour his agreement. For these reasons, I am of opinion that this appeal must be dismissed.

H **EARL LOREBURN.**—I agree in the opinion expressed by the Lord Chancellor, and with him I greatly regret the position in which the appellant has been placed, which seems to me to be hard on him. He has behaved perfectly honestly in the whole business, and one cannot help regretting the expense to which he has been put.

I have very little to add to what has been said, but I look at the case in this way. The respondents say that the appellant promised them for four years the use of a certain wall for advertising purposes by the agreement of July 1, 1913, and they say that, after that, the appellant demised that land, and that the appellant's lessees refused to make good the promise in regard to advertisement. If the agreement of July 1, which purports to be on the face of it a licence, was equivalent to creating an incorporeal hereditament or a sufficient interest in land, the appellant did not break his contract in making the lease, and would not be responsible for any trespasses that were committed by his licensees. But we must look at the document itself, and it seems to me that it does not create any interest in land at all; it merely amounts to a promise on the part of the appellant that he would allow the

other party to the contract to use the wall for advertising purposes, and there was an implied undertaking that he would not disable himself from carrying out his contract. Now the appellant has altered his legal position in respect of his control of this land. Those to whom he granted the lease have disregarded his wishes and refused to allow his bargain to be carried out, and they have been practically enabled to do so by reason of the demise that he executed. In these circumstances, it seems to me that there has been a breach in law of the contract of July 1, and that the appellant has disabled himself from giving effect to it as intended by parting with his right to present possession. That is enough to establish a case for damages against the appellant. There may be a remedy over against the lessees. I say nothing of that, because they are not here, and I do not wish either to encourage or discourage any further proceedings; but this, I think, is clear: That the existence of such a remedy, if remedy there be, does not release the appellant from his liability to answer for breaking the contract which he made.

LORD ATKINSON.—I concur and I have nothing to add.

Solicitors: *Ellis, Leathley, Willes & Gavan Duffy*, for *John J. McDonald*, Dublin; *Sweepstone, Stone, Barber & Ellis*, for *Stewart & Orr*, Dublin.

[Reported by *W. E. REID, Esq., Barrister-at-Law.*]

ATTORNEY-GENERAL (ON THE RELATION OF PICKFORDS, LTD.) v. GREAT NORTHERN RAIL. CO.

[HOUSE OF LORDS (Lord Buckmaster, L.C., Earl Loreburn, Viscount Haldane, Lord Shaw and Lord Sumner), May 9, 11, 12, June 6, July 21, 1916]

[Reported [1916] 2 A.C. 356; 85 L.J.Ch. 717; 115 L.T. 235; 80 J.P. 337; 32 T.L.R. 674; 60 Sol. Jo. 665; 14 L.G.R. 997]

Bridge—Bridge over railway—Maintenance by railway company—Need to provide for increase of traffic—"Maintain"—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict., c. 20), s. 46.

By s. 46 of the Railway Clauses Consolidation Act, 1845; "If the line of the railway cross any . . . highway, then . . . either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge, of the height and width and with the ascent or descent by this or the special Act in that behalf provided; and such bridge, with the immediate approaches, and all other necessary works connected therewith, shall be executed and at all times thereafter maintained at the expense of the company . . ."

The duty imposed on the railway company by this section is to maintain the bridge in the condition in which it was constructed, and not to enlarge and strengthen it from time to time to meet the needs of modern traffic of increased amount and weight which was unforeseen when the bridge was built.

So **held** by LORD BUCKMASTER, L.C., EARL LOREBURN, LORD SHAW, and LORD SUMNER, VISCOUNT HALDANE dissenting.

Per LORD SUMNER: "Execute" cannot be construed as "re-execute," and "maintain" does not mean "maintain and alter." Maintenance is, in itself, a word which is not indicative of, but negatives, change.

Notes. Applied: *A.-G. for Ireland v. Lagan Navigation Co.*, [1924] A.C. 877. Considered: *Manchester Corpn. v. Audenshaw U.D.C.* [1928] All E.R. Rep. 314;

- A** *London and North Eastern Rail. Co. v. North Riding of Yorkshire County Council*, [1936] 1 All E.R. 692. Referred to: *Swain v. Southern Rail. Co.* [1938] 3 All E.R. 705; *Copps v. Payne*, [1950] 1 All E.R. 246; *Lloyds Bank, Ltd. v. Railway Executive*, [1952] 1 All E.R. 1248.

As to the construction and maintenance of bridges over railways, see 31 HALSBURY'S LAWS (3rd Edn.) 588-592, and for cases see 38 DIGEST (Repl.) 301 et seq. For Railway Clauses Consolidation Act, 1845, see 19 HALSBURY'S STATUTES (2nd Edn.) 590.

Cases referred to:

- (1) *Sharpness New Docks and Gloucester and Birmingham Navigation Co. v. A.-G.*, [1915] A.C. 654; 84 L.J.K.B. 907; 112 Sol. Jo. 381; 13 L.G.R. 563, H.L.; 26 Digest (Repl.) 647, 2925.
- C** (2) *R. v. Inhabitants of Kent* (1811), 13 East 220; 104 E.R. 354; 38 Digest (Repl.) 442, 944.
- (3) *R. v. Inhabitants of Lindsey* (1811), 14 East 317; 104 E.R. 623; 26 Digest (Repl.) 646, 2920.
- D** (4) *R. v. Kerrison* (1815), 3 M. & S. 526; 105 E.R. 708; 26 Digest (Repl.) 646, 2921.
- (5) *R. v. Inhabitants of Isle of Ely, Old Bedford Bridge and New Bedford Bridge Cases* (1850), 15 Q.B. 827; 4 New Mag. Cas. 128; 4 New Sess. Cas. 222; 19 L.J.M.C. 223; 15 L.T.O.S. 412; 14 J.P. 512; 14 Jur. 956; 4 Cox, C.C. 281; 117 E.R. 671; 26 Digest (Repl.) 646, 2913.
- E** (6) *Hertfordshire County Council v. Great Eastern Rail. Co.*, [1909] 2 K.B. 403; 78 L.J.K.B. 1076; 101 L.T. 213; 73 J.P. 353; 25 T.L.R. 573; 53 Sol. Jo. 575; 7 L.G.R. 1006, C.A.; 26 Digest (Repl.) 654, 2990.
- (7) *Macclesfield Corp'n. v. Great Central Rail. Co.*, [1911] 2 K.B. 528; 80 L.J.K.B. 884; 104 L.T. 728; 75 J.P. 369; 9 L.G.R. 682, C.A.; 26 Digest (Repl.) 647, 2922.
- F** (8) *A.-G. v. Great Western Rail. Co.* (1877), 4 Ch.D. 735; 46 L.J.Ch. 192; 35 L.T. 921; 25 W.R. 330, C.A.; 38 Digest (Repl.) 284, 13.

Also referred to in argument:

- R. v. Inhabitants of Devon* (1825), 4 B. & C. 670; 7 Dow. and Ry. K.B. 147; 3 Dow. & Ry. M.C. 346; 4 L.J.O.S.K.B. 34; 107 E.R. 1210; 26 Digest (Repl.) 652, 2971.
- G** *West Lancashire Rural Council v. Lancashire and Yorkshire Rail. Co.*, [1903] 2 K.B. 394; 72 L.J.K.B. 675; 89 L.T. 139; 67 J.P. 410; 51 W.R. 694; 19 T.L.R. 625; 47 Sol. Jo. 693; 1 L.G.R. 788; 38 Digest (Repl.) 321, 205.
- Lancashire and Yorkshire Rail. Co. v. Bury Corp'n.* (1889), 14 App. Cas. 417; 59 L.J.Q.B. 85; 61 L.T. 417; 54 J.P. 197, H.L.; 38 Digest (Repl.) 312, 147.
- H** *Hertfordshire County Council v. New River Co.*, [1904] 2 Ch. 513; 74 L.J.Ch. 49; 91 L.T. 796; 68 J.P. 552; 53 W.R. 60; 20 T.L.R. 686; 48 Sol. Jo. 641; 3 L.G.R. 64; 26 Digest (Repl.) 652, 2976.
- Caledonian Rail. Co. v. Glasgow Corporation*, [1909] A.C. 138; 78 L.J.P.C. 52; 99 L.T. 784, H.L.; 38 Digest (Repl.) 314, 155.
- I** *Lloyd v. Ross*, [1913] 2 K.B. 332; 82 L.J.K.B. 578; 109 L.T. 71; 77 J.P. 341; 29 T.L.R. 400; 11 L.G.R. 503; 23 Cox, C.C. 460, D.C.; 42 Digest 870, 195.
- R. (on the prosecution of Poplar Board of Works) v. East and West India Dock Co.* (1888), 60 L.T. 232; 53 J.P. 277; sub nom. *Re East and West India Dock Co.*, 5 T.L.R. 151, D.C.; 26 Digest (Repl.) 647, 2924.

Appeal by the Attorney-General as relator from a decision of the Court of Appeal reversing one of WARRINGTON, J.

The facts appear in their Lordships' opinions.

Sir Robert Finlay, K.C., Ernest Charles, K.C., and Jowitt for the Attorney-General.

Sir John Simon, K.C., Tomlin, K.C., Vernon, and Andrewes-Uthwatt for the railway company.

The House took time for consideration.

July 21, 1916. The following opinions were read.

LORD BUCKMASTER, L.C.—The question raised in this case is of unusual importance. On the one side it involves an undoubted limitation of the rights of user of public roads carried by a bridge over the lines of a railway company, and on the other it may throw upon railway companies the obligations of reconstructing such bridges from time to time to meet the growing demands of heavy modern traffic. The circumstances under which this case has arisen must exist in many instances, and they are likely to increase.

The respondent company, by their statute passed in 1867, acquired the undertaking of another railway company known as the Edgware, Highgate, and London Railway Co., and thereby became subject to all the obligations imposed by the special Acts and the public statutes incorporated therewith which had formerly been borne by the original undertakers. The Edgware company had been incorporated by a private Act passed in 1862, by s. 1 of which it was provided that the Railways Clauses Consolidation Act, 1845, should be incorporated with and form part of the special Act, while by s. 19 the company was authorised to make and maintain the railway in accordance with the deposit plans and sections. The plans which were deposited showed a bridge, which is the bridge in question in these proceedings, by means of which a public highway, known as Crouch End Hill, in the county of Middlesex, through which the railway was to run, was to be carried over the railway. The railway was completed before its acquisition by the respondent company, and the bridge was built for the purpose of carrying the road. There is no dispute that at this time, and for many years afterwards, the bridge was in all respects adequate for the purpose of carrying the proper and ordinary traffic that passed over the road. At some later date, however, though the date is nowhere expressly specified, two waterpipes of 12 in. diameter, which were carried across the bridge when it was constructed, were removed, a waterpipe of 20 in. diameter substituted, and three additional waterpipes, two of 15 in. and one of 12 in. were added. The railway company admitted liability to strengthen the structure of the bridge, so as to provide the same margin of strength over that required to bear the new waterpipes as the margin that existed formerly over that needed for the old, and it would not have been necessary to refer to this matter at all were it not for the fact that the proceedings out of which this appeal has arisen appear, in the first instance, to have been based upon the allegation that the bridge had been so weakened by the added strain of the heavier pipes as to deprive the road that was carried over it of the support which it formerly enjoyed, but even if this were the original ground of complaint, the true dispute that has arisen, and upon which decision is required, is entirely independent of the question of these pipes, and arises in this way.

Pickfords, Ltd., have placed upon the road heavy motor engines which the bridge is unfitted to bear. They allege, and for the purpose of this case it may be assumed, that the passage of such vehicles would not be regarded as extraordinary traffic upon other portions of the road, and they say that the obligation cast upon the railway company is from time to time to strengthen and, if necessary, to rebuild the bridge, so as to carry all the traffic, whatever it may be, which can lawfully pass over the rest of the road. This is the real question involved in the appeal.

There was no specification as to the strength and character of the bridge contained in the special Act under which the railway was constructed. The obligation under which the railway company rests is that imposed by s. 46 of the Railways

A Clauses Consolidation Act, 1845, which, as I have stated, was incorporated in the special Act authorising the construction of the railway. This section is in these terms :

B "If the line of the railway cross any turnpike road or public highway, then (except where otherwise provided by the special Act) either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge, of the height and width and with the ascent or descent by this or the special Act in that behalf provided; and such bridge, with the immediate approaches, and all other necessary works connected therewith, shall be executed and at all times thereafter maintained at the expense of the company: Provided always, that, with the consent of two or more justices of petty sessions, as after mentioned, it shall be lawful for the company to carry the railway across any highway, other than a public carriage road, on the level."

C The statute contains no definition whatever, nor indeed would it be required, of the height of a bridge that carries the road. It is only the height of a bridge that crosses a road, to which reference is made in the subsequent section of the Act. So far as a bridge carrying a road is concerned, the only material provisions are those contained in ss. 50 and 51, and these specified only the width, the fences, and the ascent to the bridge. In this case it is admitted that the bridge was originally adequate, and I think the provisions that secure its adequacy are more effective than the appellant in argument was prepared to admit. It is urged by the appellant that these provisions create no standard of strength, and that this can only be formed by making the bridge satisfy the essential condition that it must carry the road and the traffic that the road from time to time must bear.

E By s. 4 of the Railway Regulation Act, 1842, provision is made that no railway shall be opened until after notice to the Lords of the Committee of Her Majesty's Privy Council, appointed for trade and foreign plantations, which is now the Board of Trade, and by s. 6, if on inspection there is reason to think that by any incompleteness of the works the opening of the railway would be attended with danger, the opening of the railway may be postponed until it appears that such opening can safely take place. The works undoubtedly include the bridges which carry the roads, and regulations made under this statute require the deposit of the plans showing the structure of those bridges in order that their strength may be ascertained. These considerations only show the means by which the adequacy of the bridge is first established. They do not touch the question whether the liability under s. 46 is to maintain the bridge which has been so passed or to maintain any bridge that may hereafter be required.

G This question, which is one of undoubted difficulty, would have been attended with far greater uncertainty had it not been for the decision of this House in *Sharpness New Docks and Gloucester and Birmingham Navigation Co. v. A.-G.* (1).

H In that case a canal company were proposing to take their canal through a highway, and the Act which authorised the construction of the works provided that this highway should be carried by a bridge of such dimensions and in such manner as the commissioners should approve, and obligations were cast upon the canal company to maintain such bridge. The case decided two important and relevant matters. First, that where a private Act casts upon a corporation the burden of maintaining a particular bridge which carries a highway across their works, the question of what would be the common law liability of the person who had intercepted a highway under similar circumstances was irrelevant for the purpose of construing the statute. If the statute imposed the duty of maintaining a defined structure, that liability was the true limit of the obligations of the company. Secondly, that an obligation expressed in general terms "from time to time to maintain and support" such a bridge did not involve the rebuilding of the structure and was only consistent with maintaining the structure that had once been erected. If, therefore, s. 46 in this case imposes upon the railway company the obligation

only of repairing a particular bridge—namely, the bridge which was properly erected to carry the road when the railway was made—then all outside considerations as to what the obligations might have been apart from the statute become irrelevant, and no greater duty than that of maintaining such a bridge is cast on them by the statute.

In my opinion, this is all that the statute does. The road is to be carried by the bridge, and it is such a bridge, with the immediate approaches and all other necessary works, which has to be executed and thereafter maintained at the company's expense. I cannot think that these words mean that such bridge is to be a changing and varying structure, altered from time to time to meet the growth of traffic wholly unforeseen and unexpected when the railway was made. There are no words in the section that imply that the structure, when once properly made to bear the road, has ever to be rebuilt in a new and strengthened form, and the only way in which the appellant urges that this meaning can be introduced into the language of the Act is by saying that the road itself is a varying and inconstant quality, and that the bridge must carry the road whatever the road may be. This, I think, puts upon the word "road" a meaning that, in this connection, it is not authorised to bear. The bridge is only bound to carry the road through which the railway passes, and that is the road determined at the moment when the railway is built, for it does not follow at all that the road within the meaning of the section is the same thing as the use of the road, which may change from time to time. I think, further, confirmation of this view is to be found in the section which relates to the widening of a bridge in case the original construction is of inadequate width. It is a remarkable thing that the Act expressly provides the way in which the road is to be altered so as to be made wider if the increased demands of traffic require it, while no corresponding provision whatever is to be found as to its being made stronger in case the traffic becomes more burdensome. In this view of the case it is not necessary to consider whether SWINFEN EADY, L.J., was correct in thinking that under s. 66 there was power to refer any doubt as to the strength of the original structure to the Board of Trade. It is urged by the appellant that such reference could only be made where there was an attempted deviation from the compliance of the terms of the statute, and the learned lord justice undoubtedly assumes that the power extends to all questions arising on construction, whether the provisions of the Act are departed from or no. I am far from saying that his view in this matter is incorrect, but this it is unnecessary to decide. It is, however, useful to notice that when the certificate is given, the certificate, if it related to a bridge, would be a certificate that the bridge was constructed in conformity with the provisions of the Act. It is the bridge constructed in conformity with the provisions of the Act which the railway company are bound to maintain, and they are, in my opinion, subject to no further or added liability.

I have avoided expressing any opinion upon the question how far traffic of an unusually heavy character placed for the first time upon a road constitutes a lawful user of the highway. It may well be that such traffic is of such a nature that its presence may constitute a nuisance, and that the use of the highway thereby may be unlawful; and, if this be so, no repeated succession of unlawful acts could ever make the user right. But apart from this, there may be unusually heavy traffic, which, originally extraordinary traffic, upon a particular road becomes ordinary owing to the changed circumstances of the district through which the road runs, and I have throughout assumed that it is this latter form of traffic which Pickfords, Ltd., desire to place on the road, and which the bridge is unfit to bear. In my opinion the judgment of the Court of Appeal was right and this appeal should be dismissed with costs.

EARL LOREBURN.—The point in this appeal is quite short and has already been stated. In my opinion, the Court of Appeal were right. What the railway

A company was required long ago to build consisted of a specific structure to be built so as to comply with given conditions. It was built in compliance with those conditions to the satisfaction of those concerned, so far as we know, and has stood ever since. That was the thing which the railway company had to maintain with the road on the top of it. If the language of the Act imposed upon this company either the duty of originally building a bridge of size, strength, and quality sufficient to meet all possible requirements of the future, or the duty of from time to time reconstructing the bridge so as to keep pace with successive advances in the carriage of heavy traffic along roads, then of course it would be binding upon me. I find no such language, but merely a direction to build a bridge and maintain it together with the road upon it. Whether or not the strength or the details are specified in the Act seems to me of no importance, provided that the thing built complies with what the Act requires. If the Act merely directs a bridge to be built, then it would be a bridge reasonably suitable according to the standard at the time for the purpose designated. The railway company is not called upon to do more. I agree with LORD SUMNER's opinion as to what the Act does require. If traffic heavier than the prescribed bridge will bear is placed upon the road the fault is not with the bridge or those who have to maintain it and the road over it, but with the people to whom Parliament has secured a way with a certain measure of strength and who think fit to place upon it weights in excess of that measure. *Sharpness New Docks and Gloucester and Birmingham Navigation Co. v. A.-G.* (1), as I understand the decision, is in accordance with this view. I thoroughly agree with that decision. Even if I did not agree with it, I should be obliged to follow it. But if some of the language used in the debate on that case bears the construction sought to be placed upon it in the argument at the Bar, then I should respectfully differ and should say that it was not necessary for the decision. To my mind, there is not any legal presumption in regard to the construction of an Act of Parliament such as was pressed upon us. There have been, it is true, expressions of opinion by very high authorities. But the Act speaks for itself and the law does not, I think, attach to its construction any rule beyond the ordinary canons of construction. I do not follow the view that any special presumption can be invoked for the purpose of interpreting an Act which authorises the interruption of a highway. When the Act imposes a duty of repairing the newly-made road you would naturally, though not necessarily, expect the new authority to be invested with the same obligations as its predecessor, but the burden may be made heavier or lighter. I see no presumption of law either way. In the present case, and I think in most if not all cases, the Act itself says what is to be done. Here it says, to be sure, that the road is to be maintained—the road across the bridge. I cannot read that as meaning that the railway company may be called on to pull down the bridge or alter its character in order to suit the road's new burdens, if there are such burdens. For these reasons I am of opinion that this appeal fails. I express no opinion in regard to the duty of road authorities to make provision for special kinds or degrees of traffic. The question does not arise here because the duty of the railway company as to the support of the road by the bridge depends on statute. It is a difficult question and will require full argument.

VISCOUNT HALDANE.—I regret that I am unable to concur in the conclusion to which I gather that the majority of your Lordships have come in this case. The question is whether the Court of Appeal were right in holding that the obligation of the respondents was limited to the maintenance of the bridge which carries the public highway from Hornsey Road to Crouch End over their railway merely in the same condition as to strength in relation to traffic as it was at the date of its completion some forty-eight years ago, and that the obligation did not extend to maintaining the bridge, by improving and strengthening it where necessary for the purpose, in such a fashion as to enable it to bear the ordinary traffic of the district coming along that public highway, which might reasonably be expected to

pass over it according to the standard of the present day. The highway with which the controversy is concerned was severed by the Edgware, Highgate, and London Railway Co., in the exercise of statutory powers conferred on it by a special Act of 1862, which incorporated the Railways Clauses Consolidation Act, 1845. Pursuant to obligations imposed by s. 46 and other sections of the latter and general Act, the bridge in question was constructed. Under a later statute the respondents have succeeded to the obligations of the original company.

Questions resembling, in point of principle, that before us, have come before the courts in a series of cases, of which the following are examples: *R. v. Inhabitants of Kent* (2), *R. v. Inhabitants of Lindsey* (3), *R. v. Kerrison* (4), *R. v. Inhabitants of Isle of Ely, Old Bedford Bridge and New Bedford Bridge Cases* (5), *Hertfordshire County Council v. Great Eastern Rail. Co.* (6), and *Macclesfield Corpn. v. Great Central Rail. Co.* (7). I think that a principle has been developed by the decisions of the court in these cases, and that it is one which commends itself on general grounds as well as by reason of the weight of a series of authorities. The principle is that where persons acting under statutory powers conferred on them for their own convenience, interrupt a highway, they will, unless the statute provides otherwise, be presumed to be under an obligation to construct such works as will restore to the public the use of the highway, and to maintain the works at their own expense in a condition adequate to the public need. When, under such circumstances, the public road which has been interrupted is restored by being carried on a bridge, the bridge and the road, which thus forms part of it, must be kept up to such a standard as will admit of the public enjoying the facilities for ordinary traffic over the road that they would have had if the interruption had not taken place, and if the substituted works had not been executed. This principle can, of course, be excluded if the legislature thinks fit to do so in unambiguous words. As LORD DUNEDIN observed in the recent case of *Sharpness New Docks and Gloucester and Birmingham Navigation Co. v. A.-G.* (1), if the statute which authorises the works goes on to define what are to be the rights and obligations following from the execution of the statutory act, it is in the language of the legislature, and there alone, that rights and remedies are to be looked for.

It is said that in the present appeal we are bound by the decision in the *Sharpness Case* (1). I took a leading part in advising the House as to the decision which was then given, and I am not likely to be wanting in loyalty to the view taken by this House on that occasion. But what was that view? Certainly not that we were laying down any novel principle, or making a precedent which would be decisive in the construction of a statute differing substantially from that which we were then construing. All the House did was to interpret the particular language of a private Act in order to ascertain whether the Act itself contained such an exhaustive definition of rights and duties as would, in accordance with LORD DUNEDIN's canon, exclude the general principle to which I referred at the outset as imposing an obligation if the statute did not exclude it. With all deference to those who think otherwise, I am quite unable to read the judgment of this House in the *Sharpness Case* (1) as having done more than interpret a particular set of words. And in interpreting other words in another statute such a judgment can render no more assistance than that which is derived by a court which has to construe a will of personal estate from decisions on other and differently worded wills. In the *Sharpness Case* (1) the private Act appointed commissioners who were to determine what should be done, and provided that the company were not to

"make the said canal . . . across any common highway . . . until they shall . . . have made and perfected such bridges . . . across such highway . . . and of such dimensions and in such manner as the commissioners . . . shall adjudge proper; and all such . . . bridges . . . to be made shall from time to time be supported, maintained, and kept in sufficient repair by the said company."

- A These words were interpreted as giving the commissioners a complete discretion as to strength, materials, and any other particulars, and as enabling them to look ahead and take account of future developments of traffic. The bridges which were to be made, and from time to time maintained and supported, as the commissioners should determine, were constructed in a fashion approved by them in 1812, and, as so constructed, were maintained at the standard which the
- B commissioners had in 1812 determined as that which was to regulate their construction once for all. The House of Lords held that the words used prescribed unambiguously the extent of an obligation which, by its terms, excluded a standard higher than that which the commissioners had prescribed. It was for the latter to consider and finally prescribe the standard. When they had certified what was to be made and perfected, with a view to the future, it might be, as well as to the
- C past, they had defined the extent of the duty of the company and became functi officio.

The words of s. 46 of the Railways Clauses Act, 1845, are very different. To begin with, there are no commissioners introduced whose decision is to prescribe the obligation. The road is simply directed in general terms by the statute to be carried over the railway by means of a bridge. The only standards prescribed as standards by which the obligation to construct the bridge is in terms regulated are standards relating exclusively to height and width and to ascent and descent. As to strength and material, which were equally within the unlimited power of prescription of the statutory commissioners in the *Sharpness Case* (1), not one word is said in s. 46. If obligations of the railway company as to these were intended to be excluded from the operation of the general principle which the

D decided cases have, as I believe, established, one would expect to find an intention to that effect expressed in the section, more particularly as it has provided for the particular cases of height and width. But all that is said in s. 46 is that

- E "such bridge [that is, the bridge by which the road is directed in general terms to be carried over the railway], with the immediate approaches, and all other
- F necessary works connected therewith, shall be executed and at all times thereafter maintained at the expense of the company."

If this be really all that is said in the statute it would seem to me plain that the duty to maintain the road which the bridge includes extends to the necessities of the ordinary traffic which the public are from time to time entitled to bring along the road. This conclusion is, in my opinion, the only one which is consistent with

G the general principle established by the authorities to which I have previously referred, and also with another principle which was not seriously questioned in the argument for the respondents, that the body which is charged with the duty of maintaining a highway has to maintain it in a condition which will enable it to carry the ordinary traffic on that highway in whatever form that ordinary traffic may develop.

- H If this be so, the duty of the respondents is to do what is necessary to strengthen the bridge, so that it may be adequate to the requirements of the ordinary traffic of to-day on the road. It is suggested that other sections in the Railway Regulation Act, 1842, and in the Railways Clauses Act show that there is no such duty on the company. I have examined the sections referred to and I do not think they bear
- I out this contention. Turning first to s. 6 of the Railway Regulation Act, 1842, this section only enables a government Department to postpone the opening of the railway in case the government inspector shall report that such opening would be attended with danger to the public "by reason of the incompleteness of the works." Surely that must mean incompleteness at the time of their original construction. Section 49 of the Railways Clauses Act relates only to the case of bridges which carry the railway over roads, and makes provision in that event for the regulation of the width and height of arches. Section 50 deals with bridges to be erected for carrying roads over railways, but it prescribes nothing, excepting

as to fences and to width and ascent, to which s. 46 had already referred. Section 51 enacts that where the width of the road is itself less than the width prescribed for the bridge by s. 50, the width of the latter may be diminished correspondingly, but must be increased correspondingly up to the prescribed maximum if the width of the road is thereafter increased. Section 65 enables the justices, on the application of the surveyor of roads, or of any two householders of the parish or district, to compel the company to maintain or keep in repair any bridge which is found to be out of repair. Section 66 provides that in case any difference shall arise between the company and any authority empowered to enforce the construction of the roads, bridges, or works as to the construction, alteration, or restoration of the same, the Board of Trade may decide on the proper manner of such construction, alteration, or restoration, and authorise any arrangement or mode of construction which shall appear to them to be in substantial compliance with the provisions of the Railways Clauses Act or the special Act, provided that they are satisfied that existing private rights or interests will not be injuriously affected thereby. I am unable to see that any of these sections which I have just referred to affect the construction of s. 46 on the only point which is material in this appeal. As to s. 46 itself, I think that, for the reasons I have stated, it is an enactment of radically different structure from that which was interpreted by this House in the *Sharpness Case* (1). It appears to me that, unlike the latter enactment, its language does not exclude the operation of the general principles to which I have adverted, and that accordingly the judgment of the Court of Appeal was wrong.

LORD SHAW.—In my opinion, the obligations of the respondents are to be measured by the language of the statutes under which the railway was constructed and the bridges made.

By the Edgware, Highgate, and London Railway Act, 1862, it was provided that the Railways Clauses Consolidation Act, 1845, should be incorporated with and form part thereof. The bridge which is in question in this case was constructed between the years 1862 and 1867 in accordance with the various railway statutes and the requirements thereunder of the Board of Trade. So far as the Consolidation Act of 1845 is concerned the obligation was in the terms already quoted—the road was to be “carried over” the railway “by means of a bridge of the height and width and with the ascent or descent by this or the special Act in that behalf provided,” and such bridge and the works connected therewith “shall be executed and at all times thereafter maintained at the expense of the company.” There are two views of this section, and at the present very critical development of road traffic in England the question at issue between the parties is of great importance. Road traffic has so developed, and in particular in certain districts, local requirements have so changed, in recent years, that great alterations have been necessitated in order to give the accommodation and the strength which these developments require. In the present case it is conceded that heavy road motor traffic is legitimately placed upon the roads, but would subject the existing bridge to a strain which it is unable from its structure to bear. It is accordingly demanded that the road, thus necessarily altered, strengthened, and, it may be, enlarged throughout the district, should be linked up by the bridge so as to be “carried” to the full effect of enabling the purpose of through-going traffic to be achieved. The other view is that such alterations, strengthenings, and enlargement, however expedient, do not fall within the scope of the obligation of maintenance, which, and which alone, falls upon the railway company. The Court of Appeal has decided that the respondents

“are liable to maintain the bridge in question in the same condition as to strength in relation to traffic as it was at the date of its completion, but that the defendants are not under any liability to improve and strengthen the bridge to make it sufficient to bear the ordinary traffic of the district which may be

A reasonably expected to pass over it according to the standard of the present day."

This is a strong, clear, and wide pronouncement, and it was argued that the result of it will be to render the heaviest through-going traffic impossible, and that in that way the network of road accommodation throughout the country must be broken by the bridge described, and by all others in similar case.

B In *Hertfordshire County Council v. Great Eastern Rail. Co.* (6) MOULTON, L.J., said ([1909] 2 K.B. at p. 412):

C "In my opinion the law, as settled by the cases of *R. v. Inhabitants of Kent* (2), *R. v. Inhabitants of Lindsey* (3), *R. v. Kerrison* (4) and *R. v. Inhabitants of Isle of Ely, Old Bedford Bridge and New Bedford Bridge Cases* (5), practically amounts to this: that where persons, acting under statutory authority, for their own purposes interrupt a highway by some work which renders it impossible for the public to use it, an obligation is *prima facie* imposed upon them to construct such works as may be necessary to restore to the public the use of the highway so interrupted, and that the obligation so imposed is of a continuing nature, involving not only the construction of such works, but also their maintenance."

D Were this important matter, my Lords, left to be settled upon a general principle, it appears to me to be not improbable that the one thus enunciated by MOULTON, L.J., might be found a safe guide in the solution of the practical difficulty which has emerged. But, in view of the judgment of this House in the *Sharpness Case* (1), I do not feel myself able to hold that the proposition so expressed can now be maintained to be law. As was said in that case by the noble and learned viscount who has preceded me, where statutory provisions are made, it is they which form the rule of liability if the statute "contains a set of provisions which appear on their face to be exhaustive . . ." Referring to s. 61 of the Act then under consideration, he observed that it "does not appear to me to admit of any resort to the assumption based on the analogy of the common law." In the judgment of LORD DUNEDIN the cases founded on by MOULTON, L.J., are examined, and there my noble friend said ([1915] A.C. at p. 663) that he was unable to agree with the dictum, "which, in my opinion, is too broadly expressed, as it would import a common law obligation running side by side with the expressed statutory obligations." LORD PARKER OF WADDINGTON said ([1915] A.C. at p. 669):

G "It is one thing to rely upon a common law principle where a statute is silent; it is quite another thing to invoke a common law principle in order to impose obligations different from or in addition to the obligations which are defined by the statute."

This is also the view of LORD PARMOOR.

H It is thus vital to see what was the extent of the statutory obligation in the present case. The appellant argued that the railway company's obligation was that "such road shall be carried over the railway," and that this involved that, as the road traffic developed and the road required additional dimensions and strength, so with the bridge, which otherwise would not be carrying the road. The consequence of such an argument might result in much public convenience: but, of course, it would involve an enormous addition to railway obligations. The reply to this argument was that the statutory obligation was not left in the general terms of merely carrying over such road, but that the means were prescribed by which this obligation was to be performed—namely, "by means of a bridge of the height and width and with the ascent or descent provided" by statute, and that it was such bridge and no other which was to be executed and maintained for the future. It is, accordingly, necessary to pause to consider exactly what was required by the various statutory enactments with which the railway company constructing the line had to comply. Under the Railway Regulation Act, 1842, certain documents had to be deposited with the Board of Trade before the railway was opened, and it

is admitted that the respondents' statement is correct that "among the documents so required to be deposited were drawings in detail of all bridges or viaducts either over or under the railway, accompanied by sufficient information to enable the strength of each bridge to be ascertained by calculation." These requirements were complied with; and, in terms of the statute, the detailed drawings were deposited with the Board of Trade. Nor is it denied that from these and from the dimensions contained therein the carrying power of the bridge could be estimated. The railway was inspected, was approved by the Board of Trade's officer, and was opened, the bridge in question being also approved. So far, according as the working out of the Acts are concerned, the resultant situation was the same, in my humble opinion, as if this particular bridge, with its specific dimensions and its consequential strength, had been the subject of express statutory stipulation for erection and maintenance.

In regard to maintenance, it should be further observed that there is nowhere in the statute any obligation, so far as can be discovered, with regard to the increase of the strength of the bridge according to future traffic requirements. I feel bound to assume that when the Board of Trade inspection took place the officials of the Department would to some extent see that a margin was allowed for the reasonable anticipations of development of the road traffic—that, in short, the proximate future would be provided for; and I respectfully agree with the opinion of LORD PARMOOR in the *Sharpness Case* (1) on this point. In the Consolidation Act of 1845 there is, however, one section in which a reference is in fact made to operations upon bridges "after the construction of the railway." I refer to s. 51. It provides that "if at any time after the construction of the railway the average available width of any such road shall be increased beyond the width of such bridge on either side thereof, the company shall be bound, at their own expense, to increase the width of the bridge to such extent as may be required . . ." This, it will be observed, is as to width only. But even there a limit is put to the obligations of the railway company by these words "not exceeding the width of such road as so widened, or the maximum width herein or in the special Act prescribed." This in one view is indicative of the desire of Parliament to make it clear that even with regard to the future on the point of width the limits of railway obligation should be clearly defined. To take the instance which I put in the course of the argument if a narrow carriage road (crossing a railway by a bridge) was increased to 40 ft. in width, it seems reasonably clear from the other clauses of the Act of Parliament that the maximum width to which the railway company would be obliged to go in accommodating the bridge to the road would be a width of only 25 ft. The idea, in short, of the exact equation of accommodation between road and bridge or of any obligation of the railway company upon such a footing is thus negated. With regard to the strength of the bridge there is no provision whatsoever, limited or unlimited, for future increase or alteration thereof. I cannot, in these circumstances, hold that such a provision should be read into the statute, which, as already explained, I hold to be the measure of the respondent's obligations. I am, accordingly, of opinion that the judgment of the learned Lords of the Court of Appeal is correct.

LORD SUMNER.—The construction of the Railways Clauses Consolidation Act, 1845, s. 46, is the real question in this appeal. Though the case has been twice elaborately argued, I think the meaning of the section remains tolerably clear. As applied to this railway the section required that in 1867 the undertakers should carry the public highway in question, known as Crouch End Hill, over their railway "by means of a bridge of the height and width and with the ascent or descent by this or the special Act in that behalf provided," and that "such bridge, with the immediate approaches and all other necessary works connected therewith," should be "executed" by the undertakers. All this they did. Furthermore, by the Railway Regulation Act, 1842, s. 6, the public Department concerned was empowered and

- A bound to inspect the bridge and works connected with it along with the rest of the undertaking. If the officers appointed should report that, in their opinion, the opening of the railway would be attended with danger to the public using the same by reason of the incompleteness of the works or permanent way, then the Department had the power and duty of preventing the railway from being opened for traffic until it should appear "that such opening may take place without danger to the public." In my opinion, incompleteness here covers not merely the case of a bridge designed to be strong enough, but not yet fully executed or completed, but also a bridge which, though fully executed according to the design, is incomplete because neither the design nor the execution has provided strength sufficient to bear the load: see per JESSEL, M.R., in *A.-G. v. Great Western Rail. Co.* (8), 4 Ch.D. at p. 739. Further, the "public" in question was clearly not confined to the members of the public who were to use the railway undertaking by passing under the bridge in trains, but included those who were to use it by passing above the trains by means of the bridge, and the danger was not confined to their persons, but extended to their goods, their vehicles, their draught animals, and so forth. On the face of this section the statutory duty which it imposes could not be performed unless the officials engaged had a full and proper opportunity of knowing the mode of construction of the bridge and of judging thereby its safety for the statutory object. Counsel for the respondents very pertinently showed, by reference to existing Board of Trade regulations employed in practice by the Department, that, as might be expected, requirements can be, and are, formulated, which enable its officials to judge, among other things, the strength and durability of such a structure, and the drawings supplied by the parties to your Lordships with the record show that the plans actually deposited during the construction gave ample materials for criticising the strength of the bridge.

- When the bridge was executed in or shortly before 1867, all these requirements were complied with: its height and width and ascent or descent were in accordance with the relevant sections of the Act, and the public officials concerned declared themselves satisfied. Accordingly, I am unable to see how it can be said that the bridge was not "executed" in accordance with the section. No question has arisen until recently as to the strength or sufficiency of the bridge. It carried the public highway across the railway, and did so efficiently, not only when the railway was opened, but, as is admitted on all hands, for many years thereafter. Changes have now taken place of a sort with which we are all familiar. The judgment of WARRINGTON, J., describes the traffic, which the relators assert that the bridge ought to be able to carry, as "heavy motor traffic," by which I understand not that the traffic of motor cars is heavy because many motor cars pass along the road, but that the traffic crossing the bridge includes heavy motors, self-propelling vehicles of a weight and energy that cause a particular strain on the bridge. The appellant's case is that, even if the bridge was duly "executed" in 1867, the respondents are now bound and compellable by law to maintain the bridge in such a fashion that it will safely carry such traffic; nay, more, that they are bound, in case of need, to reconstruct the bridge for the purpose, and so on, whenever hereafter further mechanical discoveries bring into use heavier and heavier vehicles, or such as in any other way load and strain the bridge beyond its capacity for the time being. Such a contention cannot, in my opinion, be rested on the word "execute." There are no words which expand this into "re-execute to a higher standard in the future." Nor can I think that it comes under the obligation as to maintenance. The section requires the respondents (they are the successors to the original undertakers) to maintain such bridge as is required to be executed in the first instance—"such bridge . . . shall be executed . . . and at all times thereafter maintained at the expense of the company." "Maintain" does not naturally mean maintain and alter, nor does "maintain such bridge"—namely, the bridge previously executed—naturally mean maintain it, not as it was executed, but as something indefinitely different, stronger, more durable, and possibly of

wholly dissimilar structure, material, or design. It is said that this meaning, which I venture to call unnatural, is imposed on the words used, both as to execution and maintenance, because "such bridge" is to be the means of carrying such road over the railway. So it is; but, so far, there is nothing to show that such road is anything more than the physical road known about 1866, apparently, as "Crouch End Hill."

The argument proceeds that, in relation to that road, the common law conferred on the public certain rights and imposed corresponding duties on the road authority, extending to a progressive improvement of the road as and when the growth of heavy motor traffic might require; that nothing in this section shows any intention on the part of the legislature to lessen those rights or those duties; and that, as the bridge is but a new link in the line of the old highway, the contrary intention must be presumed. Hence the duties of the highway authorities must, in respect of the part of the highway which the bridge carries, be deemed to have been transferred to the respondents as owners of the bridge. To this contention I think the short answer must be that the section is concerned with a physical thing to be executed in presenti and to be maintained in futuro, and it is engaged in telling the undertakers what they are to do then and there. Having done so, it clearly adds, "that which is hereby directed to be made shall at all times thereafter be maintained." Maintenance is, in itself, a word which is not indicative of, but negatives, change. What is maintained is a status quo. It does not point to a higher standard of attainment. Except that by implication it assures to the public the same measure of dedication as a free highway or accessibility as a turnpike road as had previously attached to the road formerly carried on solid earth and now carried by means of a bridge, I do not think the section has any concern with the duties of road authorities as such, or of public bridge authorities as such. The section is an adoptive section. It assumes a special Act of Parliament, authorising a line of railway to be carried across the line of a highway, with which it is incorporated. The section is in terms applicable equally to turnpike roads and to public highways. It takes no account of subsequent events, such as the dis-turnpiking of the road. It applies to them as they are. Possibly it may be that in the result the public now loses some advantages in respect of Crouch End Hill which it would have enjoyed if the Railways Clauses Consolidation Act, 1845, had never passed, or the railway in question had never been made. This cannot be helped. The statute will have it so. If the legislature in 1845 did not see ahead beyond the end of the century, it, at any rate, exercised a degree of foresight that has not always been equalled in public affairs.

I think that the contention on behalf of the relators fails. I have arrived at this conclusion on the bare language of the section itself, but I conceive that it is also involved in your Lordships' recent decision in the *Sharpness Case* (1). There, as here, the undertaking was laid out along a line intersecting sundry public highways. There, as here, the legislature prescribed for the undertakers expressly what they were to do, and, by implication, what they need not do. This is what is called a code. There, as here, they were to carry the roads over the canal by means of bridges. There certain commissioners were to say affirmatively what those bridges were to be in dimension, strength, and design; here the legislature fixes some of these particulars, and empowers a public Department to fix the rest negatively by bringing the undertaking to a stand, unless it is satisfied. This merely varies the mechanism. It does not affect the principle. In each case the legislature prescribes a bridge for present erection and future maintenance. It says: "Do this and your duty is done." By what precise steps or from what sources the particulars of the works to be executed are prescribed cannot be material, as soon as they are ascertained. In the course of the argument, a good deal was contended for as to the duties of road authorities in regard to new traffic over a bridge forming part of a highway, to which I should not be disposed to assent without further consideration, nor do I, for my own part, wish to be taken as

A expressing any opinion, except on the construction of s. 46 of the Railways Clauses Consolidation Act, 1845. I agree that the appeal ought to be dismissed.

Appeal dismissed.

Solicitors: *Joynson-Hicks, Hunt, Moore & Cardew; R. Hill Dawe.*

[*Reported by W. E. REID, Esq., Barrister-at-Law.*]

B

C

COOK v. DEEKS AND OTHERS

[PRIVY COUNCIL (Lord Buckmaster, L.C., Viscount Haldane, Lord Parker of Waddington and Lord Sumner), November 30, December 1, 6, 7, 1915, February 23, 1916]

[*Reported [1916] 1 A.C. 554; 85 L.J.P.C. 161; 114 L.T. 636*]

D

Company—Director—Profit from contract—Liability to account to company.

Directors of a construction company negotiated with a railway company a contract on their own behalf, but in exactly the same manner as that in which they had previously acted when negotiating contracts for the construction company, and with the advantage of the successful completion by the construction company of contracts for the railway company in the past. When all the necessary preliminaries of the contract had been concluded the directors formed a new company to carry it out, and at a meeting of the construction company, owing to their voting power, they secured the passing of a resolution declaring that the construction company had no interest in the contract and authorising them as directors to defend an action brought by the plaintiff, a minority shareholder, against them and the new company for a declaration that they and the new company were trustees of the benefit of the contract for the construction company.

E

F

Held: the directors were guilty of a breach of duty in the course they took to secure the contract; they could not retain the benefit of that contract for themselves, but must be regarded as holding it on behalf of the construction company; the resolution the passing of which they had secured was ineffective to regularise the position; and, therefore, the plaintiff was entitled to the declaration which he claimed.

G

Notes. Referred to: *Fine Industrial Commodities, Ltd. v. Powling* (1954), 71 R.P.C.

H

As to the duty of a director to account to his company for a profit made by him, see 6 HALSBURY'S LAWS (3rd Edn.) 300, 419, 421, and for cases see 9 Digest (Repl.) 486-489, 608-611.

Cases referred to:

- (1) *North-West Transportation Co. v. Beatty* (1887), 12 App. Cas. 589; 56 L.J.P.C. 102; 57 L.T. 426; 36 W.R. 647; 3 T.L.R. 789, P.C.; 9 Digest (Repl.) 506, 3336.
- (2) *Burland v. Earle*, [1902] A.C. 83; 71 L.J.P.C. 1; 85 L.T. 553; 50 W.R. 241; 18 T.L.R. 41; 9 Mans. 17, P.C.; 9 Digest (Repl.) 564, 3727.
- (3) *Jacobus Marler Estates, Ltd. v. Marler* (1913), post p. 291; 85 L.J.P.C. 167, n.; 114 L.T. 640, n., P.C.; 9 Digest (Repl.) 38, 56.
- (4) *Menier v. Hooper's Telegraph Works* (1874), 9 Ch. App. 350; 43 L.J.Ch. 330; 30 L.T. 209; 22 W.R. 396, L.J.J.; 9 Digest (Repl.) 659, 4367.

I

Appeal from an order of the Supreme Court of Ontario, Appellate Division, affirming an order of MIDDLETON, J., at the trial dismissing the action with costs.

The action was brought by the appellant on behalf of himself and all other shareholders in the Toronto Construction Co., Ltd., against the respondents, G. S. Deeks, G. M. Deeks, T. R. Hinds, and the Dominion Construction Co., Ltd., for a declaration that the respondents were trustees for the Toronto Construction Co., Ltd. (which had been joined as a defendant), of the benefit of a contract, dated April 1, 1912, and made between the individual respondents and the Canadian Pacific Railway Co.

Nisbett, K.C., and *A. M. Stewart* for the appellant.

Sir Robert Finlay, K.C., and *R. McKay, K.C.*, for the respondents.

Feb. 23, 1916. **LORD BUCKMASTER, L.C.**—The appellant is the plaintiff in a suit brought against the respondents, under circumstances to which full reference is necessary. His rights depend entirely upon the fact that he is, and has, throughout the whole history of those proceedings, been, a shareholder in the Toronto Construction Co., Ltd., one of the defendants in the suit. Between himself and the defendants G. S. Deeks, G. M. Deeks, and T. R. Hinds, there have been at sundry times various business arrangements and relationships outside their association in the Toronto Construction Co.; but, except for the purpose of explaining what may have caused the conduct to which these proceedings are due, it is unnecessary to refer at length to these relationships.

The Toronto Construction Co., was formed in 1905. It appears that at the date of its incorporation all the parties were in business in various parts of the Dominion of Canada and the United States of America as contractors. The two defendants—G. S. Deeks and G. M. Deeks—were in partnership, and had just completed for the Canadian Pacific Railway Co. a subway under the track of the Canadian Pacific Railway at Winnipeg. In 1905 the Canadian Pacific Railway were asking for tenders for the construction of a line from Bolton to Parry Sound, known as the Toronto-Sudbury Line, and the tenders of G. S. Deeks made, as it would appear, on behalf of the firm of Deeks and Deeks, were accepted by the company. Before tendering, arrangements had been made by Messrs. Deeks with a firm of Winters, Parsons, and Boomer that they should take an interest in the contract to the extent of one-half if G. S. Deeks were successful in obtaining it. Mr. Winters, however, had assumed certain obligations which rendered him unwilling to accept his full share of responsibility, and the plaintiff and the defendant, Hinds, were accordingly introduced by him to Mr. Deeks, in order to implement his obligation, with the result that all the parties agreed to share in the contract in the following proportions: G. S. Deeks and G. M. Deeks to take three-eighths; the plaintiff and the defendant Hinds to take three-eighths; and Winters, Parsons and Boomer one-quarter. In order to place these relationships upon a fixed foundation, and the better to define their interests, the Toronto Construction Co. was formed, and its share capital distributed in the proportions mentioned, the company taking over and carrying out the work under the contract. In 1906 Messrs. Winter and Boomer withdrew from the company, and the stock that they held was divided equally among the remaining parties, so that G. S. Deeks and G. M. Deeks, the plaintiff, and Hinds, each held a quarter of the capital of the company, with the exception of four shares held by Mrs. Deeks (the wife of George S. Deeks), whose introduction as a shareholder was necessary in order to provide the total number of five. These interests have remained unchanged down to the present time. The board of directors was comprised of Messrs. Deeks, Hinds, and the plaintiff, and, in addition, George S. Deeks was appointed president of the company, the plaintiff was general manager, and Hinds was secretary and treasurer, though their Lordships do not think that the description of these offices affords an accurate description of the duties assumed and discharged by the various parties. The company appears to have carried out the work of laying the Toronto-Sudbury line to the entire satisfaction of the Canadian Pacific Railway, and they continued to tender, and were fortunate in obtaining a considerable

- A** number of other contracts of great value from the Canadian Pacific Railway. Apart, however, from this work, they undertook no other contracts. As has been already stated, during part of the time of the operations of the company the plaintiff and the three defendants were associated together in various other enterprises of a similar nature in Montana and in the west, but no contracts were taken in the east except by the Toronto Construction Co.
- B** In 1907 disagreement appears to have arisen between the parties, and the different firms which had been constructed between them, and were all partnerships at will, were dissolved, and the parties refused to enter into any further voluntary arrangements between themselves. In 1909 the Canadian Pacific Railway Co. invited tenders for an important contract, known as Seaboard Number 2, a contract which involved the continuation of a line which had been already laid by the
- C** Toronto Construction Co. This contract was tendered for by the company, in competition with others, in the usual way. Their tenders did not appear to be the lowest. In consideration, however, of the company having previously constructed the line known as Seaboard Number 1, the company was given the contract at the lowest price. The date of that contract was May 14, 1910. Seaboard Number 3 was again taken up on behalf of the Toronto Construction Co., and
- D** apparently the negotiations for it were entirely conducted by Mr. Hinds, or at any rate by Mr. Hinds and Mr. Deeks, while finally a contract known as the Guelph Junction and Hamilton Branch was also taken on April 29, 1911, Mr. Leonard acting for the Canadian Pacific Railway, and either G. S. or G. M. Deeks acting on behalf of the company. As this contract was nearing completion, the defendant Hinds gave the manager of the Toronto Construction Co.—H. F. McLean—
- E** instructions to get the work through as quickly as possible, as other work was coming up. The statement upon this matter is important, and it had better be given in the actual words, taken from the evidence of Mr. McLean :

- “Q. Was the work on the Seaboard line No. 2 and No. 3 handled in any respect in any exceptional way? Was there anything out of the ordinary in the way that work was handled?—A. I do not know that it was. Q. Was it proceeded with at the ordinary rate of expedition?—A. No, I think we made better progress on that line than I had on the other line. Q. What was the reason for that progress?—We hurried the work through. Q. Why did you do that?—A. I always rush our work as fast as we possibly can. Q. Did you get any instructions as regards the Seaboard line, any special instructions?—
- G** A. Yes, I had special instructions regarding the line. Q. Who did you receive these from?—A. I think it was from Mr. Hinds. I am quite sure it was Mr. Hinds and I do not remember any conversation with Mr. Deeks over it. Q. Tell me what Mr. Hinds said about rushing the Seaboard?—A. He said there was other work coming up. The company was going to do it, if we rushed this through and got it through that fall, our opportunity would be better to get this other work. Q. Did he say what other work?—A. Yes, he referred to a contract the C.P.R. was proposing to run on the South Shore—I do not know what the name of the contract was. It is a line they were proposing to run on the south shore—. Q. The south shore of what?—A. I think they called it the South Shore line. It was down near Lake Ontario somewhere. Q. We have referred in these proceedings continually to a South Shore line—I think the line is sometimes referred to as the Campbellford, Lake Erie, and Western—is that the one?—A. That is the one I have referred to. Q. It was on these instructions of Mr. Hinds you acted in reference to the work?—A. I acted on these instructions. Q. And did you keep the work up later in the fall?—A. Yes, we tried our best to finish it, so we worked away until December. Q. Was that unusual?—A. Not for the class of work we were doing there—it would be unusual for the class of work—ballasting and track-laying in December.”

The South Shore contract is the one which has given rise to the present dispute, and it is of the utmost importance to follow closely the circumstances under which it was obtained. The representative of the Canadian Pacific Railway was a Mr. Leonard, and it was he who arranged some, though it is impossible to say how many, of the contracts effected with the Toronto Construction Co. on behalf of the railway company. His negotiations were always carried out either with Mr. Deeks or with Mr. Hinds. He never discussed any details with any other person, and he never saw the plaintiff in the office, though he sometimes saw him on the line. The management of Messrs. Deeks and Hinds of the affairs of the construction company was eminently satisfactory; but so far as railway construction was concerned, the whole of their reputation for the efficient conduct of their business had been gained by them while acting as directors of the Toronto Construction Co. In 1911, and probably at an earlier date, the three individual defendants had settled that they would no longer continue business relationships with the plaintiff. It is unnecessary to seek the cause of the quarrel, or to determine whether they had good reason for the opinion that they had formed. There was nothing to compel them to work with or for the plaintiff, and it is impossible to see that they were bound to continue their relationship with him by any legal or moral consideration. They were, however, involved with him in different reciprocal duties, by reason of their relationship in connection with the Toronto Construction Co., and, if they desired freedom to act without regard to the restrictions that those relationships imposed, it was necessary that they should terminate their positions as directors and shareholders in the company, and place it in dissolution. This they could easily have accomplished owing to the fact that they held three-fourths of the share capital. It is suggested that they might also have resolved at a general meeting of the company that the company should no longer continue the work. This would have been all but equivalent to a resolution of voluntary liquidation; but even this step was not taken. While still retaining their position as directors, while still actually acting as managers of the company, and with their duties to the company of which the plaintiff was a shareholder entirely unchanged, they proceeded to negotiate with Mr. Leonard for the new Shore Line contract, in reality on their own behalf, but in exactly the same manner as that in which they had always acted for the company, and doubtless with their claims enforced by the expeditious manner in which they, while acting for the company, had caused the last contract to be carried through. The negotiations for this contract were opened by a telephone message sent through to Mr. Hinds at the Toronto Construction Co.'s office. Upon receipt of that message certain units of price were prepared in the company's office; and, the prices being ultimately fixed, the defendant Hinds was informed by Mr. Leonard that, although the prices had been agreed to, the contract would not be then immediately let, as it was necessary that there should be an appropriation of the necessary cash made to authorise the contract by the Canadian Pacific Railway Co.

During the whole of this discussion, up till the time when these prices were fixed, it does not appear that at any moment the representatives of the Canadian Pacific Railway Co. were told that this contract was in any way different from the others that had been negotiated in the same manner on behalf of the Toronto Construction Co., although it was plain that Mr. Leonard had been told by Mr. Deeks, when he was engaged on the Georgian Bay and Seaboard line, that when it was finished Messrs. Deeks and Hinds intended to go on their own account and leave Mr. Cook. But, after all the necessary preliminaries of the contract had been concluded, Mr. Hinds made to Mr. Leonard this statement: "Remember, if we get this contract it is to be Deeks and I, and not the Toronto Construction Co." On Mar. 12, 1912, the Canadian Pacific Railway Co. made the necessary appropriation for the contract, and this was communicated to Mr. Deeks by Mr. Ramsay, who said they might proceed with the contract at once. As from this moment, although

A the formal contract was not signed until April 1, the defendants became certain of their position, and knew that they had obtained the contract for themselves. They then for the first time informed the plaintiff of what had happened. He protested without result, and the defendant, the Dominion Construction Co., was formed by the three defendants, G. S. Deeks, K. M. Deeks, and T. R. Hinds, to carry out the work. The contract was accordingly taken over by this company, by B whom the work was carried out and the profits made. On Mar. 20, 1912, there was a meeting of directors of the Toronto Construction Co. at which the three defendants were present, and they resolved that a fresh meeting of the shareholders be held to consider the question of the voluntary liquidation of the company. After sundry meetings which are not material, on April 26, 1913, resolutions were passed owing to the voting power of the defendants, G. S. Deeks, G. M. Deeks, and T. R. C Hinds, approving the sale of part of the plant of the company to the Dominion Construction Co., a declaration was made that the Toronto company had no interest in the Shore Line contract, and that the directors were authorised to defend this action, which had in the meantime been instituted.

Two questions of law arise out of this long history of fact. The first is whether, apart altogether from the subsequent resolutions, the company would have been at D liberty to claim from the three individual defendants the benefit of the contract which they had obtained from the Canadian Pacific Railway Co. The second, which only arises if the first be answered in the affirmative, whether in such event the majority of the shareholders of the company constituted by the three defendants could ratify and approve of what was done, and thereby release all claim against the directors. It is the latter question to which the Appellate Division of the E Supreme Court of Ontario have given most consideration, but the former needs to be carefully examined in order to ascertain the circumstances upon which the latter question depends.

It cannot be properly answered by considering the abstract relationship of directors and companies; the real matter for determination is what, in the special F circumstances of this case, was the relationship that existed between Messrs. Deeks and Hinds and the company that they controlled. It appears plain that the entire management of the company, so far as obtaining and executing contracts in the east was concerned, was in their hands, and, indeed, it was in part this fact which was one of the causes of their disagreement with the plaintiff. The way they used this position is perfectly plain. They accelerated the work on the expiring contract of the company in order to stand well with the Canadian Pacific Railway when G the next contract should be offered, and, although Mr. McLean was told that the acceleration was to enable the company to get the new contract, yet they never allowed the company to have any chances whatever of acquiring the benefit, and avoided letting their co-director have any knowledge of the matter. Their Lordships think that the statement of the trial judge upon this point is well founded when he said that "it is hard to resist the inference that Mr. Hinds was careful to avoid H anything which would waken Mr. Cook from his fancied security," and again, that "the sole and only object on the part of the defendants was to get rid of a business associate whom they deemed, and I think rightly deemed, unsatisfactory from a business standpoint." In other words, they intentionally concealed all circumstances relating to their negotiations until a point had been reached when the whole arrangement had been concluded in their own favour, and there was no longer any I real chance that there could be any interference with their plans. This means that, while entrusted with the conduct of the affairs of the company, they deliberately designed to exclude, and used their influence and position to exclude, the company whose interest it was their first duty to protect.

It is impossible to enter into the speculations which form part of the examination of Mr. Leonard and Mr. Ramsey on behalf of the Canadian Pacific Railway. What might have happened if the railway company from the first considered Mr. Cook as a possible competitor, or considered the position of the Toronto Construction Co.,

apart from Messrs. Deeks and Hinds, is a matter too conjectural to be brought into consideration. Their Lordships think that the Appellate Division of the Supreme Court of Ontario may have been misled in the attempts that they made to see whether this particular duty of the defendants had been the subject of previous judicial decision. Their Lordships see no reason to differ from the opinion which the Appellate Division extracted from careful consideration of the authorities, except so far as they were led by these conclusions to regard the transaction as a question of policy and a matter that lay entirely within the directors' individual discretion. But this reservation is important, for throughout the whole of the judgments, both of the learned judge who tried this case and of the Appellate Division, there is underlying rather the question whether the transaction was not one which, by virtue of their preponderating influence in the company, the defendants would be able ultimately to put right, than the real question whether it was one into which, consistently with their duty, they were at liberty to enter. It is quite right to point out the importance of avoiding the establishment of rules as to directors' duties which would impose upon them burdens so heavy and responsibilities so great that men of good position would hesitate to accept the office. But, on the other hand, men who assume the complete control of a company's business must remember that they are not at liberty to sacrifice the interests which they are bound to protect, and, while ostensible acting for the company, divert in their own favour business which should properly belong to the company they represent. Their Lordships think that, in the circumstances, the defendants, T. R. Hinds and G. S. and G. M. Deeks, were guilty of a distinct breach of duty in the course they took to secure the contract, and that they cannot retain the benefit of such contract for themselves, but must be regarded as holding it on behalf of the company.

There remains the more difficult consideration of whether this position can be made regular by resolutions of the company controlled by the votes of these three defendants. The Supreme Court have given this matter the most careful consideration, but their Lordships are unable to agree with the conclusion which they reached. In their Lordships' opinion the Supreme Court has insufficiently recognised the distinction between two classes of case, and has applied the principles applicable to the case of a director selling to his company property which was in equity as well as at law his own, and which he could dispose of as he thought fit, to the case of a director dealing with property which, though his own at law, in equity belonged to his company. *North-West Transportation Co. v. Beatty* (1) and *Burland v. Earle* (2), both belonged to the former class. In each, directors had sold to the company property in which the company had no interest at law or in equity. If the company claimed any interest by reason of the transaction, it could only be by affirming the sale, in which case such sale, though initially voidable, would be validated by subsequent ratification. If the company refused to affirm the sale the transaction would be set aside, and the parties restored to their former position, the directors getting the property and the company receiving back the purchase price. There would be no middle course. The company could not insist on retaining the property while paying less than the price agreed. This would be for the court to make a new contract between the parties. It would be quite another thing if the director had originally acquired the property which he sold to his company under circumstances which made it in equity the property of the company. The distinction to which their Lordships have drawn attention is expressly recognised by LORD DAVEY in *Burland v. Earle* (2), and is the foundation of the judgment in *North-West Transportation Co. v. Beatty* (1), and is clearly explained in the unreported case of *Jacobus Marler Estates, Ltd. v. Marler* (3).

If, as their Lordships find on the facts, the contract in question was entered into under such circumstances that the directors could not retain the benefit of it for themselves, then it belonged in equity to the company, and ought to have been dealt with as an asset of the company. Even supposing it be not ultra vires

A of a company to make a present to its directors, it appears quite certain that directors holding a majority of votes would not be permitted to make a present to themselves. This would be to allow a majority to oppress the minority. To such circumstances *North-West Transportation Co. v. Beatty* (1) and *Burland v. Earle* (2) have no application. In the same way, if directors have acquired for themselves property or rights which they must be regarded as holding on behalf of the company, a resolution that the rights of the company should be disregarded in the matter would amount to forfeiting the interest and property of the minority of shareholders in favour of the majority, and that by the votes of those who are interested in securing the property for themselves. Such use of voting power has never been sanctioned by the courts, and, indeed, was expressly disapproved in *Menier v. Hooper's Telegraph Works* (4).

C If their Lordships took the view that, in the circumstances of this case, the directors had exercised a discretion or decided on a matter of policy (the view which appears to have been entertained by the Supreme Court) different results would ensue, but this is not a conclusion which their Lordships are able to accept. It follows that the defendants must account to the Toronto company for the profits which they have made out of the transaction. Their Lordships will, therefore, humbly advise His Majesty that the judgments of MIDDLETON, J., and of the Appellate Division be set aside, and that the case be referred back to the High Court Division of the Supreme Court of Ontario for the purpose of taking such account. There must not be included in such account any claim in respect of the plant purchased from the Toronto company; their Lordships are satisfied by the evidence that this was bought at the fair market price. Their Lordships have throughout referred to the claim as one against the defendants, G. S. Deeks, G. M. Deeks, and T. R. Hinds. But it was not, and it could not be, disputed that the Dominion Construction Co. acquired the rights of these defendants with full knowledge of all the facts, and the account must be directed in form as an account in favour of the Toronto company against all the other defendants. The respondents must pay the costs of the appellant here and in the courts below, and the costs of taking the account will be dealt with in the Supreme Court. Although the account is in favour of the Toronto company, the plaintiff must have the conduct of the proceedings.

Solicitors: *Hake & Redden; Collyer-Bristow & Co.*

[Reported by W. E. REID, Esq., Barrister-at-Law.]

NOTE

JACOBUS MARLER ESTATES, LTD. v. MARLER

Agent—Account—Duty to account—Profit from transaction within scope of agency—Right of principal to take profit—Purchase by agent of property required by principal—Re-sale to principal at profit—Right of principal to treat re-sale as nugatory—Advice to principal—Voidability of transaction advised until confirmed by principal with full knowledge—Rebuttal of undue influence.

NOTE.—The following is the judgment of LORD PARKER OF WADDINGTON, delivered in the House of Lords on April 14, 1913, in the unreported case of *Jacobus Marler Estates, Ltd. v. Marler*.

[Cases referred to:

Re Cape Breton Co. (1884), 26 Ch.D. 221; 54 L.J.Ch. 217; 50 L.T. 390; 32 W.R. 853; affirmed (1885), 29 Ch.D. 795; 54 L.J.Ch. 822; 53 L.T. 181; 33 W.R. 788; 1 T.L.R. 450, C.A.; affirmed sub nom. *Cavendish Bentinck v. Fenn*

(1887), 12 App. Cas. 652; 57 L.J.Ch. 552; 57 L.T. 773; 36 W.R. 641, H.L.; 9 Digest (Repl.) 37, 50.

Ladywell Mining Co. v. Brookes, *Ladywell Mining Co. v. Huggons* (1887), 35 Ch.D. 400; 56 L.J.Ch. 684; 56 L.T. 677; 35 W.R. 785; 3 T.L.R. 546, C.A.; 9 Digest (Repl.) 38, 55.

Burland v. Earle, [1902] A.C. 83; 71 L.J.P.C. 1; 85 L.T. 553; 50 W.R. 241; 18 T.L.R. 41; 9 Mans. 17, P.C.; 9 Digest (Repl.) 564, 3727.]

LORD PARKER OF WADDINGTON.—It is no doubt well settled that in equity an agent cannot, without the consent of his principal, given with full knowledge of the material facts and under circumstances which rebut any presumption of undue influence, retain any profit acquired by him in transactions within the scope of the agency. The principal can always in such a case treat the profit as acquired on his own behalf, and insist on its being accounted for to him. For the same reason an agent whose duty it is to acquire property on behalf of his principal, cannot, without the like consent, acquire it on his own behalf and subsequently re-sell it to his principal at an enhanced price. In such a case the principal can treat the property as originally acquired for him and the re-sale as nugatory, and may, therefore, recover from the agent the money paid on such re-sale less the original price and the expenses incurred by the agent in acquiring the property. This, however, only applies where the relationship of principal and agent existed at the time when the agent acquired the property. If it did not then exist the property acquired was, at the outset, the agent's own property for all purposes, and the subsequent constitution of the relationship of principal and agent cannot deprive him of property already his own (*Re Cape Breton Co.*, *Ladywell Mining Co. v. Brookes*, and *Burland v. Earle*). There is another principle of equity which ought to be distinguished from, but is sometimes confused with, that to which I have already referred. Equity treats all transactions between an agent and his principal in matters in which it is the agent's duty to advise his principal, as voidable unless and until the principal, with full knowledge of the material facts and under circumstances which rebut any presumption of undue influence, ratify and confirm the same. In such cases the interest of the agent is in conflict with his duty, and there can be no real bargain at all. It must be remembered, however, that if the transaction be one of sale by the agent to the principal, the latter must, in order to avoid it, be able to restore the agent to his original position. If he has re-sold the property, or cannot restore it to the agent in its original condition, the right to avoid the transaction will, as a general rule, have been lost. But, even so, it does not follow that the principal is without remedy. He may be able to recover damages from the agent for negligence in the performance of his duties. Thus, if the agent's duty is to advise the principal as to the purchases of stocks or shares having a market value, and he sells to his principal stocks or shares of his own at prices in excess of their market value, he may be liable in damages for the excess of the prices received over the market value. It is a different matter if the property sold by the agent to the principal is a specific property having no market value, for the court will not fix a new price between the parties. In such a case the measure of damages will be the principal's loss in the whole transaction. If he has suffered no such loss there can be no damages. The equities above referred to as governing the relationship between principal and agent apply also to other fiduciary relationships, and in particular to that which exists between a company promoter and the company which results from the promotion, and its shareholders.

BRITISH UNION AND NATIONAL INSURANCE CO., LTD. v. RAWSON

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Pickford and Warrington, L.J.J.),
July 3, 4, 5, 17, 1916]

[Reported [1916] 2 Ch. 476; 85 L.J.Ch. 769; 115 L.T. 331; 32 T.L.R. 665;
60 Sol. Jo. 679]

Indemnity—Assignment—Enforcement by assignee—Recovery of full amount of liability of person indemnified.

A contract of indemnity is not a personal contract for the personal protection of the person indemnified which cannot be assigned to or enforced by any person other than the person indemnified. It is assignable, and the assignee can recover from the indemnifier the full amount of the liability of the person indemnified and not merely such sum as that person has actually paid.

Re Perkins, Poyser v. Beyfus (1), [1898] 2 Ch. 182, applied.

Notes. Distinguished: *Butler's Estates, Ltd. v. Bean*, [1941] 2 All E.R. 355. Referred to: *Ellis v. Torrington* (1919), 89 L.J.K.B. 369; *Norwich Union Fire Insurance Society v. Colonial Mutual Fire Insurance Co.*, [1922] All E.R. Rep. 513.

As to assignment of the right to enforce an indemnity, see 18 HALSBURY'S LAWS (3rd Edn.) 533, and for cases see 26 DIGEST (Repl.) 241.

Cases referred to:

- (1) *Re Perkins, Poyser v. Beyfus*, [1898] 2 Ch. 182; 67 L.J.Ch. 454; 78 L.T. 666; 46 W.R. 595; 14 T.L.R. 464; 42 Sol. Jo. 591; 5 Mans. 193, C.A.; 26 Digest (Repl.) 241, 1839.
- (2) *Scott v. Morley* (1887), 20 Q.B.D. 120; 57 L.J.Q.B. 43; 57 L.T. 919; 52 J.P. 230; 36 W.R. 67; 4 T.L.R. 56; sub nom. *Re Morley, Ex parte Morley, Scott v. Morley*, 4 Morr. 286, C.A.; 5 Digest (Repl.) 1108, 8953.
- (3) *Cruse v. Paine* (1868), L.R. 6 Eq. 641; 37 L.J.Ch. 711; 19 L.T. 127; 17 W.R. 44; affirmed (1869), 4 Ch. App. 441; 38 L.J.Ch. 225; 17 W.R. 1033, L.C.; 42 Digest 569, 1346.
- (4) *Evans v. Wood* (1867), L.R. 5 Eq. 9; 37 L.J.Ch. 159; 17 L.T. 190; 15 W.R. 476; 16 W.R. 67; 9 Digest (Repl.) 411, 2653.
- (5) *Lacey v. Hill, Crowley's Claim* (1874), L.R. 18 Eq. 182; 43 L.J.Ch. 551; 22 W.R. 586; sub nom. *Lacy v. Hill, Crowley's Claim*, 30 L.T. 484; 26 Digest (Repl.) 132, 936.
- (6) *Re Richardson, Ex parte Governors of St. Thomas's Hospital*, [1911] 2 K.B. 705; 80 L.J.K.B. 1232; 105 L.T. 226; 18 Mans. 327, C.A.; 5 Digest (Repl.) 726, 6285.
- (7) *Re Law Guarantee Trust and Accident Society, Ltd., Liverpool Mortgage Insurance Co.'s Case*, [1914] 2 Ch. 617; 84 L.J.Ch. 1; 111 L.T. 817; 30 T.L.R. 616; 58 Sol. Jo. 704, C.A.; 26 Digest (Repl.) 11, 13.

Also referred to in argument:

- Prosser v. Edmonds* (1835), 1 Y. & C. Ex. 481; 160 E.R. 196; 1 Digest (Repl.) 89, 668.
- Fitzroy v. Cave*, [1905] 2 K.B. 364; 74 L.J.K.B. 829; 93 L.T. 499; 54 W.R. 17; 21 T.L.R. 612, C.A.; 1 Digest (Repl.) 92, 685.
- May v. Lane* (1894), 64 L.J.Q.B. 236; 71 L.T. 869; 43 W.R. 193; 39 Sol. Jo. 132, C.A.; 1 Digest (Repl.) 89, 669.
- Swan and Cleland's Graving Dock and Slipway Co. v. Maritime Insurance Co. and Croshaw*, [1907] 1 K.B. 116; 76 L.J.K.B. 160; 96 L.T. 839; 23 T.L.R. 101; 12 Com. Cas. 73; 10 Asp. M.L.C. 450; 41 Digest 177, 177.
- Rendall v. Morphew* (1914), 84 L.J.Ch. 517; 112 L.T. 285; 26 Digest (Repl.) 241, 1840.

- British Dominions General Insurance Co., Ltd. v. Duder*, [1915] 2 K.B. 394; 84 L.J.K.B. 1401; 113 L.T. 210; 31 T.L.R. 361; 13 Asp. M.L.C. 84; 20 Com. Cas. 270, C.A.; 29 Digest 121, 734.
- Lloyd v. Dimmack* (1877), 7 Ch.D. 398; 47 L.J.Ch. 398; 38 L.T. 173; 26 W.R. 458; 26 Digest (Repl.) 251, 1745.
- Wolmershausen v. Gullick*, [1893] 2 Ch. 514; 62 L.J.Ch. 773; 68 L.T. 753; 9 T.L.R. 437; 3 R. 610; 26 Digest (Repl.) 150, 1115.
- Harris v. Kemble* (1831), 5 Bli. N.S. 730; 2 Dow. & Cl. 463; 5 E.R. 489, H.L.; 30 Digest (Repl.) 436, 792.
- Grant v. Gold Exploration and Development Syndicate, Ltd.*, [1900] 1 Q.B. 233; 69 L.J.Q.B. 150; 82 L.T. 5; 48 W.R. 280; 16 T.L.R. 86; 44 Sol. Jo. 100, C.A.; 1 Digest (Repl.) 553, 1740.
- Panama and South Pacific Telegraph Co. v. India Rubber, Gutta Percha and Telegraph Works Co.* (1875), 10 Ch. App. 515; 45 L.J.Ch. 121; 32 L.T. 517; 23 W.R. 583, L.J.J.; 1 Digest (Repl.) 552, 1730.
- Macaulay v. Polley*, [1897] 2 Q.B. 122; 66 L.J.Q.B. 665; 76 L.T. 643; 45 W.R. 681, C.A.; 42 Digest 67, 589.
- Carr v. Roberts* (1833), 5 B. & Ad. 78; 2 Nev. & M.K.B. 42; 2 L.J.K.B. 183; 110 E.R. 721; 26 Digest (Repl.) 251, 1912.
- Ashdown v. Ingamells* (1880), 5 Ex.D. 280; 50 L.J.Q.B. 109; 43 L.T. 424, C.A.; 5 Digest (Repl.) 1052, 8502.
- Wooldridge v. Norris* (1868), L.R. 6 Eq. 410; 37 L.J.Ch. 640; 19 L.T. 144; 16 W.R. 965; 26 Digest (Repl.) 131, 921.
- Brown v. Black* (1873), 8 Ch. App. 939; 42 L.J.Ch. 814; 29 L.T. 362; 21 W.R. 892, L.J.J.; 9 Digest (Repl.) 416, 2696.
- Torkington v. Magee*, [1902] 2 K.B. 427; 71 L.J.K.B. 712; 87 L.T. 304; 18 T.L.R. 703; reversed, [1903] 1 K.B. 644; 72 L.J.K.B. 336; 88 L.T. 443; 19 T.L.R. 331, C.A.; 1 Digest (Repl.) 95, 705.
- Guy v. Churchill* (1888), 40 Ch.D. 481; 58 L.J.Ch. 345; 60 L.T. 473; 5 T.L.R. 149; 37 W.R. 504; 1 Digest (Repl.) 85, 646.
- Castellan v. Hobson* (1870), L.R. 10 Eq. 47; 39 L.J.Ch. 490; 22 L.T. 575; 18 W.R. 731; 9 Digest (Repl.) 342, 2180.
- Kemp v. Baerselman*, [1906] 2 K.B. 604; 75 L.J.K.B. 873; 50 Sol. Jo. 615, C.A.; 9 Digest (Repl.) 679, 4482.
- Re Law Guarantee Trust and Accident Society, Godson's Claim*, [1915] 1 Ch. 340; 84 L.J.Ch. 510; 112 L.T. 537; 59 Sol. Jo. 234; [1915] H.B.R. 103; 29 Digest 409, 3221.
- Porter v. Vorley* (1832), 9 Bing. 93; 2 Moo. & S. 141; 1 L.J.C.P. 170; 131 E.R. 549; 5 Digest (Repl.) 1052, 8498.
- Drake v. Beckham* (1843), 11 M. & W. 315; 12 L.J.Ex. 486; 7 Jur. 204; 152 E.R. 823, Ex.Ch.; affirmed sub nom. *Beckham v. Drake* (1849), 2 H.L. Cas. 579; 13 Jur. 921; 9 E.R. 1213, H.L.; 5 Digest (Repl.) 1043, 8428.
- Castellain v. Preston* (1883), 11 Q.B.D. 380; 52 L.J.Q.B. 366; 49 L.T. 29; 31 W.R. 557, C.A.; 29 Digest 52, 156.
- Schenck v. Legh* (1803), 9 Ves. 300; 32 E.R. 618; 40 Digest (Repl.) 681, 1759.
- Defries v. Milne*, [1913] 1 Ch. 98; 82 L.J.Ch. 1; 107 L.T. 593; 57 Sol. Jo. 27, C.A.; 1 Digest (Repl.) 89, 671.

Appeal by the defendant from a decision of ASTBURY, J.
The facts are set forth in the judgment of PICKFORD, L.J.
Maugham, K.C., and *Dighton Pollock* for the defendant.
Frank Russell, K.C., and *J. H. Stamp* for the plaintiffs.

Cur. adv. vult.

July 17, 1916. The following judgments were read.

PICKFORD, L.J.—This action is concerned with the affairs of the plaintiff company, which is in liquidation, and is a claim by the liquidator as assignee of

A an agreement of indemnity given by the defendant to Mrs. Bond, who was at one time a shareholder in the company.

B In the year 1910 there were difficulties among the shareholders of the company, and many of the malcontents were represented by Mr. Wheelock, a stockbroker in Birmingham. In consequence the directors decided that the shareholders represented by Mr. Wheelock, of whom Mrs. Bond was one, should be bought out, and if the shares could not be otherwise placed, they intended to buy them themselves. In pursuance of this scheme a transfer of Mrs. Bond's shares was made out to the defendant. He, however, objected to this and required the transfer to be made out to a Mr. Bill, a clerk in his office and an infant. There was a dispute as to his motives in requiring the transfer to be to Mr. Bill, and I do not think it necessary to decide which contention was right. Mr. Wheelock, acting for Mrs. Bond, C required some assurance that the transferee was a responsible person, and on Dec. 13, 1910, the defendant sent him this letter :

"Dear Mr. Wheelock,—Thanks for yours of the 12th. I have no objection at all under the circumstances in guaranteeing Mrs. Bond and Mr. Cockson against any liability. We will discuss the question of sending out the prospectus when you call here. I dare say I may be able to arrange something for you."

D It was said that a more formal indemnity was sent, but it was not produced, and the defendant said he never sent it. I do not think it necessary to discuss the learned judge's finding on this point in favour of the plaintiffs as the defendant's counsel admitted that under the letter above quoted he was bound to indemnify Mrs. Bond against calls. A Mr. Davison, the secretary of the company, acted for the defendant and the other directors in the purchase of the shares of Mr. Wheelock's friends, and the transfers were made out at the price of 1s. 6d. per share. The real purchase price, however, was 1s., and Mr. Wheelock received a cheque from Mr. Davison at 1s. 6d. a share and returned to him a cheque at 6d. a share. In June, 1912, the company went into liquidation, and in time the liquidator discovered that Mr. Bill, whose name had been put on the list of contributories, was an infant, and Mrs. Bond's name was placed on the list in his place. She consulted Messrs. Beale & Co., solicitors, and proceedings were taken to remove her name. Similar proceedings were taken in respect of Mr. Cockson, who was also represented by Messrs. Beale & Co., and the following letters passed between them and the solicitors for the liquidator and the defendant.

G On Nov. 26, 1913, Messrs. Beale & Co. wrote to Messrs. Foss, Bilbrough & Co., the solicitors for the liquidator :

"We are confirmed by counsel in our original opinion that we shall succeed on these summonses on the technical grounds mentioned in Mr. Cockson's affidavit. This would not, however, prevent the liquidator from instituting fresh proceedings to amend the register by the substitution of our client's name for that of Bill, and, assuming that he can prove the infancy and that this was not known to the company, we think that such proceedings would succeed. Under the circumstances it seems useless to incur further expense, and we are prepared to advise our clients to withdraw their summonses if the liquidator will pay our charges in connection therewith up to date. Mr. Cockson would then have to accept responsibility for the £120 calls due on the 160 shares in his name. Mrs. Bond is a married woman and has no separate estate, so that there is nothing to be got out of her, but it might be worth while for her relatives to find a small sum to release her from the liability—say the amount of the expenses incurred by the liquidator for our and his own costs on this summons."

I On Feb. 12, 1914, Messrs. Foss, Bilbrough & Co. wrote to Messrs. Beale. The letter first of all deals with the Cockson claim, which I need not read, and then it says :

"With regard to Mrs. Bond the position is different. You state in your letter that Mrs. Bond is a married woman and has no separate estate. This information is insufficient to enable the liquidator to come to the conclusion that, if he goes on, he will receive nothing. The liquidator is therefore advised to ask for an affidavit by your client stating that she has not now and had not when the transfer was executed nor when the calls were respectively made any free separate estate."

Then they refer also to some possible proceedings against the defendant. On Feb. 14 Messrs. Beale & Co. write acknowledging that letter and say:

"Our client, however, wishes the matter disposed of, and is prepared to pay £110 in settlement, each party to pay his own costs. [That refers to Mr. Cockson. Then: Ex parte Bond.] We are awaiting our client's instructions and will write you again next week."

On Mar. 10, Messrs. Beale & Co. write again. They deal, first of all, with Mr. Cockson, and then they say with regard to Mrs. Bond:

"We have abandoned the summons for rectification of the register and have informed the liquidator that Mrs. Bond is a married woman without any separate estate whatever, so that any further proceedings on his part would be waste of time and expense. Our charges to date amount to £15 15s., which amount we shall be glad to receive from Mr. Rawson in pursuance of his indemnity."

On Mar. 16, Messrs. Nordon and Drury, who are the defendant's solicitors, write:

"We are in receipt of your letter of the 25th inst. inclosing cheque in our instructs us to settle these claims by payment of £120 and thirty guineas for your costs, provided you will accept thirty guineas down and Mr. Rawson's acceptance at three months for the £120. Mr. Rawson offers as a reference as to his ability to meet the acceptance in three months the London and South-Western Bank, Charing Cross. On hearing from you we will obtain our client's cheque for £31 10s. and his acceptance for £120 with interest at 5 per cent. for the three months."

On Mar. 27, Messrs. Beale & Co. write:

"We are in receipt of your letter of the 25th inst. inclosing cheque in our favour for £31 10s. and Mr. Rawson's acceptance at three months in favour of Mr. Charles Cockson for £121 10s. in settlement of our client's claims as arranged."

Mrs. Bond's name, therefore, remained on the list of contributories, and in July, 1914, a judgment was obtained against her for an amount for calls in what is called the amended form that was settled in *Scott v. Morley* (2)—that is, a judgment against her present or future separate estate. On Feb. 8, 1915, the liquidator took an assignment from Mrs. Bond of the defendant's contract to indemnify her which, so far as material, was in the following terms. It recites the various transactions, and then it recites:

"And whereas in an action in the King's Bench Division of the High Court of Justice in which the company was plaintiff and the said Jane Bond was defendant it was, by a judgment dated July 6, 1914, adjudged that the company recover against the said Jane Bond the sum of £683 9s. 3d. and £5 6s. for costs, such sum of £683 9s. 3d. being the amount of calls and interest thereon due in respect of the said shares. And whereas the company has agreed, on having an assignment of the rights of the said Jane Bond against the said F. L. Rawson under the said letter or otherwise, to make no further claim upon the said Jane Bond in relation to the said shares whether under the said judgment or otherwise. Now this indenture witnesseth that, in consideration of the

covenant on the company's part hereinafter contained the said Jane Bond doth hereby assign unto the company all that the benefit of the said letter dated the 13th day of December, 1910, . . . and of the agreement by the said F. L. Rawson therein contained and all moneys that may now be or hereafter become payable by the said F. L. Rawson pursuant to the said letter and agreement and the benefit of all other rights of indemnity (if any) that the said Jane Bond may have against the said F. L. Rawson in relation to the said shares or to the said agreement to hold the same unto the company absolutely. And the company hereby covenants with the said Jane Bond that the company will not at any time hereafter take any step to enforce the said judgment or make any claim against the said Jane Bond, her heirs, executors, or administrators in respect of the said judgment debt or in respect of the said shares or any of them except to the extent of the moneys recoverable from the said F. L. Rawson by virtue of the agreement of indemnity and other rights hereinbefore expressed to be hereby assigned to the company."

The plaintiffs now sue on this indemnity, and the defendant raises several defences : (i) that the contract of indemnity is not assignable; (ii) that it is only a contract to indemnify Mrs. Bond against actual loss, and, therefore, as the judgment is only against her separate estate, and she has none, and has paid and can pay nothing, there is no liability; (iii) that any claim upon the indemnity was settled by the transactions of February and March, 1914; and, (iv), by amendment during the trial, that the whole agreement was induced by the fraud of Wheelock, the vendor's agent, in returning to Davison, the purchaser's agent, as a bribe, the difference between 1s. 6d. a share and the real price, 1s.

The first two points are of general importance, and the last two apply to this case only, and I shall deal with them in the reverse order to that in which I have mentioned them. [His Lordship, on the evidence, decided against the defendant on points (iii) or (iv), and also decided point (ii) in favour of the plaintiffs on grounds which do not call for report in view of the provision of s. 1 (a) of the Law Reform (Married Women and Tortfeasors) Act, 1935, that a married woman should be capable of acquiring, holding and disposing of, property in all respects as if she were a feme sole, and he continued:] The only question remaining is whether this contract was assignable. It is a question really of practical importance only as to the principal creditor, for an assignment to anyone else is so improbable as to be almost negligible. But still in principle the question is as to a power to assign generally. I think this is really covered by the decision in *Re Perkins, Poyser v. Beyfus* (1). The ground on which the contract of indemnity is said not to be assignable is that it is a personal contract which cannot be assigned to or enforced by anyone but the indemnified. But in *Re Perkins, Poyser v. Beyfus* (1) such a contract was held to be part of the property of the bankrupt and to vest in the trustee and to be assignable by him. Personal contracts of the bankrupt are not, as a rule, property of the bankrupt which vest in the trustee, and I agree with the argument of the junior counsel for the plaintiffs that the power to assign given to the trustee by the bankruptcy does not extend to make assignable in his hands contracts which in their nature were not assignable by the bankrupt, though it may remove such objections as might arise from the doctrines of champerty and maintenance. I think, therefore, a decision that the contract of indemnity is assignable by the trustee involves a decision that it is in its nature assignable by the bankrupt. The result of these cases goes very far because they seem to me to establish that in effect in the case of an insolvent debtor a contract to indemnify him has the same result as a guarantee to the principal creditor of payment of the debt, but I think this is their effect. In my opinion, the appeal must be dismissed.

WARRINGTON, L.J.—The defendant's argument on his main contention is that a contract of indemnity is for the personal protection of the party to be indemnified, and is, therefore, like other personal contracts, not capable of assignment either in equity before the Supreme Court of Judicature Act, 1873, or under that Act. I think this argument is disposed of by the decision of the Court of Appeal in *Re Perkins, Poyser v. Beyfus* (1). In that case the plaintiff Poyser was the original lessee under a lease dated Oct. 5, 1891. In 1893 he assigned the lease to one Plaistowe, and in 1895 Plaistowe assigned to Perkins. Each assignment contained a covenant by the assignee to pay the rent reserved by and observe the covenants contained in the lease and to indemnify the assignor against all claims and liabilities in respect thereof. Plaistowe became bankrupt, Perkins was dead, the lessor called upon the plaintiff to pay, and he did pay certain accrued rent and insurance premiums. The plaintiff proved in the bankruptcy of Plaistowe for the amount so paid and the estimated amount of his future liability. This proof was compromised and as a term of such compromise the trustee assigned to the plaintiff Plaistowe's right to be indemnified by Perkins. The plaintiff then sued the executors of Perkins and was held entitled to recover the amount paid by him to the lessor and to have liberty to apply in respect of any future liability. It was said by NORTH, J., and by the Court of Appeal that the right to be indemnified was property of the bankrupt vesting in his trustee and capable of being assigned by him like any other item of the bankrupt's property. But if the contract of indemnity be a merely personal contract it would, in my opinion, be impossible to hold that it formed part of the property of the bankrupt. It seems to me, therefore, that this decision, though founded to some extent on the provisions of the Bankruptcy Act, 1883, amounts to a decision that a contract of indemnity is not to be treated as a merely personal covenant not capable of assignment.

There remains, however, the question: What can the assignee recover? Can he recover only the amount (if any) which has been actually paid by his assignor, or can he compel the indemnifier to pay and discharge the liability of the assignor? In the present case and, in *Re Perkins, Poyser v. Beyfus* (1), the assignee is the original creditor, and, if he is as assignee entitled to call upon the indemnifier to discharge the liability of the indemnified, it results indirectly in his obtaining payment of his debt by the indemnifier. Again I think *Re Perkins, Poyser v. Beyfus* (1) answers the question. Plaistowe was liable to pay the plaintiffs a certain sum of money—namely, the sum which the plaintiff had paid to the lessor. Perkins had agreed to indemnify Plaistowe against that liability. Plaistowe assigns the indemnity to the plaintiff, and it is held that Perkins must pay to the plaintiff the sum for which Plaistowe was liable, though the latter had himself paid nothing in respect of that liability. Moreover, I think this decision follows logically on the manner in which courts of equity had given effect to contracts of indemnity. In many cases they had ordered the indemnifier to pay the debt against which the indemnity had been given though nothing had been paid by the person indemnified. *Cruse v. Paine* (3) is an example. Money has even been ordered to be paid by the indemnifier to the indemnified himself in respect of moneys for which he was liable, but which he had not paid. *Evans v. Wood* (4) is an example, and shows that SIR GEORGE JESSEL, M.R., was not mistaken in saying, as he did in *Lacey v. Hill, Crowley's Claim* (5) (L.R. 18 Eq. at p. 191), that

“if the creditor is not a party it has been decided that the party seeking indemnity may be entitled to have the money paid over to him.”

The more recent cases of *Re Richardson, Ex parte Governors of St. Thomas's Hospital* (6), and *Re Law Guarantee Trust and Accident Society, Ltd., Liverpool Mortgage Insurance Co.'s Case* (7) are in accordance with this view. It seems to me, therefore, that Mrs. Bond—leaving out of consideration the point raised as to her status as a married woman—was entitled to have the amount of the calls paid by the defendant to the plaintiff company or to herself, and that this right

A was capable of assignment, and that the plaintiffs as assignees were entitled to have it enforced by an order directing payment to themselves. The appeal fails and ought to be dismissed.

LORD COZENS-HARDY, M.R.—I agree. The appeal will be dismissed with costs.

Appeal dismissed.

Solicitors: *Nordon & Drury; Foss, Bilbrough, Plaskitt & Co.*

[Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]

NASH v. ROCHFORD RURAL DISTRICT COUNCIL

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Warrington and Scrutton, L.J.J.), November 28, 29, December 7, 1916]

[Reported [1917] 1 K.B. 384; 86 L.J.K.B. 370; 116 L.T. 129; 81 J.P. 57; 15 L.G.R. 103]

Highway—Negligence of authority—Liability of district council for negligence of predecessor—Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 67—Highway Act, 1862 (25 & 26 Vict., c. 61), ss. 11, 25, 39—Local Government Act, 1888 (51 & 52 Vict., c. 41), ss. 75, 100—Local Government Act, 1894 (56 & 57 Vict., c. 73), ss. 25 (1), 67, 75.

The plaintiff claimed damages from the defendant highway authority for injury suffered by him when the surface of the highway, along which he was driving, broke owing to negligent construction of a drain beneath it. The drain had been placed there, not by the defendants, but by their predecessors, the parish surveyors or the highway board under the Highways Acts, 1835 and 1862, and this was the first occasion on which damage had been caused by its defective condition.

Held: where a highway authority did a negligent act which caused no damage during the existence of that authority, but damage resulted during the existence of an authority which succeeded the negligent authority, the succeeding authority was not liable for its predecessor's negligence, and, therefore, the plaintiff's action failed.

Notes. Applied: *Baxter v. Stockton-on-Tees Corp.*, [1958] 2 All E.R. 675.

Referred to: *Maxwell Willshire v. Bromley Rural Council* (1917), 87 L.J.Ch. 241.

As to negligence of highway authorities, see 19 HALSBURY'S LAWS (3rd Edn.) 150–153, 311–314, and for cases see 26 DIGEST (Repl.) 428 et seq., 467. For Highway Acts, 1835 and 1862, see 11 HALSBURY'S STATUTES (2nd Edn.) 34, 118, and for Local Government Acts, 1888 and 1894, see *ibid.*, vol. 14, pp. 171, 226.

Cases referred to:

- (1) *Cowley v. Newmarket Local Board* [1892] A.C. 345; 62 L.J.Q.B. 65; 67 L.T. 486; 56 J.P. 805; 8 T.L.R. 788; 1 R. 45, H.L.; 26 Digest (Repl.) 419, 1290.
- (2) *Russell v. Men of Devon* (1788), 2 Term Rep. 667; 100 E.R. 359; 26 Digest (Repl.) 654, 2993.
- (3) *Darley Main Colliery Co. v. Mitchell* (1886), 11 App. Cas. 127; 55 L.J.Q.B. 529; 54 L.T. 882; 51 J.P. 148; 2 T.L.R. 301, H.L.; 1 Digest (Repl.) 15, 122.
- (4) *Backhouse v. Bonomi* (1861), 9 H.L. Cas. 503; 34 L.J.Q.B. 181; 4 L.T. 754; 7 Jur. N.S. 809; 9 W.R. 769; 11 E.R. 825, H.L.; 17 Digest (Repl.) 87, 75.

(5) *Papworth v. Battersea Corpn.* (No. 2), [1916] 1 K.B. 583; 85 L.J.K.B. 746; 114 L.T. 340; 80 J.P. 177; 60 Sol. Jo. 120; 14 L.G.R. 236, C.A.; 26 Digest (Repl.) 531, 2074.

Appeal by defendants from the verdict and judgment at the trial before LORD COLERIDGE, J., and a special jury at the Essex Assizes.

The facts appear in the judgment of the MASTER OF THE ROLLS.

Hohler, K.C., and *Naldrett* for the defendant local authority.

Hawke, K.C., and *F. Phillips* for the plaintiff.

Cur. adv. vult.

Dec. 7, 1916. The following judgments were read.

LORD COZENS-HARDY, M.R.—The plaintiff was driving his pony along a public highway under the care and management of the defendants, the Rochford Rural District Council. His pony's leg broke through the crust of the road at a place where a pipe drain was laid under the road for the purpose of conveying water. According to the finding of the jury the drain was negligently constructed, and the accident was due to such negligent construction. Water had escaped at the place in question, and the soil under the crust had been washed or sucked away. The action was launched on the footing that the drain had been constructed by the defendants. There was no evidence to support this allegation, and the jury have expressly negatived it. By an arrangement made in the course of the trial, without any amendment of the pleadings, the jury were asked whether the defendants' "predecessors in title" caused the drain to be constructed, and the answer of the jury was "Yes." Judgment was entered for damages £100.

It is admitted that mere negligence in omitting to repair will not support an action against a highway authority: *Cowley v. Neumarket Local Board* (1). There is no evidence, and certainly no finding, as to when the drain was laid, or by what authority. The successive road authorities were as follows: (a) 1835 to 1863, parish surveyors under the Highway Act, 1835; (b) 1863 to 1881, the highway board under the Highway Act, 1862; (c) 1881 to 1895, parish surveyors, the highway board having been dissolved; (d) 1895 to present time, the defendant under the Local Government Act, 1894. It seems to me that the plaintiff is in great difficulty by reason of his inability to ascertain which of the authorities laid down the drain. It is not the defendants. But it may have been laid down during (a), (b), or (c), and possibly by some authority prior to 1835. Counsel for the plaintiff boldly argued that the parish is the body which is represented by all the authorities, and that the defendants are liable for all the consequences of any misfeasance, however many years ago, by any one of the successive highway authorities. I am unable to assent to this argument. Assume that the drain was laid down some time between 1835 and 1895. The construction of the drain, however negligent, gave no cause of action until the accident to the plaintiff. Damage is a necessary part of the cause of action. There was no legal liability until damage occurred. It is like the right of support, where a man by excavating on his own land lets down his neighbour's house. There is no legal wrong in the mere excavation not followed by damage to the house. So a false and fraudulent representation, not followed by damage, gives no cause of action. The plaintiff relies upon s. 25 (1) of the Local Government Act, 1894, by which there was transferred to the defendants "all the powers, duties, and liabilities" of "any highway authority" in the district, and makes them "successors of" the public authority—i.e., of the surveyors of the parish. And the plaintiff relies upon the definitions of "highway authority" and "liabilities" in s. 100 of the Local Government Act, 1888, which definitions are made applicable to the Act of 1894 by s. 75.

In my opinion, there is nothing in s. 100 of the Act of 1888 which so enlarges the meaning of "liabilities" as to include a case like the present. This is not a "liability to any proceeding for enforcing any duty or for punishing the breach of any duty," and the subsequent words relate only to pecuniary obligations. It

A follows, therefore, that the defendants are not liable for damages for a negligent act before 1895 which did not result in damage until after 1895. In my opinion, the judgment cannot be supported, and the appeal must be allowed and judgment entered for the defendants.

B **WARRINGTON, L.J.**, stated the facts and continued: The point raised on this appeal is that the learned judge in the court below was wrong in treating the misfeasance of the preceding authority as equivalent to the misfeasance of the defendants themselves, so as to enable a person who suffers injury in consequence thereof to recover damages from the defendants. The highway in question has been under the control of a number of different authorities, and the jury do not find—and in fact there was no evidence enabling them to find—by which in particular of the several authorities other than the defendants the drain was constructed.

C From 1835 to 1863 the parish of Rayleigh, in which this accident took place, was a highway parish under the Highway Act, 1835, and the surveyor of highways was the highway authority. In 1863, after the passing of the Highway Act, 1862, the parish of Rayleigh and certain other parishes were formed into a highway district, and the highway board constituted under that Act became the highway authority. D In 1881 the highway district was dissolved in pursuance of the provisions of s. 39 of the Act of 1862, and the parish of Rayleigh again became a highway parish, and the highways passed again under the authority of the surveyor of highways. This continued until 1895, when the Local Government Act, 1894, came into operation as regards the Rochford district, including Rayleigh. Under this Act E the rural district council is the highway authority. The statutory provisions as to the transmission of liability are as follows. By s. 11 of the Act of 1862 it is enacted that

F "all such powers, rights, duties, liabilities, capacities, and incapacities (except the power of making, assessing, and levying highway rates) as are vested in or attached to or would but for this Act have become vested in or attached to any surveyor or surveyors of any parish forming part of the district shall vest in and attach to the highway board."

Section 39, which provides for the dissolution of a district, defines the consequences in the following terms:

G "Where any highway district is dissolved, or where any parish is excluded from any highway district, the highways in such district or parish shall be maintained, and the provisions of the [Highway Act, 1835] in relation to the election of surveyors and all other matters shall apply to the said highways as if such highways had never been included within the limits of a highway district."

H The Act contains no definition of the word "liabilities," nor, as will be seen from the above citation, was it thought necessary or expedient to provide for the transmission of "liabilities" from the board to the surveyor or to the parish. The state of things existing before the formation of the district was simply restored. The Local Government Act, 1894, s. 25, provides that

I "there shall be transferred to the district council of every rural district all the powers, duties, and liabilities . . . of any highway authority in the district . . . and rural district councils shall be the successors of the highway authority."

Under s. 75, expressions used in that Act are, unless the context otherwise requires, to have the same meaning as in the Local Government Act, 1888. By that Act, s. 100, the expression "highway authority"

"means as respects a highway district the highway board, and as respects a highway parish the surveyor or surveyors of highways or other officers performing similar duties,"

and the expression "liabilities"

"includes liability to any proceedings for enforcing any duty or for punishing the breach of any duty, and includes all debts and liabilities to which any authority are or but for this Act would be liable or subject to whether accrued, done at the date of the transfer, or subsequently accruing."

The jury have not identified the "predecessor" by whom the negligent act was committed. But we will suppose for the moment that it was the surveyor or one of the surveyors in office during the years 1881-1895. Would the provisions of the Act of 1894 render the district council liable for the consequences of the negligent act of the surveyor? To so hold would, I think, be inconsistent with the doctrine, now well established, that a highway authority is responsible for misfeasance only. And though, of course, it is competent to Parliament to abolish that doctrine altogether or to make it inapplicable where the act of misfeasance is that of a preceding authority, I do not think one ought to hold that such a result has happened unless the words are clear. In the present case I cannot find either in s. 25 of the Act of 1894 or in the definition in s. 100 of the Act of 1888 any sufficient intention to pass on the responsibility for a wrongful act not their own and by itself affording no cause of action. The preceding authority was not in fact under any liability, inasmuch as the damage essential to the existence of liability had not arisen.

If I am right on the construction of the Act of 1894, it is unnecessary to go further. For in the Act of 1862, s. 25, there was a transfer of liability from the district board to the surveyor, and the words in s. 11 transferring the liabilities of the surveyor to the board were not so strong as the corresponding expression in the Act of 1894 as interpreted by the definitions in the Act of 1888. I think it would require much clearer words than either statute contains to render the incoming body liable for the consequences of a wrong act not committed by itself. The reference to punishment affords a further argument in favour of the construction I have adopted, for it can hardly be supposed that Parliament intended to render an authority liable to punishment for something done by another. On the whole, I think the appeal ought to be allowed and judgment entered for the defendants.

SCRUTTON, L.J., stated the facts and continued: By a long line of authorities from *Russell v. Men of Devon* (2) to *Cowley v. Newmarket Local Board* (1) it is clear that the defendants were not liable in a civil action for nonfeasance, as distinguished from misfeasance, and that, therefore, even if they knew of the negligent construction and consequent hole, but did nothing, no liability would attach to them. But for some reason the jury were asked if the defendants were negligent in not ascertaining and remedying the defect, and they answered "Yes." Question and answer were immaterial and superfluous. On further consideration the learned judge in the court below held that there was evidence on which the jury could find that some road authority constructed the drain, with which I agree. He further said:

"Without going into the Acts and statutes and sections in detail, I am of opinion that the language in each case is sufficiently wide to cover the construction placed upon them by the plaintiff—namely, that the authority in each case was responsible for the acts of misfeasance of the predecessors in title."

This, though satisfactory to the plaintiff, does not help the Court of Appeal much as to the grounds of the learned judge's decision. It is, therefore, necessary to examine the Acts and statutes with some care.

The defendants, the Rochford Rural District Council, came into existence in 1895 by virtue of the Local Government Act, 1894. In 1881 a previously existing Rochford Highway Board, constituted under the Highway Act, 1862, had been dissolved, and from 1881 to 1895 the surveyors of the parish of Rayleigh had been

A the road authority. Before 1864, surveyors of the parish of Rayleigh had also been the road authority—since 1835 under the Highway Act, 1835, and before that date under the Highway Act, 1773. Each surveyor held office for a year. One of these authorities, and there was no evidence which, had been negligent in the construction of the drain. But no damage had been caused by that negligence up to the year 1895, when the defendant road board came into existence. Therefore, no previous authority had been “liable,” in the ordinary legal sense of the word, to anyone for negligence. For, as was pointed out by LORD BLACKBURN in *Darley Main Colliery Co. v. Mitchell* (3) (11 App. Cas. at p. 142), you may be as negligent as you like, but no cause of action or liability arises till your negligence does damage.

C The plaintiff suggests, however, that by the statutes an authority which has done nothing is indeed not liable for doing nothing (which is nonfeasance), but is liable for something done by a predecessor if that act causes damage during the reign of the latter authority; and, further, that the latter authority may be liable, by transmission of liability, though an intermediate authority, who itself did nothing, and in whose reign no damage occurred, but who is yet supposed to have a liability derived from its predecessor’s negligence to pass on. I turn to examine the statutes which are supposed to have worked this result. It is sufficient in the first instance to see what statutes transferred liability from the surveyors of the parish of Rayleigh in 1894 to the Rochford Rural District Council in 1895. Section 25 of the Local Government Act, 1894, transfers to the rural district council all the powers, duties, and liabilities of any highway authority in the district. By s. 67 :

E “Where any powers and duties are transferred by this Act from one authority to another authority—(1) All property held by the first authority for the purpose or by virtue of such powers and duties shall pass to and vest in the other authority, subject to all debts and liabilities affecting the same . . . (3) All debts and liabilities of the first authority incurred by virtue of such powers and duties shall become debts and liabilities of the latter authority . . .”

F Section 100 of the Local Government Act, 1888 defines “liabilities” to include

G “liability to any proceeding for enforcing any duty, or for punishing the breach of any duty, and includes all debts and liabilities to which any authority are or would but for this Act be liable or subject to, whether accrued due at the date of the transfer or subsequently accruing. . . .”

Section 75 of the Local Government Act, 1894, provides that the expressions used in that Act shall, unless the context otherwise require, have the same meaning as in the Local Government Act, 1888, thus incorporating in the sections quoted the definition of liability already set out.

H The question is whether a previous authority who has done a negligent act causing no damage has any “liability,” as above defined, to pass on to a subsequent authority, so that on damage accruing due to that negligence the subsequent authority, which itself has done nothing and is not liable for nonfeasance, becomes liable to an action for negligence. The question could not be confined to an action for negligence. Where an excavation on land ultimately causes damage in adjoining land, there is no cause of action till damage ensues, and the statutes of limitation run from the occurrence of damage: *Backhouse v. Bonomi* (4). Other examples can easily be suggested. I cannot think that negligence not causing damage involves a “liability” in the ordinary legal sense, or in the sense of the interpretation clause, either “a liability to any proceeding for enforcing a duty,” or “a liability to which any authority would but for this Act be liable or subject to, whether accrued due at the date of the transfer or subsequently accruing.” The latter words point to bills of exchange and similar obligations where a liability arises from acceptance, accruing due at a future date. Indeed, as the definition of

"liability" includes liability and punishment, it should obviously be construed strictly.

It was argued that it was desirable to treat the various authorities as one succession representing the parish, each authority liable as representing the one continuous parish. But I gather that Rayleigh parish is not the same as the area of Rochford District Council; and, if it were, it is not the duty of the courts, who are bound by the rule of *Cowley v. Newmarket Local Board* (1), to hold that highway authorities are not liable for nonfeasance, to make generous constructions of the words of statutes in order to defeat that rule. If it is to be altered, it must be altered by Parliament, which has at present allowed it to stand unaltered for many years. I may add that the decisions in the much litigated case of *Papworth v. Battersea Corpn.* (No. 2) (5) do not touch this point. In that case there was a question whether the liability of corporations for negligence not followed by damage was transferred through corporation 2 to corporation 3, in whose time damage was occasioned. As between corporation 2 and corporation 3 "liabilities" were transferred, but as between corporation 1 and 2 there were no express words transferring liabilities. In that position, of the three judges of the Court of Appeal one held that "liabilities" were transferred, one that they were not, and one declined to express an opinion, which, indeed, was not necessary, as all held that corporation 1 was not negligent. The question here whether negligence not followed by damage can create a liability to be transferred was not argued or decided. In any event, the judgment appealed from must be set aside and judgment entered for the defendants with costs here and below. In view of the fact that the plaintiff failed entirely on the pleadings on which he went to trial, I do not see my way to give him the costs of any matters decided in his favour.

Appeal allowed.

Solicitors: *Kingsford, Dorman & Co.*, for *Gregsons & Powell, Southend-on-Sea*; *Lawton & Taylor*, for *William Bygott, Rayleigh, Essex*.

[Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]

HERBERT MORRIS, LTD. v. SAXELBY

[HOUSE OF LORDS (Lord Atkinson, Lord Shaw, Lord Parker of Waddington and Lord Sumner), November 4, 5, 8, 22, 23, 1915, February 8, 1916]

[Reported [1916] 1 A.C. 688; 85 L.J.Ch. 210; 114 L.T. 618; 32 T.L.R. 297; 60 Sol. Jo. 305]

Contract—Illegality—Public policy—Restraint of trade—Restraint on employee on leaving employment—Extent of employer's right to protection—Right of employee to benefit of experience and training—Need for restraint to be reasonable.

A covenant by the employee in a contract of service provided that he would not at any time during a period of seven years from the date of his ceasing to be employed by the employer carry on or be concerned, directly or indirectly, in the United Kingdom in the same industry as his employer.

Held: having regard to all the circumstances, the covenant was not reasonable in reference to the interests of the parties and was prejudicial to the interests of the public, and, therefore, it was void and unenforceable.

Decision of the Court of Appeal, [1915] 2 Ch. 57, affirmed.

It is in the public interest that a man should be free to exercise his skill and experience to the best advantage for the benefit of himself and all those who desire to employ him. . . . No person has an abstract right to be protected against competition per se in his trade or business. . . . A man who goes into an employment is entitled to make use in any other employment, whether on his own account or that of another employer, of the knowledge which he has acquired in the first-named employment of the general organisation and management of a business of the kind in question: per LORD ATKINSON.

Trade secrets, the names of customers, all such things which in sound philosophical language are denominated objective knowledge may not be given away by a servant, and there is no rule of public interest which prevents a transfer of them against the master's will being restrained. On the other hand, a man's aptitudes, his skill, his dexterity, his manual or mental ability, all those things which in sound philosophical language are not objective, but subjective, may, and ought, not to be relinquished by a servant. They are not his master's property; they are his own property; they are himself. . . . There runs through this part of the law a real distinction between cases of contracts for the sale of a business, on the one hand, and, on the other, cases of contracts of service: per LORD SHAW.

All restraints on trade of themselves, if there is nothing more, are contrary to public policy, and, therefore, void. It is not that such restraints must of themselves necessarily operate to the public injury, but that it is against the policy of the common law to enforce them except in cases where there are special circumstances to justify them. To be valid a restraint must be reasonable in the interests of the contracting parties, and, secondly, it must be reasonable in the interests of the public. To be reasonable in the interests of the parties the restraint must afford adequate protection to the party in whose favour it is imposed and be to the advantage of the covenantee who otherwise might lose such advantages as obtaining the best terms on the sale of a business or the possibility of obtaining employment or training under competent employers. It is no longer thought that the court should weigh the advantages accruing to the covenantor against the disadvantages imposed on him by the restraint. Such a process has long been rejected as impracticable. . . . I cannot find a case in which a covenant against competition by a servant or apprentice has, as such, ever been upheld by the court. The only reason for upholding a restraint on an employee is that the employer has some proprietary right,

whether in the nature of trade connection or trade secrets, for the protection of which such a restraint is, having regard to the duties of the employee, reasonably necessary : per LORD PARKER OF WADDINGTON.

Notes. Considered: *Horwood v. Millar's Timber and Trading Co.*, post p. 847; *Great Western and Metropolitan Dairies, Ltd. v. Gibbs* (1918), 34 T.L.R. 344; *Joseph Evans & Co., Ltd. v. Heathcote*, [1918-19] All E.R. Rep. 279. Applied: *Hepworth Manufacturing Co. v. Riott*, [1918-19] All E.R. Rep. 1019. Considered: *McEllistrim v. Ballymacelligott Co-operative Agricultural and Dairy Society*, [1919] A.C. 548. Applied: *Ropeways, Ltd. v. Hoyle* (1919), 88 L.J.Ch. 446; *Attwood v. Lamont*, [1920] All E.R. Rep. 55. Considered: *Dewes v. Fitch*, [1920] 2 Ch. 159; *British Reinforced Concrete Engineering Co. v. Schelff*, [1921] All E.R. Rep. 202; *Spence v. Mercantile Bank of India* (1921), 37 T.L.R. 390. Applied: *Bowler v. Lovegrove*, [1921] 1 Ch. 642. Considered: *Palmolive Co. (of England) v. Freedman*, [1928] 2 Ch. 264; *Empire Meat Co. v. Patrick*, [1939] 2 All E.R. 85. Applied: *Routh v. Jones*, [1947] 1 All E.R. 758. Considered: *Jenkins v. Reid*, [1948] 1 All E.R. 471. Applied: *Maud S. Drapers (a firm) v. Reynolds*, [1956] 3 All E.R. 814; *Kores Manufacturing Co. v. Kolok Manufacturing Co.*, [1957] 3 All E.R. 159. Referred to: *Forster & Sons, Ltd. v. Suggett* (1918), 35 T.L.R. 87; *Whitmore v. King* (1918), 87 L.J.Ch. 646; *Smedley v. Smedley* (1918), [1921] 2 Ch. 580, n.; *Rawlings v. General Trading Co.*, [1921] 1 K.B. 635; *Express Dairy Co. v. Jackson*, [1929] All E.R. Rep. 327; *Wyatt v. Kreglinger and Fernau*, [1933] 1 K.B. 793; *Pellow v. Ivey* (1933), 49 T.L.R. 422; *Worsley & Co. v. Cooper*, [1939] 1 All E.R. 290. *Connors Bros., Ltd. v. Connors*, [1940] 4 All E.R. 179; *Marchon Products, Ltd. v. Thornes* (1954), 71 R.P.C. 445; *Vandervell Products, Ltd. v. McLeod*, [1957] R.P.C. 185; *Moriarty (I. of T.) v. Evans Medical Supplies, Ltd.*, *Evans Medical Supplies, Ltd. v. Moriarty (I. of T.)*, [1957] 3 All E.R. 718.

As to agreements in restraint of trade, see 32 HALSBURY'S LAWS (2nd Edn.) 397 et seq., and for cases see 43 DIGEST 19 et seq.

Cases referred to :

- (1) *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535; 63 L.J.Ch. 908; 71 L.T. 489; 10 T.L.R. 636; 11 R. 1, H.L.; 43 Digest 22, 139.
- (2) *Leather Cloth Co. v. Lorscheut* (1869), L.R. 9 Eq. 345; 39 L.J.Ch. 86; 21 L.T. 661; 34 J.P. 328; 18 W.R. 572; 43 Digest 23, 147.
- (3) *Sir W. C. Leng & Co., Ltd. v. Andrews*, [1909] 1 Ch. 763; 78 L.J.Ch. 80; 100 L.T. 7; 25 T.L.R. 93, C.A.; 43 Digest 25, 164.
- (4) *Mason v. Provident Clothing and Supply Co., Ltd.*, [1913] A.C. 724; 82 L.J.K.B. 1153; 109 L.T. 449; 29 T.L.R. 727; 57 Sol. Jo. 739, H.L.; 43 Digest 22, 143.
- (5) *A.-G. of Commonwealth of Australia v. Adelaide Steamship Co., Ltd.*, [1913] A.C. 781; 83 L.J.P.C. 84; 109 L.T. 258; 12 Asp. M.L.C. 361; sub nom. *R. and A.-G. of Commonwealth of Australia v. Adelaide Steamship Co.*, 29 T.L.R. 743, P.C.; 43 Digest 12, 68.
- (6) *Mitchel v. Reynolds* (1711), 1 P. Wms. 181; Fortes. Rep. 296; 10 Mod. Rep. 130; 24 E.R. 347; 43 Digest 11, 59.
- (7) *Mallan v. May* (1843), 11 M. & W. 653; 12 L.J.Ex. 376; 1 L.T.O.S. 110, 258; 7 Jur. 536; 152 E.R. 967; 43 Digest 32, 258.

Also referred to in argument :

- Eastes v. Russ*, [1914] 1 Ch. 468; 83 L.J.Ch. 329; 110 L.T. 296; 30 T.L.R. 237; 58 Sol. Jo. 234, C.A.; 43 Digest 43, 432.
- Rousillon v. Rousillon* (1880), 14 Ch.D. 351; 49 L.J.Ch. 338; 42 L.T. 679; 44 J.P. 663; 28 W.R. 623; 43 Digest 21, 138.
- Printing and Numerical Registering Co. v. Sampson* (1875), L.R. 19 Eq. 462; 44 L.J.Ch. 705; 32 L.T. 354; 23 W.R. 463; 43 Digest 67, 705.

- A** *Homer v. Ashford and Ainsworth* (1825), 3 Bing. 322; 11 Moore, C.P. 91; 4 L.J.O.S.C.P. 62; 130 E.R. 537; 43 Digest 31, 250.
- Hitchcock v. Coker* (1837), 6 Ad. & El. 438; 1 Nev. & P.K.B. 796; 2 Har. & W. 464; 6 L.J.Ex. 266; 1 J.P. 215; 112 E.R. 167, Ex.Ch.; 43 Digest 36, 326.
- Ward v. Byrne* (1839), 5 M. & W. 548; 9 L.J.Ex. 14; 3 J.P. 724; 3 Jur. 1175; 151 E.R. 232; 43 Digest 26, 183.
- B** *Tallis v. Tallis* (1853), 1 E. & B. 391; 22 L.J.Q.B. 185; 21 L.T.O.S. 43; 17 Jur. 1149; 1 W.R. 114; 118 E.R. 482; 43 Digest 30, 240.
- Badische Anilin und Soda Fabrik v. Schott, Segner & Co.*, [1892] 3 Ch. 447; 61 L.J.Ch. 698; 67 L.T. 281; 8 T.L.R. 742; 43 Digest 33, 269.
- E. Underwood & Son, Ltd. v. Barker*, [1899] 1 Ch. 300; 68 L.J.Ch. 201; 80 L.T. 306; 47 W.R. 347; 15 T.L.R. 177; 43 Sol. Jo. 261, C.A.; 43 Digest 73, 777.
- C** *Mills v. Dunham*, [1891] 1 Ch. 576; 60 L.J.Ch. 362; 64 L.T. 712; 39 W.R. 289; 7 T.L.R. 238, C.A.; 43 Digest 62, 641.
- Haynes v. Doman*, [1899] 2 Ch. 13; 68 L.J.Ch. 419; 80 L.T. 569; 15 T.L.R. 354; 43 Sol. Jo. 553, C.A.; 43 Digest 24, 158.

D **Appeal** from a decision of the Court of Appeal affirming a judgment of SARGANT, J. The facts appear in the opinion of LORD ATKINSON.

Sir Robert Finlay, K.C., Walter, K.C., and Kerly, K.C., for the appellants.

Romer, K.C., and Sheldon for the respondent.

The House took time for consideration.

Feb. 8, 1916. The following opinions were read.

- E** **LORD ATKINSON.**—This is an appeal from an order of the Court of Appeal, dated Mar. 31, 1915, affirming the judgment of SARGANT, J., dated Oct. 30, 1914, and dismissing the action with costs. The appellants are the plaintiffs, and the respondent is the defendant. The action out of which the appeal arises was brought to restrain the respondent, a former servant of the appellants, (i) from being concerned in the sale or manufacture of pulley blocks, hand overhead runways, electric overhead runways, hand overhead travelling cranes, or any part thereof, and (ii) from divulging or using confidential information acquired by him while in the service of the appellants. This claim is based upon two covenants contained in an agreement under seal or indenture dated Mar. 17, 1911, executed by the appellants and respondent, under which the respondent was to be employed for a period of two years certain from Feb. 7, 1911, and thereafter subject to four weeks' notice on either side, at a salary of £3 17s. 6d. per week. The covenants run as follows:

- H** "6. The employee shall not divulge nor communicate to any person, corporation, or firm, any information which he may receive or obtain in relation to the company's affairs, and all instructions, drawings, notes, and memoranda made by the employee or which may come into his possession while engaged as aforesaid shall be the exclusive property of the company. 7. In consideration of the agreement hereinbefore contained, the employee covenants and agrees with the company, their successors and assigns, that he will not at any time during a period of seven years from the date of his ceasing to be employed by the company, either in the United Kingdom of Great Britain or Ireland, carry on, either as principal, agent, servant, or otherwise, alone or jointly, or in connection with any other person, company, or firm, or be concerned or assist, directly or indirectly, whether for reward or otherwise, in the sale or manufacture of hand overhead travelling cranes, pulley blocks, or hand overhead runways, or any part thereof, or be concerned as aforesaid in any business connected with such sale or manufacture."

I It will be observed that there is no clause in covenant No. 6 prohibiting the "using" of information, as distinct from the divulging or communicating of it, and JOYCE, J.,

points out that nothing but an express provision against "using" the information would justify such an injunction as is claimed. The matter, though to a great extent immaterial, since the appellants admit they cannot establish that any breach of this covenant was committed by the respondent, or even threatened, is not without some significance, inasmuch as it tends to show that what the appellants desired from the first was that the respondent should be restrained from using in the service of some other employer that skill and knowledge which he had acquired by the exercise of his own mental faculties on what he had seen, heard, and had experience of in the employment of the appellants themselves. The appellants, feeling obviously the difficulty of defending the clause at the end of the seventh covenant running in these words, "or in any part thereof, or be concerned as aforesaid in any business connected with such sale or manufacture," have consented to treat the covenant for the purposes of their action as if these words had been deleted, and are willing to take an injunction confined to what is prohibited by the remainder of the covenant.

The defence of the respondent is, in effect, that the restrictions imposed on him by this indenture go far beyond anything reasonably necessary for the protection of the plaintiffs in their trade or business, are oppressive to him, and that, being in restraint of trade, either the entire agreement, or at all events covenant No. 7, is not binding upon him. By the word "oppressive," I take it that it is not meant that the respondent was induced to enter into this agreement by fraud, misrepresentation, or deceit, or forced to enter into it by such duress as would entitle him in a court of equity to have it set aside whether it referred to his trade or not, but "oppressive" in the sense that it would, if enforced, deprive him for a lengthened period of the power of employing in any part of the United Kingdom that mechanical and technical skill and knowledge which, as I have said, his own industry, observation, and intelligence have enabled him to acquire in the very specialised manufacturing business of the appellants, thus forcing him to begin life afresh, as it were, and depriving him of the means of supporting himself and his family. If that is what is meant, then such oppression, if it existed, does not concern him alone. The general public suffer with him, for it is in the public interest that a man should be free to exercise his skill and experience to the best advantage for the benefit of himself and all those who desire to employ him. And, in cases like the present, the public interest in respect of such restrictions in the interest of the covenantor if they are not conterminous certainly overlap. It is quite true, as the Master of the Rolls points out, that as things now are, two principles or views of public policy come into conflict in such cases as this—namely, freedom of trade and freedom of contract. While the community is vitally interested in trade being free it is also vitally interested in people being free to contract and being held to their contracts. The facts are all before the House, so one need not be troubled with the question upon whose shoulders, those of the covenantor or those of the covenantee, the burden of proof on issues such as that raised in this case rests.

I think it has been generally assumed that the law upon this subject of the validity or invalidity of contracts in restraint of trade has been authoritatively determined by the decision of this House in *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.* (1), and that it is laid down in the clearest and most happily selected language in the oft-quoted passage of the judgment of LORD MACNAGHTEN, so that it is, I think, no longer necessary to refer to the earlier authorities. The passage runs thus ([1894] A.C. at p. 565):

"The true view at the present time is, I think, this: The public have an interest in every person's carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading and all restraint of trade themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions; restraints

A of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and, indeed, it is the only justification if the restriction is reasonable—
 B reasonable that is in reference to the interests of the parties concerned, and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all the authorities."

It will be observed that LORD MACNAGHTEN uses the plural, "parties concerned," in the earlier portion of this passage, meaning, apparently, to include both the covenantor and covenantee, while in the latter portion of the passage he merely speaks of "protection" being given to the covenantee, which does not injure the
 C public. But in the opening lines of the passage he had already said that the individual (here the covenantor), as well as the public, have an interest in freedom of trading.

If it be assumed, as I think it must be, that no person has an abstract right to be protected against competition per se in his trade or business, then the meaning of the entire passage would appear to me to be this: If the restraint affords to
 D the person in whose favour it is imposed nothing more than reasonable protection against something which he is entitled to be protected against, then as between the parties concerned the restraint is to be held to be reasonable in reference to their respective interests, but, notwithstanding this, the restraint may still be held to be injurious to the public and therefore void, the onus of establishing to the satisfaction of the judge who tries the case facts and circumstances which show that
 E the restraint is of the reasonable character mentioned resting upon the person alleging that it is of that character, and the onus of showing that, notwithstanding that it is of that character, it is nevertheless injurious to the public, and, therefore, void resting in the like manner on the party alleging the latter. In *Leather Cloth Co. v. Lonsont* (2), a case, no doubt, of the sale of the goodwill of a business, I find JAMES, V.-C., also used the phrase "not unreasonable for the protection of the
 F parties," meaning both covenantor and covenantee. Dealing with the contention that a general restraint of trade throughout the United Kingdom is bad on the face of it, he says (L.R. 9 Eq. at pp. 353, 354):

"I do not read the cases as having laid down that un rebuttable presumption. . . . All the cases, when they come to be examined, seem to establish this
 G principle, that all restraints upon trade are bad as being in violation of public policy, unless they are natural and not unreasonable in dealing legally with some subject-matter of contract. The principle is this: Public policy requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the State of his labour, skill, or talent by any contract that he enters into. On the other hand, public policy requires that
 H when a man has, by skill or by any other means, obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market: and in order to enable him to sell it advantageously in the market it is necessary that he should be able to preclude himself from entering into competition with the purchaser. In such a case the same public policy that enables him to do that does not restrain him from alienating that which
 I he wants to alienate, and, therefore, enables him to enter into any stipulation, however restrictive it is, provided that restriction is not unreasonable having regard to the subject-matter of the contract."

These considerations in themselves differentiate, in my opinion, the case of the sale of goodwill from the case of master and servant or employer and employee. The vendor in the former case, in the absence of some restrictive covenant, would be entitled to set up in the same line of business as that which he sold in competition with the purchaser, though he could not solicit his own old customers.

The possibility of such competition would necessarily depreciate the value of the goodwill. The covenant excluding it necessarily enhances that value, and presumably the price demanded and paid, and, therefore, all those restrictions on trading are permissible which are necessary at once to secure that the vendor shall get the highest price for what he has to sell, and that the purchaser shall get all he has paid for. Restrictions on freedom of trading are in both classes of case imposed, no doubt, with the common object of protecting property. But there the resemblance between them, I think, ends.

In all cases such as the present one has to ask oneself what are the interests of the employer that are to be protected, and against what is he entitled to have them protected? He is undoubtedly entitled to have his interest in his trade secrets protected, such as secret processes of manufacture which may be of vast value. And that protection may be secured by restraining the employee from divulging these secrets or putting them to his own use. He is also entitled not to have his old customers by solicitation or such other means enticed away from him. But freedom from all competition per se apart from both these things, however lucrative it might be to him, he is not entitled to be protected against. He must be prepared to encounter that even at the hands of a former employee.

I now turn to the facts to endeavour to ascertain what it is in reality that the appellants seek to be protected against. They are very successful manufacturers of the class of machinery already mentioned. They have specialised in it—standardising many parts common to different types of machines. Though they make some other machinery, this kind constitutes three-fourths of their output. In this manufacture they appear to be the premier firm in England. Their business is very extended. Their head offices are at Loughborough. They have branch offices at London, Manchester, Birmingham, Leeds, Sheffield, Newcastle, Cardiff, and Glasgow. They have a traveller in Ireland, but no office. Their regular and apparently principal customers, as appears from the evidence of their managing director, Mr. H. Morris, are the Admiralty, the War Office, the Government Ordnance Factory, numerous foreign and colonial governments, railway companies both at home and abroad, and, more recently, the Aircraft Department and the torpedo factories. No other customers are named. There is nothing to show that the respondent ever came into personal relations with any of the officers of these Departments or undertakings, or that through his acquaintance or personal influence with any of them he might be able to divert their custom from the plaintiffs to any other firm. There is, I think, no danger whatsoever of anything of that kind. The enticing away of customers is, therefore, really out of the question and may, I think, be put aside. In addition, the appellants have thoroughly organised their business, both on the manufacturing and commercial side of it. They have got up and arranged in an elaborate, careful, and systematic manner a large number of charts, called E charts. These give details of manufacture, charts of strength of materials, and facts ascertained by experience in the carrying on of their various works. They have also drawings, called L sheets, comprising tables and plotted curves, indicating the composition and dimensions suitable for particular jobs. They have drawings of special machines, and elaborate indices of the cost of every piece of machinery turned out by them, as well as minute tabulated details of every job obtained or tendered for. They have kept records of the instructions sent out from time to time as to the method of doing various kinds of work. In addition, they have on the commercial side collected and tabulated information as to the requirements of existing customers and probable requirements of prospective ones, so as to keep a record of the work done for the first class and to determine what kind of advertisement they should send to the second.

All the documents are highly confidential. They are handed out from time to time to the employees; but it is always seen to that they are traced and returned. The information they contain is so detailed and minute that it would be impossible

A for any employee to carry it away in his head. He might retain the recollection of the general character and principle of the elaborate scheme of organisation, but no more. SARGANT, J., has found all these facts. But this tabulated information is not in the nature of a trade secret, such as a secret process of manufacture. The sheets, cards, and formula, and other documents of the kind described are private and confidential documents, the property of the appellants. Clause 6
B rightly and fully protects them against a disclosure of them. A breach of that covenant has not been proved or even threatened. It is claimed, however, by the appellants that this organisation and general method of business are trade secrets which the defendant is not entitled either to divulge to another or use his knowledge of them in the service of any persons other than themselves. The respondent cannot, however, get rid of the impressions left upon his mind by his
C experience on the plaintiffs' works; they are part of himself; and, in my view, he violates no obligation express or implied arising from the relation in which he stood to the appellants by using in the service of some persons other than them the general knowledge he has acquired of their scheme of organisation and methods of business.

It is, moreover, in my view, perfectly clear upon the evidence of their managing
D director that the danger against which the plaintiffs desired to be protected is neither the enticing away of customers nor the divulgence or use and employment of any trade secret. It is that the respondent would carry away and might put to use in the establishment of their trade rivals the superior skill and knowledge he, the respondent, has by his talent acquired in their works, raise the character of the output of their rivals, improve their methods, and thereby make them more
E formidable competitors in trade of the appellants.

That, I think, is plain, and every word of the able and convincing judgment of FARWELL, L.J., in *Sir W. C. Leng & Co., Ltd. v. Andrews* (3) applies to it. After quoting the passage from the judgment of LORD MACNAGHTEN, which I have already quoted, the lord justice said ([1909] 1 Ch. at pp. 773, 774):

F "The argument which has been addressed to us on behalf of the respondents does not bring the case within that doctrine. That doctrine does not mean that an employer can prevent his employee from using the skill and knowledge in his trade or profession which he has learnt in the course of his employment by means of directions or instructions from the employer. That information and that additional skill he is entitled to use for the benefit of himself and the
G benefit of the public, who gain the advantage of his having had such admirable instruction. The case in which the court interferes for the purpose of protection is where use is made, not of the skill which the man may have acquired, but of the secrets of the trade or profession which he had no right to reveal to anyone else—matters which depend to some extent on good faith. A good deal has been said about organisation. The evidence is singularly scanty in regard to details upon the exact meaning of that word in the present case;
H but I apprehend that a man who goes into an office is entitled to make use in any other office, whether his own or that of another employer, of the knowledge which he has acquired in the former of details of office organisation, such as the establishment of one department with a chief or head and grades of subordinates under him, the desirability of establishing local centres of information in various towns and villages round about Sheffield, and the like. To acquire
I the knowledge of the reasonable mode of general organisation and management of a business of this kind, and to make use of such knowledge, cannot be regarded as a breach of confidence in revealing anything acquired by reason of a person having been in any particular service, although the person may have learnt it in the course of being taught his trade; but it would be a breach of confidence to reveal trade secrets, such as prices, etc., or any secret process or things of a nature which the man was not entitled to reveal."

I think that passage is thoroughly sound.

It was contended that it was open to the respondent even if restrained by the injunction asked for to earn his living as a general engineer. To answer that it is only necessary to consider what was his training. He was twenty-nine years of age last July. In February, 1901, he at the age of fifteen or sixteen years entered the appellant's employment as a junior draftsman. Before he reached twenty-one years of age he had become leading draftsman in a department dealing with pulley blocks, hand overhead runways, and hand overhead travelling cranes, but not up to then with electric overhead runways. His salary was 50s. per week. His work had been confined to this special branch of manufacture. He had no experience of any other. Yet immediately on coming of age he was required to sign an agreement dated July 16, 1906, containing a prohibitive clause similar to that now sued upon save that electric overhead runways are not mentioned in it. Thus before ever he had acquired that varied knowledge and experience of the different branches of the appellants' business, the possession of which by him is now urged as the justification for the covenants relied on, he was similarly bound. This fact strongly suggests that what really prompted to the making of this agreement of July, 1906, was the fear that the respondent's skill as a draftsman might be put at the service of a rival in trade. From March, 1908, to February, 1909, he was at the appellants' establishment in Cardiff as resident engineer, so that up to this his knowledge and experience was confined to the engineering side of this specialised business. In February, 1909, he was transferred to London to manage the selling branch of the business. In 1910 he was sent to Loughborough to take charge of the selling department in connection with the sale of pulley block and Admiralty contracts. He continued there till he left the appellants' employment in April, 1913. Thus his whole engineering training was connected with the manufacture of these four special machines and their component parts. He says he has tried to get employment as a general engineer and has failed, and he was, therefore, obliged, being unable to live in France, to take service with one of the appellants' rivals. I doubt very much if with his want of experience of any kind of engineering other than the one he will ever, or at least for a length of time, be able to obtain employment as a general engineer. This would at all events appear certain that he can only employ his skill and training to the most advantage both to the community and himself by engaging in that class of business in which he has passed his whole working life. On the whole, therefore, I am of opinion that this agreement binding for a period of seven years, and applying to the whole of the three kingdoms, is not, having regard to all the circumstances of the case, reasonable in reference to the respective interests of the parties concerned, and is prejudicial to the interests of the public. I, accordingly, think that the order appealed from was right and should be affirmed, and this appeal should be dismissed with costs.

LORD SHAW (read by LORD ATKINSON).—I am humbly of opinion that the judgments of SARGANT, J., and—in the Court of Appeal—of LORD COZENS-HARDY, M.R., and JOYCE, J., are well founded both upon authority and in principle. So satisfied, indeed, is my mind with these judgments that I should feel well content with a simple concurrence therein. But the dissent of PHILLIMORE, L.J., and the heavy assault delivered upon certain opinions recently delivered—notably in *Mason v. Provident Clothing and Supply, Co., Ltd.* (4)—and upon certain principles laid down, or rather re-affirmed, in that and the *Adelaide Steamship Case* (5)—which principles I thought and still think to be familiar and sound—these things induce me to make the following statement.

I humbly think that this case is covered by the authority of *Mason's Case* (4). The circumstances were not remotely analogous, and the principles in issue were the same. It binds this House, and I see no cause whatsoever for looking upon it as not satisfactory to the reason. All that was argued upon it was to the effect that certain observations made in the course of the judgments were merely dicta

A and were erroneous. These observations were two in number, and they went to the root of the judgment. Nor were they erroneous. The first was, that there does run through this part of the law a real distinction between cases of contracts for the sale of a business, on the one hand, and, on the other, cases of contracts of service. I do not repeat what I ventured to say to this House on that subject in *Mason's Case* (4). When a business is sold, the vendor, who, it may be, has inherited it or built it up, seeks to realise this piece of property, and obtains a purchaser upon a condition without which the whole transaction would be valueless. He sells, himself agreeing not to compete, and the law upholds such a bargain, and declines to permit a vendor to derogate from his own grant. Public interest cannot be invoked to render such a bargain nugatory: to do so would be to use public interest for the destruction of property. Nothing could be a more sure deterrent to commercial energy and activity than a principle that its accumulated results could not be transferred save under conditions which would make its buyer insecure. In the case of restraints upon the opportunity to a workman to earn his livelihood, a different set of considerations comes into play. No actual thing is sold or handed over by a present to a future possessor. The contract is an embargo upon the energy and activities and labour of a citizen; and the public interest coincides with his own in preventing him, on the one hand from being deprived of the opportunity of earning his living, and it, the public, on the other, from being deprived of the work and service of a useful member of society. In this latter case there is not a something already realised, made over to and for the use of another, but there is a something to be created, developed, and rendered to the individual advantage of the worker and to the use of the community at large. It is much too late in the day to attempt an attack upon a principle of distinction so plain.

The other observation in *Mason's Case* (4) which was challenged was that applicable to agreements in restraint of the action of employees who left one service for another, or set up in business for themselves. Trade secrets, the names of customers, all such things which in sound philosophical language are denominated objective knowledge—these may not be given away by a servant; they are his master's property, and there is no rule of public interest which prevents a transfer of them against the master's will being restrained. On the other hand, a man's aptitudes, his skill, his dexterity, his manual or mental ability—all those things which in sound philosophical language are not objective, but subjective—they may, and they ought, not to be relinquished by a servant; they are not his master's property; they are his own property; they are himself. There is no public interest which compels the rendering of those things dormant or sterile or unavailing; on the contrary, the right to use and to expand his powers is advantageous to every citizen, and may be highly so for the country at large. This distinction, which was also questioned in argument, is just as plain as the other. An excellent concrete example of the latter point may be found in the present case. The second head of the injunction claimed is "from divulging or communicating . . . information as to the customers or affairs of the plaintiff company and from otherwise divulging or using such information." This is purely objective, and it was with exact correctness made the subject of a separate claim. As it turns out there is no ground for it in fact; it was entirely given up at your Lordships' Bar. But the subjective side appears in this way. The first injunction claimed is an injunction restraining W. Saxelby for a period of seven years from entering the services of Messrs. Vaughan & Sons, and from carrying on in the United Kingdom "either as principal, agent, servant, or otherwise, alone or jointly or in connection with any other person, firm, or company, or being concerned or assisting directly or indirectly, whether for reward or otherwise, in the sale or manufacture of" four or five pieces of machinery named. This echoes correctly the agreement of parties, and the basis of the restraint claimed is that the servant has become, during the seven

years passed in the master's service, a clever, well-instructed, and capable man.

The question is: Can such a voluntary restraint be enforced by law? Observe its scope. In time, it is for seven years of a man's working life. In space, it is over the entire United Kingdom. In subject-matter, it is directly or indirectly and it is wholly, for that time and in that space, subversive of the way of life to which the servant's past special training has led up. This question is legitimate, and it is legitimately so put. For, in my view, when such an agreed restraint is made the basis of a claim for injunction (i) it is not enough to table the agreement; (ii) facts and circumstances must be set forth which would warrant the law being invoked, and the statement of these facts and circumstances must set out the specialties affecting the relations of parties, or the particular necessities of the case, so as to overcome the presumption which the law makes in favour of the free disposal of one's own labour; (iii) if such facts and circumstances be relevantly set forth, the onus of proof is upon the party averring them to satisfy the court of their sufficiency to overcome the presumption; while (iv) as the time of restriction lengthens, or the space of its operation extends, the weight of that onus grows. Subject to these conditions and within these limits, a case may be made out for restraining the general freedom of trade to which the public interest leans, in favour of the particular freedom of contract which it may be established it was not inconsistent with the general interest to maintain. Furthermore, I may be allowed to allude to what I think is a misapprehension upon this topic of public interest, and the interest of the contracting parties. It is too apt to be supposed that these things are in collision or antagonism; and ground is thought to be obtained for this opinion in the well-known sentences of LORD MACNAGHTEN in the *Nordenfelt Case* (1). It is because the law is the protector of freedom both of contract and of trade that it has to adjust the bounds of each. It is well settled that the law will not sustain a covenant of the kind here in question when its provisions go beyond those necessary for the protection of the interest of the covenantee. The interest of the covenantor has also to be considered, and LORD MACNAGHTEN's words specifically referred to the interest of both parties. But the interest of the covenantor entirely equates, in kind, although not in degree, with the interest of the public; and he can only be successful in pleading his own interest if he is able to establish that the restraint upon him is of a kind and type which, if general, would be injurious to society at large. It is thus that the apparent conflict is reconciled, and an adjustment of all the interests concerned is secured.

The delicacy of the operation of law in settling the bounds of either freedom has been long familiar. In these cases, as I have pointed out, there are two freedoms to be considered, one the freedom of trade and the other the freedom of contract: and to that I will now again venture to add that it is a mistake to think that public interest is only concerned with one. It is concerned with both. It may be, and probably is, that jurisprudence has reflected the evolution of economic thought by accentuating at one period freedom of trade, and at another freedom of contract; but the stage of balance and reconciliation which has now been definitely reached is, it may be observed, in truth a reversion to, and a re-statement of, the perennial problem set forth in the penetrating judgment of LORD MACCLESFIELD in *Mitchel v. Reynolds* (6), in which, speaking more than two centuries ago, he says (1 P. Wms. at p. 182):

"The resolutions of the books upon these contracts seeming to disagree, I will endeavour to state the law upon this head and to reconcile the jarring opinions."

In my opinion, *Mitchel v. Reynolds* (6) still remains among all the decisions one of the most outstanding and helpful authorities. LORD MACCLESFIELD states the principle in a form which seems to fit and rule many very modern conditions, and many developments of commerce and of contract (*ibid.* at p. 190):

A "The true reasons of the distinctions upon which the judgments in these cases of voluntary restraints are founded are, first, the mischief which may arise from them, first to the party by the loss of his livelihood, and the subsistence of his family; secondly, to the public by depriving it of a useful member. Another reason is the great abuses these voluntary restraints are liable to; as, for instance, from corporations, who are perpetually labouring for exclusive advantages in trade, and to reduce it into as few hands as possible; as likewise from masters, who are apt to give their apprentices much vexation, on this account, and to use many indirect practices to procure such bonds from them, lest they should prejudice them in their custom when they come to set up for themselves."

C These principles are far-reaching and enlightened. In my opinion, they may have been now and again in the course of these two centuries obscured: they have never been lost. When they are applied in the present instance, the case is simplicity itself. It is admitted that on the objective side nothing has been done amiss. I do not see that there were any trade secrets; if there were any, they have not been given away. It is not suggested that they will be, and this is the case also with information about customers, &c.; in fact, the whole of that claim for injunction has been abandoned. As to what remains, namely, the claim against Mr. Saxelby setting up or assisting in a business which does the special engineering work in which he was trained, this is rested upon the likelihood that his own abilities, skill, and knowledge would be of advantage to himself or others as competitors in manufacture and trade. So rested, it is an audacious claim, whether regarded from the point of view of the parties or of the public. From the point of view of the appellants it is plainly put, a claim against competition per se, a claim to cripple all rivals in trade by the denial to them of a supply of all skilled labour which has had the advantage of being performed under the appellants, and accordingly pro tanto to compel them to seek for labour in a foreign market. From the point of view of the respondent it is, justly interpreted, a claim to put him in such a bondage in regard to his own labour that, if he seek to find employment or advancement elsewhere, he must, for seven years of his life, become an exile. From the point of view of the public one would have thought that it was at least not inconsistent with the public interest to "let knowledge grow from more to more." And under modern conditions, both of society and of trade, it would appear to be in accord with the public interest to open and not to shut the markets of these islands to the skilled labour and the commercial and industrial abilities of its inhabitants, to further and not to obstruct for these *les carrières ouvertes*. All such considerations are shut down under an appeal to enforce this restraint, and I am humbly of opinion that its enforcement cannot be compelled by law. I agree that the appeal should be dismissed.

H **LORD PARKER OF WADDINGTON** (read by LORD SUMNER).—In *Nordenfellt v. Maxim Nordenfellt Guns and Ammunition Co.* (1), LORD MACNAGHTEN considered most if not all of the prior cases relating to contracts in restraint of trade, and came to certain conclusions. I had to consider them in *A.-G. of the Commonwealth of Australia v. Adelaide Steamship Co.* (5), and I adhere to everything I then said. As I read LORD MACNAGHTEN's judgment, he was of opinion that all restraints on trade of themselves, if there is nothing more, are contrary to public policy, and, therefore, void. It is not that such restraints must of themselves necessarily operate to the public injury, but that it is against the policy of the common law to enforce them except in cases where there are special circumstances to justify them. The onus of proving such special circumstances must, of course, rest on the party alleging them. When once they are proved, it is a question of law for the decision of the judge whether they do or do not justify the restraint. There is no question of onus one way or another. It will be observed that in LORD

MACNAGHTEN's opinion two conditions must be fulfilled if the restraint is to be held valid. First, it must be reasonable in the interests of the contracting parties, and, secondly, it must be reasonable in the interests of the public. In the case of each condition he lays down a test of reasonableness. To be reasonable in the interests of the parties the restraint must afford adequate protection to the party in whose favour it is imposed; to be reasonable in the interests of the public it must be in no way injurious to the public.

X With regard to the former test, I think it clear that what is meant is that for a restraint to be reasonable in the interests of the parties it must afford no more than adequate protection to the party in whose favour it is imposed. So conceived, the test appears to me to be valid both as regards the covenantor and covenantee, for though in one sense, no doubt, it is contrary to the interests of the covenantor to subject himself to any restraint, still it may be for his advantage to be able so to subject himself in cases where, if he could not do so, he would lose other advantages, such as the possibility of obtaining the best terms on the sale of an existing business or the possibility of obtaining employment or training under competent employers. As long as the restraint to which he subjects himself is no wider than is required for the adequate protection of the person in whose favour it is created, it is in his interest to be able to bind himself for the sake of the indirect advantages he may obtain by so doing. It was at one time thought that in order to ascertain whether a restraint were reasonable in the interests of the covenantor, the court ought to weigh the advantages accruing to the covenantor under the contract against the disadvantages imposed upon him by the restraint, but any such process has long since been rejected as impracticable. The court no longer considers the adequacy of the consideration in any particular case. If it be reasonable that a covenantee should, for his own protection, ask for a restraint, it is, in my opinion, equally reasonable that the covenantor should be able to subject himself to this restraint. The test of reasonableness is the same in both cases.

It was suggested in argument that the interests of the public ought to be considered and weighed in determining whether a restraint is reasonable in the interests of the parties. I dissent from this view. It would, indeed, entirely destroy the value of LORD MACNAGHTEN's tests of reasonableness. The first question in every case is whether the restraint is reasonable in the interests of the parties. If it is not, the restraint is bad. If it is, it may still be shown that it is injurious to the public, though, as I pointed out in the case referred to, the onus of so showing would lie on the party alleging it.

It appears to me that LORD MACNAGHTEN's statement of the law requires amplification in another respect. If the restraint is to secure no more than "adequate protection" to the party in whose favour it is imposed, it becomes necessary to consider in each particular case what it is for which and what it is against which protection is required. Otherwise it would be impossible to pass any opinion on the adequacy of the protection. In the *Nordenfelt Case* (1) that which it was required to protect was the goodwill of a business transferred by the covenantor to the covenantee, and that against which protection was sought was competition by the covenantor throughout the area in which such business was carried on. Under the particular circumstances of the case a world-wide covenant against competition was held no more than adequate for the purchaser's protection. It was argued before your Lordships that no distinction can be drawn between the position of the purchaser of the goodwill of a business taking such a covenant from his vendor and the case of the owner of a business taking such a covenant from his servant or apprentice. In both cases it was said that the property to be protected was the same, and the dangers to be guarded against the same. I am of opinion that this argument cannot be accepted. The distinction between the two cases is, I think, quite clear, and is recognised both by LORD MACNAGHTEN and LORD

- A HERSCHELL in the *Nordenfelt Case* (1). The goodwill of a business is immune from the danger of the owner exercising his personal knowledge and skill to its detriment, and if the purchaser is to take over such goodwill with all its advantages it must, in his hands, remain similarly immune. Without, therefore, a covenant on the part of the vendor against competition, a purchaser would not get what he is contracting to buy, nor could the vendor give what he is intending to sell.
- B The covenant against competition is, therefore, reasonable if confined to the area within which it would in all probability enure to the injury of the purchaser.

It is quite different in the case of an employer taking such a covenant from his employee or apprentice. The goodwill of his business is, under the conditions in which we live, necessarily subject to the competition of all persons (including the servant or apprentice) who choose to engage in a similar trade. The employer

C in such a case is not endeavouring to protect what he has, but to gain a special advantage which he could not otherwise secure. I cannot find any case in which a covenant against competition by a servant or apprentice has, as such, ever been upheld by the court. Wherever such covenants have been upheld it has been on the ground, not that the servant or apprentice would, by reason of his employment or training, obtain the skill and knowledge necessary to equip him as a possible competitor in the trade, but that he might obtain such personal knowledge of the influence over the customers of his employer, or such an acquaintance with his employer's trade secrets as would enable him, if competition were allowed, to take advantage of his employer's trade connection or utilise information confidentially obtained. As might be expected, where the cases are so numerous, it is not impossible to find dicta pointing to a contrary conclusion. I refer in especial

E to what was said by PARKE, B., in *Mallan v. May* (7), but even here it is to be observed that counsel in argument supported the validity of the covenant on the ground that it was no more than was necessary to prevent the defendant from availing himself of the knowledge he had acquired in the plaintiff's service to interfere with the plaintiff's customers. If a covenant restraining competition by an employee were in itself reasonable, it is difficult to see why the court has

F considered in almost every case whether such covenant could be justified as no more than sufficient to protect trade connection and trade secrets.

The point did not arise for actual decision until *Sir W. C. Leng & Co., Ltd. v. Andrews* (3). In that case the covenantor was a newspaper reporter. He did not in the course of his employment come across the covenantee's customers, nor was he intrusted by his employers with any confidential information whatever. The

G effect of the covenant, therefore, was merely to prevent him using his personal skill and knowledge within the limited area mentioned in the covenant; in other words, it was merely to preclude competition. In these circumstances it was unanimously held that the covenant was bad. In *Mason v. Provident Clothing and Supply Co., Ltd.* (4) it was argued, apparently for the first time in this class of case, that an

H employer might reasonably say: "I will not have the skill and knowledge acquired in my employment imparted to my trade rivals," and that the validity of the restraint did not depend upon personal contact with the employer's customers, but upon the fact that the employee gained that general knowledge which put him into a position to compete with his master and made him a source of danger, against which the master was entitled to protect himself. This argument was

I rejected by your Lordships' House, and the restraint in question was held bad, as being wider than was necessary to protect the employer from injury by misuse of the employee's acquaintance with customers or knowledge of trade secrets. In fact the reason, and the only reason, for upholding such a restraint on an employee is that the employer has some proprietary right, whether in the nature of trade connection or in the nature of trade secrets, for the protection of which such a restraint is—having regard to the duties of the employee—reasonably necessary. Such a restraint has, so far as I know, never been upheld, if directed only to the

prevention of competition or against the use of the personal skill and knowledge acquired by the employee in the employer's business.

It remains to apply what I have said to the particular circumstances of the present case. Mr. Herbert Morris, the managing director of the plaintiff company, very candidly admitted that the real object of the plaintiff company in imposing the restraint was to preclude competition on the part of the defendant after he had left the company's employment. The company objected, he said, to skill and knowledge acquired in its service being put at the disposition of any trade rival, and the skill and knowledge he referred to was the general skill and knowledge which an employee of any ability must necessarily obtain as opposed to knowledge of any matter and skill in any process in which the company could be said to have any property at all. To use LORD SHAW's metaphor in *Mason v. Provident Clothing and Supply Co., Ltd.* (4), it was "subjective" as opposed to "objective" skill and knowledge; or, to use the expression of JOYCE, J., in this case, it was skill and knowledge "which were his own," and in no sense the plaintiffs' property. As directed against competition or against the use of this skill and knowledge, I am clearly of opinion that the restraint was in no way required for the plaintiffs' protection, and, therefore, unreasonable and bad in law. An attempt was, however, made in argument to justify the restraint on the ground that it was no more than adequate for the protection of the plaintiffs' trade connection and trade secrets. I am of opinion that this attempt completely failed. With regard to the plaintiffs' connection, there is little or no evidence that the defendant ever came into personal contact with the plaintiffs' customers. For a period, it is true, he was manager of the London branch of the plaintiffs' business, and for another period sales manager at Loughborough. With the exception of these periods he was employed entirely in the engineering department. Had the restraint been confined to London and Loughborough and a reasonable area round each of these centres, it might possibly have been supported as reasonably necessary to protect the plaintiffs' connection, but a restraint extending over the United Kingdom was obviously too wide in this respect. I am not satisfied that the defendant was intrusted with any trade secret in the proper sense of the word at all. Counsel for the appellants boldly argued that the expression "trade secrets" ought to be extended so as to include everything which Mr. Morris claimed to be peculiar to the plaintiffs method of carrying on their business. I will assume that the matters referred to by counsel are in fact peculiar to the plaintiffs' business, though I can hardly regard Mr. Morris's uncorroborated evidence as very satisfactory proof that the practices in question were unknown to other firms. Still, the manner in which SARGANT, J., dealt with this part of the case appears to me to be unanswerable. Though the defendant had access to the E charts, the L sheets, the drawings of special machines, the costs index, and other documents, all of which may be considered confidential, these documents were far too detailed for the defendant to carry away their contents in his head. All that he could carry away was the general method and character of the scheme of organisation practised by the plaintiff company. Such scheme and method can hardly be regarded as a trade secret. The same applies to the plaintiff company's system of standardising mechanical apparatus capable of being used in more than one class of machine. The nearest approach that I can find in the evidence to anything in the nature of a trade secret is the mention of certain formulæ, said to be based on the plaintiff's experience, and to be more trustworthy than Molesworth's formulæ for similar purposes. During the course of the argument your Lordships asked for, but failed to obtain these formulæ, and, therefore, I am unable to judge whether they are such that the defendant could carry them in his memory. I, therefore, cannot attach any great importance to them. It would be a point of some difficulty whether the possession by an employee of a single trade secret would justify a restraint as wide as that in the present case, but under the circumstances I do not consider that this point really arises. In my opinion, the case

A falls within your Lordships' decision in *Mason v. Provident Clothing and Supply Co., Ltd.* (4). The appeal therefore fails.

LORD SUMNER.—I have had the advantage of reading and considering the judgment of my noble and learned friend LORD PARKER, and I entirely agree with it.

Appeal dismissed.

B Solicitors: *Ward, Perks & Terry; Pettiver & Pearkes.*

[*Reported by W. E. REID, ESQ., Barrister-at-Law.*]

Re PAWSON

D [KING'S BENCH DIVISION (Horridge, J.), February 27, May 3, 4, 14, 1917]

[Reported [1917] 2 K.B. 527; 86 L.J.K.B. 1285; 117 L.T. 315;

[1917] H.B.R. 87]

Bankruptcy—Proof—Secured creditor—Voting in respect of "whole debt"—No valuation of security—Voting in respect of debt proved—Other debts due covered by security—Surrender of security—Omission to value security arising from inadvertence—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), Sched. 1, para. 10.

E The creditor of a bankrupt proved for a debt, but deliberately refrained from mentioning a security which covered not only the debt proved but also any other debts which might become due. At a creditors' meeting the creditor voted in respect of the whole debt proved, but at the time he was owed further sums by the bankrupt all of which were covered by security. On a motion by the trustee in bankruptcy that by voting in respect of his "whole debt" within para. 10 of Sched. 1 to the Bankruptcy Act, 1914, he had surrendered his security,

G **Held:** the creditor, having voted in respect of the debt proved, had voted in respect of his "whole debt" within para. 10, and, as the court was not satisfied, as a question of fact, that the omission to value the security had arisen by inadvertence, the creditor must be deemed to have surrendered his security.

Notes. Referred to: *Re Maxson, Ex parte Trustee* (1919), 88 L.J.K.B. 854.

H As to proof of debts in bankruptcy and valuation of security, see 2 HALSBURY'S LAWS (3rd Edn.) 499, 500, and for cases see 4 DIGEST (Repl.) 372 et seq. For para. 10 of Sched. 1, to the Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 444.

Cases referred to:

- (1) *Re Burr, Ex parte Clarke* (1892), 67 L.T. 232; 40 W.R. 608; 8 T.L.R. 671; 36 Sol. Jo. 628; affirmed 67 L.T. 465, C.A.; 4 Digest (Repl.) 373, 3397.
- (2) *Re Safety Explosives, Ltd.*, [1904] 1 Ch. 226; 73 L.J.Ch. 184; 90 L.T. 321; 52 W.R. 470; 11 Mans. 76, C.A.; 4 Digest (Repl.) 373, 3399.
- (3) *Re Paine, Ex parte Read*, [1897] 1 Q.B. 122; 66 L.J.Q.B. 71; 75 L.T. 316; 45 W.R. 190; 13 T.L.R. 13; 41 Sol. Jo. 30; 3 Mans. 309; 4 Digest (Repl.) 317, 2878.

Also referred to in argument:

Wolmershausen v. Gullick, [1893] 2 Ch. 514; 62 L.J.Ch. 773; 68 L.T. 753; 9 T.L.R. 437; 3 R. 610; 4 Digest (Repl.) 301, 2735.

Re King, Ex parte Mesham (1885), 2 Morr. 119; 4 Digest (Repl.) 373, 3395.

Motion on behalf of a trustee in bankruptcy for a declaration that a secured creditor had surrendered a security, consisting of an indenture of indemnity and mortgage, by voting at a meeting of creditors in respect of the whole debt comprised in the proof; that he was not entitled to rank as a secured creditor on the property comprised in the security in priority to the trustee; and for an order that the deed might be cancelled in so far as it consisted of a security on the property of the bankrupt. There was also a cross motion of the secured creditor for an order that he might amend his proof by inserting therein the particulars and value of the security, or, in the alternative, that he might withdraw the proof and rely on the security. In the further alternative he asked for a declaration that the mortgage was not affected except in so far as it relates to the debt in respect of which the proof was lodged—namely, £1,113.

In December, 1906, the debtor executed an indenture of indemnity in favour of Captain Bewicke, a secured creditor, which was not dated, because it was to include a policy of insurance on the debtor's life for £7,500, which, although arranged for, had not then been issued. The mortgage was prepared by one Weatherley, the secured creditor's then solicitor, as security for all moneys which might be paid by the secured creditor on certain bills which he had indorsed. In addition to the policy, the mortgage was to include the debtor's interest under his marriage settlement. On Nov. 16, 1906, the draft was settled by counsel. The deed was executed in the presence of Weatherley on Dec. 28, 1906. He subsequently gave it to his clerk to be stamped, and kept it for some time.

A letter dated Dec. 28, 1906, referring to the deed and signed by the debtor, was read to the court. In February, 1907, the debtor desired to borrow from one Leslie on the security of his interest under the mortgage. The secured creditor agreed to postpone his security to enable this to be done. The original of the deed could not now be found, but a copy was produced on the solicitors undertaking to have it stamped. On Sept. 11, 1907, a receiving order was made against the debtor. The secured creditor made no mention of the security in his proof for £1,113, Weatherby being ill at the time; but he attended a creditors' meeting next day and voted in respect of his proof. It comprised three items—namely £100, money lent on April 12, 1907; £509, money paid to the sheriff on June 8, 1907; and £504, paid to Wilton & Co. on Aug. 10, 1907. On the date when Captain Bewicke voted the debtor owed him two further sums—namely, £42 for the preparation of the deed above referred to and £149, a year's premium on the policy. He was also under a contingent liability. All of these matters were covered by the mortgage. Affidavits of the secured creditor, Weatherley, a member of the firm of Kenneth Brown, Baker, Baker & Co., and of the trustee were read to the court.

The motion was resisted on the ground that the omission to value the security was due to inadvertence within the meaning of para. 10 of Sched. 1 to the Bankruptcy Act, 1914, which provides that:

"For the purpose of voting, a secured creditor shall, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to vote only in respect of the balance (if any) due to him, after deducting the value of his security. If he votes in respect of his whole debt he shall be deemed to have surrendered his security unless the court on application is satisfied that the omission to value the security has arisen from inadvertence."

Hansell for the trustee.

Clayton, K.C., and *Merlin*, for the secured creditor, Captain Bewicke.

Clauson, K.C., and *Sanger*, for the other secured creditors.

Cur. adv. vult.

May 14, 1917. **HORRIDGE, J.**, read the following judgment: In this case there were two motions, one asking in effect for a declaration that a security

A dated Dec. 28, 1906, on the property of the bankrupt had been surrendered by the respondent within the provisions of para. 10 of Sched. 1 to the Bankruptcy Act, 1914, he having voted in respect of his whole debt, and the other, being a cross-motion by Captain Bewicke to amend his proof of debt for £1,113, sworn by him on Nov. 5, 1907, by inserting therein particulars and value of such security. I am satisfied upon the evidence before me that the security in question was, in fact, executed on or about the date which it now bears. The letter dated Dec. 28, 1906, signed by the bankrupt, and addressed to Messrs. Weatherley & Co., referring to the deed of indemnity and charge given to Captain Bewicke, was, I think, clearly written in 1906, even though possibly the date may have been afterwards altered. Further, it was not disputed the policy referred to in the deed was in fact obtained from the Caledonian Insurance Co. about that time.

C The question of fact which I have to decide is whether or not I am satisfied that the omission to insert the particulars and value of the security in the proof of Nov. 5, 1907, arose from inadvertence. The trustee says the omission to mention the security was intentional, and was due to an arrangement previously entered into between the bankrupt and Captain Bewicke, and Captain Bewicke agreed, though taking the security, to keep the fact of its existence secret. The provisions of the deed itself throw some light upon the matter. By cl. 6 it was provided that Captain Bewicke should not give notice to the trustees or trustee for the time being of the realty settlement or of the personalty settlement (the subject-matters of which settlements are included in the security) unless and until he should have demanded payment, and default should have been made by the bankrupt for fourteen days, but this provision was not to preclude notice of the security being given to the assurance society or to any prior mortgagee, or preclude registration of the security as the grant of an annuity or otherwise. The deed was not dated and no notice of its existence was in fact given to the trustees, to the assurance company, to any prior mortgagee, nor was it stamped or registered. The bankrupt stated that on the evening of the day on which the security was given he had an understanding with Captain Bewicke stating he held the mortgage and would not put it into force, and that he would rely on the bankrupt's getting sufficient money on some future date, and that he would give the bankrupt plenty of time to do that. Captain Bewicke stated in evidence that he did agree to keep the bankrupt's affairs as dark as he could. A further advance was subsequently obtained on the property, the subject matter of the security, from the Economic Assurance Society, and on Jan. 18, 1907, Messrs. Beachcroft, Thomson & Co. informed Messrs. G Weatherley & Co., who had acted as solicitors for both parties at the time of the giving of the security in question, that such loan of £6,000 from the Economic Society had been completed and the bankrupt had signed a further equitable charge for £2,000 in their favour. At this time Messrs. Weatherley & Co. held the mortgage deed of Dec. 28, 1906, and they in no way communicated with H Captain Bewicke. The mortgage deed, in fact, had been left in the custody of Messrs. Weatherley & Co., and, according to the evidence of Mr. Weatherley, had never been placed in his strong room, where such a security would ordinarily be put. When the proof came to be made on the bankruptcy of Pawson, Mr. Weatherley was ill, and Captain Bewicke employed another solicitor, Mr. Cobbold, who, as appears from the evidence of the witness Cooper, did obtain certain particulars from him necessary for the preparation of the proof. The proof was put in I for three sums—£100 money lent on I.O.U., £509 paid to Messrs. Wilton & Co., and £504 paid to Messrs. Wilton & Co. At the time of this proof Captain Bewicke had also paid £42 for costs of the preparation of the deed, £149 for the year's premium on the policy of assurance, and he was also liable as surety for the bankrupt on bills for a considerable amount on which he had placed his name. The proof remained on the file, and nothing was heard of the security on Dec. 28, 1906, until, as appears by the affidavit of Mr. Weatherley, he discovered it at the beginning of 1916 in a bundle of papers relating to Captain Bewicke's affairs

which had remained in his possession. Shortly after this discovery, namely, on Mar. 16, 1916, a notice was served on the trustee of the estate of the bankrupt setting out particulars of the deed and the amounts which had become payable under it. By an indenture dated Dec. 31, 1906, the bankrupt, with the consent of the Economic Assurance Society, had appointed receivers of the premises included in the security of Dec. 25, 1906, and they have continued down to the present time and up to the receipt of the notice of Mar. 16, 1916, and have accounted for any surplus of the rents and profits to the trustee in this bankruptcy without notice of the mortgage of Dec. 28, 1906.

The question I have to consider is whether or not I am satisfied the omission to value the security arose from inadvertence. In *Re Burr, Ex parte Clarke* (1) VAUGHAN WILLIAMS, J., took the view inadvertence would not be constituted in a case in which the creditor, balancing the advantage and disadvantage of stating and valuing his security, deliberately elects to prove for his whole debt; but as was pointed out by that learned judge when sitting in the Court of Appeal in *Re Safety Explosives, Ltd.* (2), this was mentioned amongst things which could not constitute inadvertence, and I do not consider in the earlier case the learned judge intended to lay down an exclusive definition. STIRLING, L.J., in *Re Safety Explosives, Ltd.* (2) reverts to the Bankruptcy Act in using the word "inadvertence." It must always, I think, be a question of fact whether the judge is satisfied the omission to value has arisen from inadvertence. VAUGHAN WILLIAMS, L.J., speaks in his judgment in *Re Safety Explosives, Ltd.* (2) of "the onus which was clearly on him of showing that the omission was caused by inadvertence."

It was argued before me that Captain Bewicke did not know the security ought to be valued, and Mr. Cobbold, the solicitor who prepared the proof, did not know of the existence of the security; but these facts are not inconsistent with Captain Bewicke having deliberately decided he would not produce his security under any circumstances, and it must be borne in mind that the production of it in November, 1907, might have led to inquiries as to why the bankrupt did not give notice of it to the trustee. The facts as deposed to in para. 5 of Captain Bewicke's affidavit as to the deed having been disclosed and then postponed to a security to one Leslie were pressed before me as showing it could not have been intended to conceal the deed, but nothing was proved before me as to the circumstances under which the advance by Leslie was made. There may have been good reasons, such as a requirement by Leslie of a declaration as to encumbrances, which the parties were not prepared to make, and it may have been that the advance by Leslie was made under such circumstances as to prevent the knowledge of the making of the security of Dec. 28, 1906, coming to the trustee. Answer No. 80 given in his private examination was much relied upon by counsel for Captain Bewicke. In that answer he says he remembers previously to a race in March, 1907, he had broken with the bankrupt, and, therefore, it was said he would not be likely to withdraw his security when he came to prove his debt, and I think his still desiring not to show inconsistent with his being on less friendly relationship with the bankrupt. I was very dissatisfied with the way in which Captain Bewicke gave his evidence. He was not sure that his proof had been prepared by Mr. Cobbold, though he said to the best of his belief it had. He could not remember definitely going to Mr. Cobbold about the proof. He said to the best of his belief he did not tell Mr. Cobbold about the mortgage; he did not understand anything about it, although he knew he had security of sorts. His memory was to my mind quite unreliable, and he certainly did not satisfy me the concealment of the mortgage was unintentionally done. Upon the whole of the facts I am of opinion the security was intentionally concealed by Captain Bewicke, and I certainly am not satisfied that the omission to mention or value it arose from inadvertence.

I, therefore, cannot see my way to give him any relief under para. 10 of Sched. 1 to the Bankruptcy Act, 1914. A difficult question remains. At the time when the proof was tendered the bankrupt was further indebted to Captain Bewicke in the

- A** sums of £42 and £149, and Captain Bewicke was entitled to prove also for his contingent liability as a surety who had put his name on the bankrupt's bills: *Re Paine* (3). All these matters were duly covered by the security, and the proof should have been made for the full amount of the actual and contingent liability setting out the particulars of the mortgage of Dec. 28, 1905, which secured all these matters. Does the omission here to value such security cause the security
- B** to be entirely surrendered to the trustee, or is it still a security for the matters which were not included in the proof? The words of para. 10 of Sched. 1, are: "... If he votes in respect of his whole debt he shall be deemed to have surrendered his security..." I think the words "whole debt" are used in contradistinction to the previous words in the paragraph "balance (if any) due to him after deducting the value of his security." I think he votes in respect of his whole debt within
- C** the meaning of para. 10, if he votes in respect of the debt which he has proved, and that, therefore, he must be deemed having not chosen to put in a claim for his whole debt, to nevertheless have surrendered the security within the words of para. 10 and not merely a portion of the security. This seems to be the only workable rule, as otherwise, under these circumstances, there would be a partial surrendering of the security to which the trustee would be entitled, and the balance of the
- D** same security would be held by Captain Bewicke as a security for a portion of his claim which he omitted to insert in his proof. I think he must be taken, by not valuing the security, to have surrendered it in its entirety.

- The proper order seems to be to dismiss Captain Bewicke's motion with costs, and to make an order upon the earlier motion of the trustee in the terms of the notice of motion. I thought it right to have before me the prior and subsequent
- E** incumbrancers on the property, the subject-matter of the mortgage of Dec. 28, 1906, and they were represented by counsel appearing for them all. On the hearing it was agreed I should state in my judgment that I decide no question of priority as between the incumbrancers and the trustee. I think they were, however, necessary parties to be present at the disposal of these motions, and therefore I direct that Captain Bewicke also pay their costs. If my decision as to the whole
- F** of the security having been surrendered is correct, I think the trustee ought now to admit a further or amended proof in respect of the other liabilities of the bankrupt to Captain Bewicke which were not included in his first proof, but of course Captain Bewicke would not be entitled in any way to claim the value of the security if he adopts the course of sending in a further or amended proof.

Trustee's motion allowed: cross-motion dismissed.

Solicitors: *Mawby, Mawby & Morris; Kenneth Brown, Baker, Baker & Co.; Young, Jackson, Beard & King.*

[Reported by W. V. BALL, Esq., Barrister-at-Law.]

Re MELLODY. BRANDWOOD v. HADEN

[CHANCERY DIVISION (Eve, J.); November 22, 1917]

[Reported [1918] 1 Ch. 228; 87 L.J.Ch. 185; 118 L.T. 155; 82 J.P. 128;
34 T.L.R. 122; 62 Sol. Jo. 121]

Charity—Benefit to community—Education—Gift to provide annual treat or field day for school children.

By her will the testatrix directed that the proceeds of sale of certain property should be paid to the vicar and trustees of St. A.'s Church, T., to be held on trust as to one half of the income thereof to provide an annual treat or field day for the school children of T. on the anniversary of her birth, and the trustees were given a power of selection among the children to participate in such treat.

Held: the bequest was a valid charitable trust, both as tending to the advancement of education and as being for purposes beneficial to a particular section of the community.

Notes. Distinguished: *Wernher's Charitable Trust (Trustees) v. I.R. Comrs.*, [1937] 2 All E.R. 488. Referred to: *Re Ward's Estate*, *Ward v. Ward* (1937), 81 Sol. Jo. 397.

As to gifts to charity for the advancement of particular educational purposes, see 4 HALSBURY'S LAWS (3rd Edn.) 218, 221, and for cases see 8 DIGEST (Repl.) 328 et seq.

Cases referred to in argument:

Income Tax Special Purposes Comrs. v. Pemsel, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 7 T.L.R. 657; 3 Tax Cas. 53, H.L.; 8 Digest (Repl.) 312, 1.

Re Mariette, *Mariette v. Aldenham School, Governing Body*, [1915] 2 Ch. 284; 84 L.J.Ch. 825; 113 L.T. 920; 31 T.L.R. 536; 59 Sol. Jo. 630; 8 Digest (Repl.) 327, 98.

Re Nottage, *Jones v. Palmer*, [1895] 2 Ch. 649; 64 L.J.Ch. 695; 73 L.T. 269; 44 W.R. 22; 11 T.L.R. 519; 39 Sol. Jo. 655; 12 R. 571, C.A.; 8 Digest (Repl.) 358, 370.

Re Drummond, *Ashworth v. Drummond*, [1914] 2 Ch. 90; 83 L.J.Ch. 817; 111 L.T. 156; 30 T.L.R. 429; 58 Sol. Jo. 472; 8 Digest (Repl.) 359, 371.

Adjourned Summons.

The testatrix Mary Priscilla Melody, who died on Jan. 1, 1917, by her will, dated Aug. 4, 1916, appointed the plaintiffs James Henry Brandwood and Malcolm Keith, executors and trustees, and gave, devised and bequeathed to them two leasehold dwelling-houses and premises at Turton in the county of Lancaster upon trust to sell the same, and, after payment of all incidental costs and expenses and the costs and expenses in connection with the preparation of any necessary trust deed to carry out the trust thereby declared, to stand possessed of the residue of the moneys to arise from such sale in trust to pay the same to the vicar and trustees for the time being of St. Anne's Church, Turton, to be held by them upon trust to invest the residue of the moneys to arise from such sale and to hold and stand possessed of such investments, upon trust as to one equal half part of the net income to arise from such investments to provide an annual treat or tea party for the aged poor people of Turton, or as many of such as the same would provide for, such annual treat or tea party to take place on Jan. 17 in each year, unless a Sunday, and then the day before such date (such date being the anniversary of the birth of her deceased husband Joseph Melody), and as to the other equal half part of the income to provide an annual treat or field day for the school children of Turton or as many of such children as the same would provide

A for, such annual treat or field day to take place on the nearest Saturday to May 21
in each year, that being the anniversary of her own birth, and the testatrix
expressly desired and directed that such treats should be respectively called the
"Joseph Melody Treat" and the "Mrs. Joseph Melody Treat," and that the
vicar and trustees and their successors should have full power to elect what
persons should be entitled to participate in such treats respectively. And the
B testatrix gave all her residuary real and personal estate upon trust for the infant
defendant Winifred Haden as and when she should attain the age of twenty-one
years.

C In the parish of Turton there were about 600 children and three schools, St.
Anne's Church of England School; the Edgworth Wesleyan School, and the Hob
Lane Council School. No question arose concerning the bequest for the treat for
the aged poor people of Turton, which was admittedly a good charitable gift. This
summons was taken out by the trustees of the will to determine whether the bequest
for the purpose of providing an annual treat or field day for the school children
of Turton was a valid charitable trust, or was void and fell into residue and to
whom the trustees ought to pay the proceeds of sale of the two dwelling-houses.

D *J. W. Manning* for the trustees of the will.

St. John Clerke for the vicar of St. Anne's Church, Turton.

Fairfax Luxmoore for the infant defendant interested in residue.

Austen-Cartmell for the Attorney-General.

E **EVE, J.**—I think that this gift can be supported as a good charitable gift on
two grounds, first, as tending to the advancement of education; and, secondly, as
being for purposes beneficial to a particular section of the community. It is no
doubt true that a school treat may not always be used only for educational purposes,
but it does not necessarily follow that it partakes of the orgies of a juvenile bean-
feast. It may well be made, and I doubt not often is made, the occasion for
pointing out to the children those objects of the countryside and nature about
which in their school hours they have read in their books, or which they have
F seen in the pictures displayed upon the walls of their schoolroom, but with which
they can make no more intimate acquaintance in school. I think also that there
was a good deal of force in the argument of counsel for the vicar of St. Anne's
Church that the possibility of being included in the list of those elected to participate
in this annual treat would tend to encourage regularity in attendance at school
and in the work and habits of the children, and to promote industry and zeal in
G their studies. On these grounds I think that this can be supported as a gift
tending to the advancement of education. Further, I think that it is a gift for
purposes beneficial to a section of the community. In the circumstances of the
present devastating war, children constitute a very important section of the
community; this is a trust for the benefit of the school children of Turton, whether
the children attending a school of any particular denomination I will not pretend
H to say, but it is a trust for a large and important section of the public resident
or being educated in Turton, and on that ground also it is, in my opinion, also a
good charitable gift. The fund will be transferred to the Official Trustees of Charit-
able Funds, and a scheme for its administration will have to be prepared.

Solicitors: *Woodcock, Ryland & Parker*, for *Woodcock & Sons*, Haslingden;
Cole & Jackson, for *Broadbent & Heelis*, Bolton; *Treasury Solicitor*.

[Reported by W. P. PAIN, ESQ., Barrister-at-Law.]

Re WILKINSON'S SETTLEMENT. BUTLER v. WILKINSON

[CHANCERY DIVISION (Sargant, J.), March 7, 16, 1917]

[Reported [1917] 1 Ch. 620; 86 L.J.Ch. 511; 117 L.T. 81; 33 T.L.R. 267; 61 Sol. Jo. 414]

Conflict of Laws—Power of appointment—Special power to appoint by will—Exercise by will in Italian form and valid by Italian law, but unattested by witnesses—Letters of administration with will annexed admitted to probate in England—Wills Act, 1837 (7 Will. 4 & 1 Vict., c. 26), s. 9, s. 10, s. 27.

By a marriage settlement dated 1855 personal property in England was given to trustees in trust for such of the children of the marriage as, in the events which happened, W. should "by will appoint." W. died in Italy in 1914, having acquired an Italian domicile and having by her will, made in Italian form, expressed the desire that her unmarried children should have equal shares in the settled property. The will was valid according to Italian law, but had not been attested by witnesses. Letters of administration with the will annexed were granted out of the Probate Division of the High Court in England.

Held: "will" in the instrument creating such a power was not limited to a will executed in accordance with the law of England, but included any instrument recognised by the law of England as a will, and, as the Italian will had been admitted to probate in England, it operated as a valid execution of the special power of appointment in the English settlement.

Notes. Applied: *Re Lewal's Settlement Trusts, Gould v. Lewal*, [1918] 2 Ch. 391. Considered: *Re Wernher, Wernher v. Beit*, [1918] 1 Ch. 339; *Re Waite's Settlement Trusts, Westminster Bank, Ltd. v. Brouard*, [1957] 1 All E.R. 629.

As to the law governing succession to moveables where a power of appointment is exercised by a foreign will admitted to probate in England, see 7 HALSBURY'S LAWS (3rd Edn.) 60, 61, and as to the exercise of powers of appointment by a document recognised as a testamentary instrument by the Probate Division see, *ibid.*, vol. 30, p. 246; and for cases see 11 DIGEST (Repl.) 411 et seq. For s. 9, s. 10, s. 27 of the Wills Act, 1837, see 26 HALSBURY'S STATUTES (2nd Edn.) 1332, 1335, 1347, and for the Wills Act, 1861, (Lord Kingsdown's Act) see 26 HALSBURY'S STATUTES (2nd Edn.) 1356.

Cases referred to:

- (1) *Re Price, Tomlin v. Latter*, [1900] 1 Ch. 442; 69 L.J.Ch. 225; 82 L.T. 79; 48 W.R. 373; 16 T.L.R. 189; 44 Sol. Jo. 242; 11 Digest (Repl.) 415, 686.
- (2) *D'Huart v. Harkness* (1865), 34 Beav. 324; 5 New Rep. 440; 34 L.J.Ch. 311; 11 Jur. N.S. 633; 13 W.R. 513; 55 E.R. 660; 11 Digest (Repl.) 414, 682.
- (3) *Re Kirwan's Trusts* (1883), 25 Ch.D. 373; 52 L.J.Ch. 952; 49 L.T. 292; 32 W.R. 581; 11 Digest (Repl.) 415, 683.
- (4) *Hummel v. Hummel*, [1898] 1 Ch. 642; 67 L.J.Ch. 363; 78 L.T. 518; 46 W.R. 507; 11 Digest (Repl.) 415, 685.
- (5) *Re D'Este's Settlement Trusts, Poulter v. D'Este*, [1903] 1 Ch. 898; 72 L.J.Ch. 305; 88 L.T. 384; 51 W.R. 552; 47 Sol. Jo. 353; 11 Digest (Repl.) 416, 688.
- (6) *Re Scholefield, Scholefield v. St. John, Re Young, Smith v. St. John*, [1905] 2 Ch. 408; 74 L.J.Ch. 610; 93 L.T. 122; 54 W.R. 56; 21 T.L.R. 675; on appeal [1907] 1 Ch. 664; 75 L.J.Ch. 720; 23 T.L.R. 764, C.A.; 11 Digest (Repl.) 416, 689.
- (7) *Re Simpson, Coutts & Co. v. Church Missionary Society*, [1916] 1 Ch. 502; 85 L.J.Ch. 329; 114 L.T. 835; 11 Digest (Repl.) 416, 690.

Also referred to in argument :

Milnes v. Foden (1890), 15 P.D. 105; 59 L.J.P. 62; 62 L.T. 498; 44 Digest 227, 518.

Barretto v. Young, [1900] 2 Ch. 339; 69 L.J.Ch. 605; 83 L.T. 154; 11 Digest (Repl.) 415, 687.

Re Walker; MacColl v. Bruce, [1908] 1 Ch. 560; 77 L.J.Ch. 370; 98 L.T. 524; 52 Sol. Jo. 280; 11 Digest (Repl.) 415, 684.

Adjourned Summons to determine whether a power of appointment had been properly exercised by a certain testamentary instrument. In a marriage settlement of English property dated 1855 the gift to the trustees was "in trust for such of the children of the marriage as," in the events that had happened, L. C. Wilkinson should by will appoint. L. C. Wilkinson died in 1914 in Italy, where she had resided for about twenty-seven years, and had acquired an Italian domicile. She made a will in Italian form valid according to Italian law but with no attesting witnesses to it, and in it she desired that the unmarried children should have equal shares in the settled property, which was in fact all personalty or treated as such, adding, "and any other property which I can have the power and the right to dispose of," and an additional £100 was given to the unmarried son. Letters of administration with this will annexed were granted out of the Probate Division of the High Court of Justice in England, and it was submitted that this will was a good exercise of the power.

The trustees of the settlement took out an originating summons raising the questions (i) whether the domicile of the testatrix was Italian; (ii) whether her will purported to exercise the power; and (iii) whether the will operated to exercise the power, although executed in such a manner as to be in direct compliance with Italian law only, and not with the provisions of the Wills Act, 1837.

Cecil Turner for the trustees.

Owen Thompson for the unmarried children who claimed under the will.

Devonshire (Dighton Pollock with him) for the married children.

Cur. adv. vult.

Mar. 16, 1917. **SARGANT, J.**, read the following judgment: In this case I have already expressed my view (i) that Mrs. Wilkinson was domiciled in Italy for many years prior to her death; (ii) that her will purported to exercise the power of appointment amongst children vested in her under her marriage settlement; and (iii) that her will operated to exercise the power, although executed in such a manner as to be in direct compliance with Italian law only and not with the provisions of the Wills Act, 1837. I thought, however, in view of the numerous authorities on the last of these points, that as to this point I had better put my reasons into writing. The question to be solved seems to me to be most clearly and definitely stated at the beginning of the admirable judgment of STIRLING, J., in *Re Price, Tomlin v. Latter* (1). It is whether the word "will" in such a power as occurs in the settlement here includes any instrument recognised by the law of England as a will, or is limited to a will executed in accordance with the law of England. STIRLING, J., answered this question, as LORD ROMILLY had previously answered it in *D'Huart v. Harkness* (2), namely, by holding that the word "will" had the wider of the two meanings, and that, secondly, the conditions requisite to the exercise of the power had been complied with when once you found probate in this country of a will and a donee of such a power purporting to exercise the power. Both *D'Huart v. Harkness* (2) and *Re Price* (1) were cases in which the power was a general power, while here the power is a special power. But, in my judgment, this does not alter the nature of the problem to be solved, and when once English law has recognised a document as a will by admitting it to probate, that document is a will within the meaning of such a power as this, and is therefore capable of exercising the power. It is true that the decision in *Re Kirwan's Trusts* (3) (where *D'Huart v. Harkness* (2) was not cited) and the case of *Hummel v.*

Hummel (4) were to some extent in conflict with *D'Huart v. Harkness* (2); but *Re Price* (1) seriously weakened the authority of *Re Kirwan's Trusts* (3) and *Hummel v. Hummel* (4), and must at least be taken as limiting their operation to cases where the will purporting to exercise the power could only be admitted to English probate under the provisions of Lord Kingsdown's Act [Wills Act, 1861].

It is also true that *Re D'Este's Settlement Trusts* (5) and *Re Scholefield, Scholefield v. St. John* (6) have again cast doubts on the generality of the application of the rule in *D'Huart v. Harkness* (2) and have at least created exceptions from the rule—namely, in a class of cases where there is no indication in the will itself of an intention to exercise the general power, and such exercise would only take place by virtue of the provisions of s. 27 of the Wills Act, 1837, but both these cases have been seriously criticised in and much shaken by the recent decision of NEVILLE, J., in *Re Simpson, Coutts & Co. v. Church Missionary Society* (7), with which I entirely agree, and to the reasoning in which I think the following addition may perhaps be made: s. 27 of the Wills Act, 1837, though contained in an Act relating to wills, is really an enactment dealing primarily with powers, and property subject to powers, rather than with wills. That section seems to me to recognise that the interest of the donee of a general power of appointment over property is so analogous to ownership of property that a will of that person making a general disposition of property should, *prima facie*, be held to extend to and include property embraced in a general power. And, if this is the true view of the section, I see no reason why the statutory extension of such a disposition should be limited to wills made in accordance with the law of England and should not apply to any will recognised by the law of England as such. For these reasons I think that the decisions in *D'Huart v. Harkness* (2) and *Re Price* (1) are of more general application than would appear to be indicated by *Kirwan's Trusts* (3) or *Re D'Este's Settlement Trusts* (5); but in any case these last two cases cannot now be taken as throwing doubt on the general rule, and must at most be regarded merely as establishing two classes of exception to it; and it is sufficient for the present purpose to say that, even if those two classes of exception exist, the present case does not fall within either of them.

The property will therefore go amongst the unmarried children after making provision for the £100 legacy to the unmarried son.

Solicitors: *Iliffe, Henley & Sweet*, for *Wilkinson & Butler*, St. Neots, Hunts;
Church, Adams, Prior & Balmer.

[Reported by L. MORGAN MAY, Esq., Barrister-at-Law.]

LEISTON GAS CO., LTD. v. LEISTON-CUM-SIZEWELL URBAN DISTRICT COUNCIL

COURT OF APPEAL (Lord Reading, C.J., Warrington, L.J., and Scrutton, J.),
May 25, 1916, June 9, 1916]

[Reported [1916] 2 K.B. 428; 85 L.J.K.B. 1759; 115 L.T. 172; 80 J.P. 385;
32 T.L.R. 588; 60 Sol. Jo. 554; 14 L.G.R. 922]

Contract—Supply of gas to local authority—Frustration—Illegality—Performance of part of contract becoming illegal—Performance of other parts legal and duly performed—Benefit to authority.

By a contract in writing dated June 2, 1911, the plaintiffs, a gas company, agreed to provide during a minimum period of five years column lanterns, burners, and other plant, to connect the lamps to their mains, to supply gas for public lighting in the defendant's district, and to maintain the plant and keep it in repair, the defendants paying to the plaintiffs quarterly a certain sum per lamp per annum. By an order dated Jan. 23, 1915, and issued by a competent military authority under the Defence of the Realm (Consolidated) Regulations, 1914, during the war of 1914–18, the lighting of lamps within the defendants' district was prohibited. The defendants thereupon contended that the agreement was at an end, and that they were absolved from making any further payments. In an action by the plaintiffs to recover the amount payable under the contract for the three quarters ending Sept. 30, 1915,

Held: while part of the performance of the contract had become illegal, other substantial parts of it, e.g., the maintenance of the lamps and other plant, were lawful and the plaintiffs were bound to perform them and had performed them; for 3½ years the defendants had had the benefit of the entire services contracted for, including expenditure by the plaintiffs in providing the plant; and it could not be said that the contract was frustrated by the prohibition against street lighting, and the defendants were justified in treating it at an end and refusing to make the payments provided by it.

Notes. Followed: *Wycombe Borough Electric Light and Power Co. v. Chipping Wycombe Corpn.* (1917), 33 T.L.R. 489. Considered: *Egham and Staines Electricity Co. v. Egham U.D.C.*, [1942] 1 All E.R. 674. Referred to: *Metro-politan Water Board v. Dick, Kerr & Co.*, ante p. 122; *Duke of Westminster v. Howard* (1940), 85 Sol. Jo. 106; *Denny, Mott and Dickson, Ltd. v. James B. Fraser & Co.*, [1944] 1 All E.R. 678.

As to impossibility of performance and frustration of contracts, see 8 HALSBURY'S LAWS (3rd Edn.) 178–194, and for cases see 12 DIGEST (Repl.) 414 et seq.

Cases referred to:

- (1) *Baily v. De Crespigny* (1869), L.R. 4 Q.B. 180; 10 B. & S. 1; 38 L.J.Q.B. 98; 19 L.T. 681; 33 J.P. 164; 17 W.R. 494; 12 Digest (Repl.) 420, 3249.
- (2) *Taylor v. Caldwell* (1863), 3 B. & S. 826; 2 New Rep. 198; 32 L.J.Q.B. 164; 8 L.T. 356; 27 J.P. 710; 11 W.R. 726; 122 E.R. 309; 12 Digest (Repl.) 418, 3242.
- (3) *Nickoll and Knight v. Ashton, Edridge & Co.*, [1901] 2 K.B. 126; 70 L.J.K.B. 600; 84 L.T. 804; 49 W.R. 513; 17 T.L.R. 467; 9 Asp. M.L.C. 209; 6 Com. Cas. 150, C.A.; 12 Digest (Repl.) 430, 3308.
- (4) *Krell v. Henry*, [1903] 2 K.B. 740; 72 L.J.K.B. 794; 89 L.T. 328; 52 W.R. 246; 19 T.L.R. 711, C.A.; 12 Digest (Repl.) 435, 3327.
- (5) *Jackson v. Union Marine Insurance Co., Ltd.* (1874), L.R. 10 C.P. 125; 44 L.J.P.C. 27; 31 L.T. 789; 23 W.R. 169; 2 Asp. M.L.C. 435, Ex.Ch.; 12 Digest (Repl.) 438, 3339.

- (6) *Horlock v. Beale*, ante p. 81, [1916] 1 A.C. 486; 85 L.J.K.B. 602; 114 L.T. 193; 32 T.L.R. 251; 60 Sol. Jo. 236; 13 Asp. M.L.C. 250; 21 Com. Cas. 201, H.L.; 12 Digest (Repl.) 433, 3322.
- (7) *Graves v. Legg* (1854), 9 Exch. 709; 23 L.J.Ex. 228; 23 L.T.O.S. 254; 2 C.L.R. 1266; 156 E.R. 304; 12 Digest (Repl.) 473, 3531.
- (8) *Bettini v. Gye* (1876), 1 Q.B.D. 183; 45 L.J.Q.B. 209; 34 L.T. 246; 40 J.P. 453; 24 W.R. 551; 12 Digest (Repl.) 482, 3590.
- (9) *Pordage v. Cole* (1669), 1 Wms. Saund. 319; 1 Lev. 274; 2 Keb. 542; T. Raym. 183; 1 Sid. 423; 85 E.R. 449; 12 Digest (Repl.) 472, 3520.
- (10) *Paradine v. Jane* (1647), Ayleyn, 26; Sty. 47; 82 E.R. 897; 12 Digest (Repl.) 417, 3236.
- (11) *Lord Clifford v. Watts* (1870), L.R. 5 C.P. 577; 40 L.J.P.C. 36; 22 L.T. 717; 18 W.R. 925; 12 Digest (Repl.) 429, 3302.
- (12) *The Moorcock* (1889), 14 P.D. 64; 58 L.J.P. 73; 60 L.T. 654; 37 W.R. 439; 5 T.L.R. 316; 6 Asp. M.L.C. 373, C.A.; 12 Digest (Repl.) 686, 5274.
- (13) *Kingston v. Preston* (1773), cited in 2 Doug. K.B. at p. 689; sub nom. *Anon.*, Lofft, 194; 98 E.R. 606; 12 Digest (Repl.) 471, 3518.

Also referred to in argument :

Geipel v. Smith (1872), L.R. 7 Q.B. 404; 41 L.J.Q.B. 153; 26 L.T. 361; 20 W.R. 332; 1 Asp. M.L.C. 268; 12 Digest (Repl.) 418, 3245.

Loates v. Maple (1903), 88 L.T. 288; 12 Digest (Repl.) 425, 3275.

Hadley v. Clarke (1799), 8 Term Rep. 259; 101 E.R. 1377; 12 Digest (Repl.) 459, 3426.

Esposito v. Bowden (1857), 7 E. & B. 763; 8 State Tr. N.S. 807; 27 L.J.Q.B. 17; 29 L.T.O.S. 295; 3 Jur. N.S. 1209; 5 W.R. 732; 119 E.R. 1430, Ex.Ch.; 12 Digest (Repl.) 440, 3352.

Re Shipton, Anderson & Co. and Harrison Bros. & Co., [1915] 3 K.B. 676; 113 L.T. 1009; sub nom. *Shipton, Anderson & Co. v. Harrison Bros. & Co.*, 84 L.J.K.B. 2137; 31 T.L.R. 598; 21 Com. Cas. 138, D.C.; 12 Digest (Repl.) 450, 3391.

St. Enoch Shipping Co., Ltd. v. Phosphate Mining Co., [1916] 2 K.B. 624; 86 L.J.K.B. 74; 21 Com. Cas. 192; 12 Digest (Repl.) 333, 2580.

F. A. Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co., [1915] 3 K.B. 668; 84 L.J.K.B. 2095; 31 T.L.R. 540; affirmed [1916] 1 K.B. 485; 85 L.J.K.B. 241; 114 L.T. 259; 32 T.L.R. 201; 13 Asp. M.L.C. 284, C.A.; affirmed ante p. 104; [1916] 2 A.C. 397; 85 L.J.K.B. 1389; 115 L.T. 315; 32 T.L.R. 677; 21 Com. Cas. 299; 13 Asp. M.L.C. 467, H.L.; 12 Digest (Repl.) 442, 3361.

Chandler v. Webster, [1904] 1 K.B. 493; 73 L.J.K.B. 401; 90 L.T. 217; 52 W.R. 290; 20 T.L.R. 222; 48 Sol. Jo. 245, C.A.; 12 Digest (Repl.) 463, 3461.

Andrew Millar & Co., Ltd. v. Taylor & Co., Ltd., [1916] 1 K.B. 402; 85 L.J.K.B. 346; 114 L.T. 216; 32 T.L.R. 161; 60 Sol. Jo. 140, C.A.; 12 Digest (Repl.) 445, 3371.

Distington Hematite Iron Co., Ltd. v. Possehl & Co., [1916] 1 K.B. 811; 85 L.J.K.B. 919; 115 L.T. 412; 32 T.L.R. 349; 2 Digest (Repl.) 271, 621.

Janson v. Driefontein Consolidated Mines, Ltd., [1902] A.C. 484; 71 L.J.K.B. 857; 87 L.T. 372; 51 W.R. 142; 18 T.L.R. 796; 7 Com. Cas. 268, H.L.; 12 Digest (Repl.) 271, 2084.

Grimsdick v. Sweetman, [1909] 2 K.B. 740; 78 L.J.K.B. 1162; 101 L.T. 278; 73 J.P. 450; 25 T.L.R. 750; 53 Sol. Jo. 717, D.C.; 12 Digest (Repl.) 336, 2596.

London and Northern Estates Co. v. Schlesinger, [1916] 1 K.B. 20; 85 L.J.K.B. 369; 114 L.T. 74; 32 T.L.R. 78; 60 Sol. Jo. 223; 2 Digest (Repl.) 274, 634.

Scottish Navigation Co., Ltd. v. W. A. Souter & Co. [1916] 1 K.B. 675; 85 L.J.K.B. 1181; 32 T.L.R. 234; *Admiral Shipping Co., Ltd. v. Weidner, Hopkins & Co.*, [1916] 1 K.B. 429; 85 L.J.K.B. 409; 114 L.T. 171; 13 Asp. M.L.C. 246; consolidated appeals [1917] 1 K.B. 222; 86 L.J.K.B. 336; 115 L.T. 812; 33 T.L.R. 70; 61 Sol. Jo. 85; 13 Asp. M.L.C. 539; 22 Com. Cas. 154, C.A.; 12 Digest (Repl.) 437, 3335.

Appeal by defendants from an order made by Low, J., in an action tried by him without a jury.

The facts appear in the judgment of LORD READING, C.J.

J. A. Hawke, K.C., and *A. H. Poyser* for the defendants.

J. B. Matthews, K.C., and *Rayner Goddard* for the plaintiffs.

Cur. adv. vult.

June 9, 1916. The following judgments were read :

LORD READING, C.J.—The plaintiffs sued the defendants for three quarterly payments, due Mar. 31, June 30, and Sept. 30, 1915, respectively, under a contract in writing made between the plaintiffs and the defendants and dated June 2, 1911. The defendants denied liability on the ground that the contract had become impossible of performance, or, alternatively, that the plaintiffs had not performed the service to be rendered in consideration of the quarterly payments. The action came for trial before Low, J., who gave judgment for the plaintiffs for the amount claimed. The defendants appeal and ask that judgment should be entered for them.

The plaintiffs are a gas company and the defendants are the local authority for the district of Leiston. By a memorandum of agreement between the parties it was agreed : (i) That the contract should be for five years, dated from Aug. 1, 1911, and to remain in force until determined by either party giving six calendar months' notice expiring on July 31, 1916, or July 31 in any subsequent year; (ii) that the plaintiffs should provide 105 column lanterns and burners, and connect them to their mains by Aug. 1, 1911, the plant to remain the property of the plaintiffs; (iii) that during the continuance of the agreement the plaintiffs should supply gas and light, extinguish, clean, repair, paint, and maintain the lamps; (iv) that the defendants should pay to the plaintiffs £1 7s. 6d. per lamp per annum for each of the 101 lamps extinguished at 11.15 p.m., and £3 7s. 6d. for each of the four lamps burning all night, the payments to be made in equal quarterly instalments. By an order made under the Defence of the Realm Regulations [during the 1914-18 war] by the competent military authority for the purpose of darkening the street at night owing to the exigencies of war none of the lamps except twenty-six was lighted during the first twenty-six nights of the first quarter of 1915. Thereafter during the remainder of the quarter, and the two succeeding quarters, the military authority decided that the streets must be in complete darkness, and issued an order forbidding the lighting of any lamps, and none was lighted.

The defendants contend that the contract must be regarded as one made for the public lighting of the district, and that, as the military authority prohibited the lighting of the lamps for this purpose, the contract became impossible of performance (i) because its performance would be unlawful, and (ii) because the object of the venture was frustrated, or, to adopt the language sometimes used, the foundation of the contract had gone. There is no doubt that when a party contracts to perform an act, lawful at the time of the making of the contract, which thereafter becomes impossible of performance by reason of a change in the law, he is discharged from the obligation under the contract: *Baily v. De Crespigny* (1). Again, the law is well settled that where the performance of the contract becomes impossible by the cessation of the existence of the thing which is the subject-matter of the contract, the contract is to be construed as

"subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor":

per BLACKBURN, J., in *Taylor v. Caldwell* (2), 3 B. & S. at p. 833. This principle is not confined to the cessation of the existence of the subject-matter of the contract, but applies equally "to the cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things going to the root of the contract": *Nickoll and Knight v. Ashton, Edridge & Co.* (3); *Krell v. Henry* (4). Another well-known illustration of this principle of the common law is that of a charterer of a vessel who was excused from the obligation of loading her on the ground that the delay in the arrival of the vessel had made the stipulated voyage commercially impossible, and, consequently, had frustrated the object of the venture: *Jackson v. Union Marine Insurance Co., Ltd.* (5). The law upon this subject was considered recently in the House of Lords in *Horlock v. Beal* (6), and was summarised by LORD WRENBURY, who said (ante p. 102):

"Where a contract has been entered into, and by a supervening cause beyond the control of either party its performance has become impossible, I take the law to be as follows. If a party has expressly contracted to do a lawful act come what will—if, in other words, he has taken upon himself the risk of such a supervening cause—he is liable if it occurs, because by the very hypothesis he has contracted to be liable. But if he has not expressly so contracted, and from the nature of the contract it appears that the parties from the first must have known that its fulfilment would become impossible if such a supervening cause occurred, then upon such a cause occurring both parties are excused from performance. In that case a condition is implied that if performance becomes impossible the contract shall not remain binding."

It is often difficult, when applying the principle above stated, to determine on which side of the line the particular case falls. The decision in this case must depend on the true effect of the contract.

Under the memorandum of agreement the plaintiffs undertook to perform various services for the defendants in return for an agreed rate of payment to be made quarterly by the defendants for every quarter in the five years' duration of the contract. These services included the provision and erection and maintenance of the column lamps and other plant for the supply of gas as stipulated, and the defendants agreed to make these payments extending over five years as the remuneration to the plaintiffs, not only for supplying and lighting the gas for the lamps, but also for providing and erecting and maintaining the plant. In fact the plaintiffs had performed the various services under the contract for nearly 3½ years before the event under discussion happened. The column lamps remain their property under the contract, and the defendants have had the advantage of them throughout the 3½ years. They have used them even in the three quarters of 1915, not indeed to the full extent, as the lamps were not lighted except for the twenty-six days of the first quarter, but to the extent that they were connected with the main and would be lighted whenever the prohibition by the military authority was relaxed or withdrawn. Upon these facts I cannot hold that the performance of the contract had become unlawful, or that the venture was frustrated by the act of the executive in forbidding the lighting of the lamps. Part of the performance of the contract had become unlawful, but another part of the contract, which cannot be regarded as a trivial part, was lawful and could be performed. In these circumstances the defendants are not justified in treating the contract as at an end, or in refusing to make the payments as agreed by them.

The defendants further contend that the supply of gas and the lighting of the lamps is a condition precedent to the plaintiffs' right to recover the quarterly payments. The answer to this contention depends upon the intention of the

A parties to be collected from the instrument and the circumstances legally admissible in evidence, with reference to which it is to be construed: per PARKE, B., in *Graves v. Legg* (7), 9 Exch. at p. 716, quoted by BLACKBURN, J., in *Bettini v. Gye* (8), 1 Q.B.D. at p. 186. The observations I have already made upon the facts of the present case demonstrate that, in my judgment, this alternative contention of the defendants must fail. It was not intended that the supply of gas should be

B a condition precedent to the right to recover the quarterly payments. Under the contract there is an inclusive payment for all the services, and the consideration cannot be apportioned. The parties might have agreed the payment for each service, but they have preferred to agree to quarterly payments for the whole service extending over five years. PARKE, B., in *Graves v. Legg* (7) (9 Exch. at p. 716) states the well-acknowledged rule of law that

C "where a covenant of agreement goes to part of the consideration on both sides, and may be compensated in damages, it is an independent covenant or contract."

I hold that the agreement by the plaintiffs to supply the gas is to be regarded as an independent agreement, and not as a condition precedent. The defendants

D have received part of the consideration, and, if the plaintiffs had been in default, the defendants could have recovered compensation for the failure to supply the gas and light the lamps: *Pordage v. Cole* (9) (1 Wms. Saund. at p. 320 e.). The plaintiffs were not in default, and, therefore, the defendants cannot recover on a cross-claim for damages, but as the supply of gas by the plaintiffs was not a condition precedent to the right to recover, the defendants cannot justify their refusal to make the

E quarterly payments under the contract. Accordingly, I come to the conclusion that this appeal should be dismissed.

WARRINGTON, L.J.—The plaintiffs are a gas company. They sue the defendants, an urban district council, for three quarterly payments due under a contract made in 1911 for the lighting of the council's district. The defendants

F contend that owing to the action of the military authority in forbidding the lighting of street lamps in their district they are discharged from their liability to pay. The learned judge has rejected the defence. The defendants appeal. The defendants' principal contention, and, as I think, the only one capable of being put forward with any prospect of success, is that, the lighting of their district having been rendered illegal, the foundation of the contract is gone and the object with which

G it is made is entirely frustrated, with the legal consequence that the contract is avoided and each party discharged from his obligations thereunder. If the defendants could establish in fact the destruction of the foundation of the contract or the entire frustration of its object, the legal consequence would, in my judgment, follow. The real question, I think, is: Are the necessary facts established in this case?

H [His LORDSHIP stated the facts and continued:] There are certain points to be noted about the contract. The plaintiffs undertook the whole of the matters incident to public lighting—that is to say, the provision and maintenance of the lamps, their connection with the main involving the supply of gas, and the maintenance and cleansing of the appliances, including the due supply of burners and so forth. For this they are to be paid an annual sum by equal quarterly payments.

I The sum is measured by the number of lamps and is uniform for them all, with the exception of four which burn all night. It is an annual sum payable by equal quarterly payments—that is to say, not by payments varying according to the quantity of gas likely to be consumed in each particular quarter. It covers, and is the remuneration for, the entire service to be performed by them, and no particular part is attributed to any particular item of that service. It follows, I think, that failure to supply in a particular quarter any one of those items would not be a condition precedent to the recovery of the quarterly payment. But if such failure

amounted to a breach of contract, the remedy must be in damages. The contract cannot be divided into a number of quarterly contracts. If the contract then remains subsisting, the defendants cannot, in my opinion, rest their defence on the failure of the plaintiffs during the periods in question to light the district in the manner contemplated by the contract.

But the contention is that the contract has been avoided altogether and both parties are discharged from their obligations as the result of what the defendants say is the destruction of the foundation of the contract, or, to put the same idea into other words, the entire frustration of its object. Whether this event has taken place is a question of fact, and must, I think, be answered in the negative. The effect of the action of the executive is to render unlawful so long as its orders remain in force, which may be for the continuance of the war or a shorter period, the lighting of the street lamps. This renders impossible of performance only one of the services provided for by the contract—namely, the actual lighting and extinguishment of the lamps. It is still lawful for the plaintiffs to perform, and they remain bound to perform, all their other obligations, including the maintenance of the connection of the lanterns with the mains, whereby the supply of gas could be at once resumed so soon as the prohibition is wholly or in part removed. Looking at it from another point of view, it may be said that the plaintiffs are able and willing to keep up the supply of gas, and in fact do so, but by the action of the authorities the defendants are prevented from making use of it when supplied. Moreover, for 3½ years the defendants have had the benefit of the entire services contracted for, including the expenditure of money in providing plant. The parties have not thought fit to provide a separate charge for the supply of gas, but have chosen to adopt an inclusive payment. Under these circumstances I find it impossible to come to the conclusion that the foundation of the contract has been destroyed or its object frustrated. No doubt, the public lighting is for the time in abeyance, but this is not, in my opinion, enough to avoid altogether such a contract as the present with the result of relieving the defendants from making a payment a large part of which, at all events, must have been earned. I think the inability to enjoy all they pay for is a loss which must fall on the defendants. In my opinion the judgment of Low, J., was correct and ought to be affirmed.

SCRUTTON, J.—It is necessary first to appreciate exactly what the agreement sued under provides. It is a contract to last for five years from Aug. 1, 1911, and thereafter till determined by six months' notice terminating on July 31 of any year after and including 1916. The gas company are to provide 105 standards and burners with automatic lighters, which remain their property, and to connect them with their mains, and to supply gas and incandescent mantles and chimneys for and light, extinguish, clean, repair, paint, and maintain the said lamps. The lamps are to be lit every night between certain hours varying with sunset and sunrise, except on bright moonlight nights. The council is not to pay in proportion to gas supplied, but pays an annual rate for each of the lamps contracted for, reduced on a scale if the gas company reduce their charge for gas. The annual sum is payable quarterly. The quarterly payment, therefore, does not immediately depend on gas supplied; it is the same in the winter and summer quarters, and the same whether the quarter contains many or few bright moonlight nights. It includes an unapportioned sum for supply and maintenance of plant. The gas company are liable for damages or penalty (both words are used) for each lamp they fail to light on any night when it ought to be lit, unless the failure is due to circumstances beyond their control; and the parties provide that if there is delay in starting the lamps on Aug. 1, 1911, the penalty shall not apply, but the quarterly payment shall be reduced pro rata. They make no express provision for any reduction from the quarterly payment in case of failure to light from causes beyond the gas company's control, nor do they say whether the company are to suffer a

A reduction of payment as well as damages in the case of failure to light from causes within their control.

At first sight it is very tempting to say, "This is a contract to provide illumination, and the person who does not provide illumination cannot ask to be paid for it." But when the consequences come to be more closely looked into it is not so easy to follow them. The gas company supplies lighted gas for half the first quarter, and is then prevented by causes beyond its control from supplying lights till the middle of the second quarter, when the impediment is removed and the supply of light recommences. What is the consequence? Can the council refuse payment for the first quarter and for the second quarter, because a full quarter's gas is not supplied in either case; does the contract remain in existence, the company being bound to go on as soon as the impediment is removed? Or is there to be apportionment of the quarters' payments according to the time during which lighted gas is supplied, the time of darkness being written out of the contract? Does the contract come to an end when the supply of lighted gas has ceased for so long a time as to go to the root of the contract, to quote the language of BLACKBURN, J., in *Bettini v. Gye* (8), citing with approval PARKE, B., in *Graves v. Legg* (7), or to defeat the commercial purpose of the adventure, in the language of BRAMWELL, B., in *Jackson v. Union Marine Insurance Co., Ltd.* (5)? The attempt to answer these questions suggests that the court may really be asked to make an agreement for the parties in a matter which they have not thought of or expressly dealt with. Since the time of *Paradine v. Jane* (10), see also per WILLES, J., in *Lord Clifford v. Watts* (11), L.R. 5 C.P. at p. 586, when the question was discussed whether a loyal Englishman need pay rent to his landlord when the house he rented had been destroyed by the King's enemies, the "wild scots," the distinction has been taken between duties or charges imposed by the law, where the party cannot perform it by events occurring without any default in him, in which case he is excused by the impossibility, and duties created by the agreement of the party, when he is "bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." Since then the courts have steadily refused to make contracts for parties which they might have, and have not, made for themselves, unless the term is so obvious and necessary that it must be implied as a matter of business in such a contract: *The Moorcock* (12), 14 P.D. at p. 68.

It is said that the supply of lighted gas has become illegal. This is true for an uncertain time; at any moment the illegality may be removed by peace, or changed conditions of war. But the payment of the quarterly sum has not become illegal, and part of it is not for light supplied, but for plant which has been supplied and of which the council has had the benefit. To excuse themselves from breaking the contract to pay, not being an illegal contract, the council must, I think, satisfy the court of one of two things. Either they must establish that the performance of the contract to supply lighted gas is a condition precedent of the necessity to observe the contract to make a quarterly payment, so that the two contracts are "dependent" and not "independent," to use the language of *Pordage v. Cole* (9) and of LORD MANSFIELD in *Kingston v. Preston* (13), cited in 2 Doug. K.B. at p. 689, in which case the company, not having supplied lighted gas for the whole of three quarters respectively, cannot sue for payment; or the council must satisfy the court that, though a mere failure to supply lighted gas for a short time will not relieve them from payment, there is in this case such an extensive and permanent failure to supply as "goes to the root of the matter, so that the performance of the rest of the contract by the plaintiffs is rendered a different thing in substance from what the defendant has stipulated for": per BLACKBURN, J., in *Bettini v. Gye* (8), 1 Q.B.D. at p. 188.

First, can it be said that any failure to supply lighted gas, beyond those trifling failures to which the maxim *de minimis* might apply, prevents the company from recovering payment in respect of the quarter in which the failure occurs?

Counsel for the defendants, I think, argued that it was so; and, though I think they argued that a subsequent acceptance by the council of lighted gas after the failure might waive the breach, they, as I understood them, contended that a fortnight's or a month's failure not waived in this way annulled the whole contract. I cannot take the view that such a failure by itself annuls the contract, or that the contract might be treated as twenty quarterly separate contracts, one of which might be cancelled or blotted out, while the rest remained. The payment is a flat-rate payment, not a payment by meter for gas supplied, and it includes something for plant supplied and still available. For certain kinds of failure to supply light the parties have provided a remedy in damages, and in other cases a deduction from the quarterly payment. They have not expressly provided for the case of a failure to supply light owing to causes beyond the company's control, and I do not think the court ought to make such a contract for them when the consideration for the payment claimed has not wholly failed.

There remains the question whether, though a mere failure to supply will not by itself be sufficient to relieve from payment, a failure of such a lengthy and permanent character as substantially to alter the mode of performance of the contract will have this effect and terminate the contract. I think this must be so even if the contract is one for a fixed time. I put to the counsel concerned the case of an Act of Parliament being passed, after the agreement had been in operation for a quarter, prohibiting lighting the gas for four years, and asked whether the agreement would remain alive or would be in force for the last nine months only when the operation of the Act had ceased. I think the agreement would be annulled, for the reason that a supply of gas for a year in two broken periods would be a totally different thing from the five years' supply which the council bargained for, and that the obligation to supply gas for three months, and again four years later for nine months, for four quarterly payments would be a totally different contract from that which the company entered into. If this principle is granted the question is then one of fact. Is the period from the first total failure to supply on Jan. 26, 1915, to the issue of the writ on Nov. 10—that is, 9½ months—sufficient to annul a contract which is to last for at least five years, perhaps more, and of which the council has already had the benefit for 8½ years? These questions of degree are always difficult, but, treating it as a question of fact, I should hold that there had not at the issue of the writ been sufficient change of character in performance to destroy the contract. For these reasons I arrive at the same result as Low, J., and think that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: Mackrell, Maton, Godlee & Quincey; Frank A. Graham, for Harold A. Mullens, Leiston.

[Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.]

Re TURNER. KLAFTENBERGER v. GROOMBRIDGE

[CHANCERY DIVISION (Neville, J.), November 23, 1916, January 12, 15, 31, 1917]

[Reported [1917] 1 Ch. 422; 86 L.J.Ch. 290; 116 L.T. 278; 61 Sol. Jo. 300]

B *Limitation of Action—Annuity charged upon proceeds of sale of land and personality—Limitation of period for recovery of arrears—Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 42.*

C Where a testator charges an annuity on the proceeds of sale of his real and personal estate, with power to postpone the sale of the real estate, it is charged upon land within the meaning of s. 42 of the Real Property Limitation Act, 1833, and six years' arrears only are recoverable by virtue of that section, the remedy being barred not only against the real estate, but against the personal estate to the same extent, and that is so though the annuity is charged not only upon land, but upon the continuing rents of land.

Henry v. Smith (1) (1842), 2 Dr. & War. 381, applied.

D **Notes.** This case was overruled by the Court of Appeal in *Re Jordison, Raine v. Jordison*, [1922] 1 Ch. 440, in so far as NEVILLE, J., held that the fact that there was an express trust made no difference, having regard to s. 10 of the Real Property Limitation Act, 1874. The case, however, remains authority for the proposition stated in the headnote. The Real Property Limitation Acts, 1833 and 1874, have been repealed by the Limitation Act, 1939. By s. 17 of the 1939 Act a claim for arrears of rent is barred after six years, and by s. 31 (1) of that Act "rent" is defined as including an annuity charged upon land.

E As to limitation and annuities, see 24 HALSBURY'S LAWS (3rd Edn.) 231, 264, 265, and for cases see 32 DIGEST 419, 420. As to the period of limitation where an annuity is secured by a trust, see 24 HALSBURY'S LAWS (3rd Edn.) 286. For the Limitation Act, 1939, see 13 HALSBURY'S STATUTES (2nd Edn.) 1159.

F Cases referred to :

- (1) *Henry v. Smith* (1842), 2 Dr. & War. 381.
- (2) *Dower v. Dower* (1885), 15 L.R.Ir. 264; 32 Digest 419, 963 iv.
- (3) *Re Nugent's Trusts* (1885), 19 L.R.Ir. 140; 32 Digest 419, 963 iii.
- (4) *Re Hartland, Banks v. Hartland*, [1911] 1 Ch. 459; sub nom. *Re Dixon Hartland, Banks v. Hartland*, 80 L.J.Ch. 305; 104 L.T. 490; 55 Sol. Jo. 312; 30 Digest (Repl.) 233, 807.
- (5) *Sutton v. Sutton* (1882), 22 Ch.D. 511; 52 L.J.Ch. 333; 48 L.T. 95; 31 W.R. 369, C.A.; 32 Digest 395, 757.
- (6) *Re Young, Brown v. Hodgson*, [1912] 2 Ch. 479; 81 L.J.Ch. 817; 107 L.T. 380; 39 Digest 146, 409.
- (7) *Hughes v. Coles* (1884), 27 Ch.D. 231; 53 L.J.Ch. 1047; 51 L.T. 226; 33 W.R. 27; 32 Digest 420, 971.

G Also referred to in argument :

Francis v. Grover (1845), 5 Hare, 39; 15 L.J.Ch. 99; 6 L.T.O.S. 235; 10 Jur. 280; 67 E.R. 818; 32 Digest 419, 965.

Re Raggi, Brass v. H. Young & Co., Ltd., [1913] 2 Ch. 206; 82 L.J.Ch. 396; 108 L.T. 917; 23 Digest 367, 4369.

I *Gough v. Bult* (1848), 16 Sim 323; 17 L.J.Ch. 486; 12 Jur. 859; 60 E.R. 898; 32 Digest 421, 981.

Hunter v. Nockolds (1850), 1 Mac. & G. 640; 1 H. & Tw. 644; 19 L.J.Ch. 177; 12 Jur. 256; 41 E.R. 1413, L.C.; 32 Digest 418, 959.

Re Wenham, Hunt v. Wenham, [1892] 3 Ch. 59; 61 L.J.Ch. 565; 67 L.T. 648; 40 W.R. 636; 36 Sol. Jo. 540; 23 Digest (Repl.) 360, 4289.

Tippets v. Heane (1834), 1 Cr. M. & R. 252; 4 Tyr. 772; 3 L.J.Ex. 281; 149 E.R. 1074; 32 Digest 379, 622.

- Re England, Steward v. England*, [1895] 2 Ch. 820; 65 L.J.Ch. 21; 73 L.T. 237; 44 W.R. 119; 39 Sol. Jo. 704; 12 R. 539, C.A.; 32 Digest 408, 869.
- Barnes v. Glenton*, [1899] 1 Q.B. 885; 68 L.J.Q.B. 502; 80 L.T. 606; 47 W.R. 435; 15 T.L.R. 295; 43 Sol. Jo. 366, C.A.; 32 Digest 323, 84.
- Re Powers, Lindsell v. Phillips* (1885), 30 Ch.D. 291; 53 L.T. 647, C.A.; 32 Digest 414, 915.
- Re Frisby, Allison v. Frisby* (1889), 43 Ch.D. 106; 59 L.J.Ch. 94; 61 L.T. 632; 38 W.R. 65; 6 T.L.R. 40, C.A.; 32 Digest 407, 855.
- Re Fox, Brooks v. Marston*, [1913] 2 Ch. 75; 82 L.J.Ch. 393; 108 L.T. 948; 32 Digest 429, 1035.
- Re Tucker, Tucker v. Tucker*, [1894] 3 Ch. 429; 63 L.J.Ch. 737; 71 L.T. 453; 12 R. 141, C.A.; 32 Digest 390, 712.
- Booth v. Coulton* (1870), 5 Ch. App. 684; 39 L.J.Ch. 622; 18 W.R. 877, L.J.; 39 Digest 148, 419.
- Asbury v. Asbury*, [1898] 2 Ch. 111; 67 L.J.Ch. 471; 78 L.T. 494; 46 W.R. 536; 22 Digest (Repl.) 86, 629.
- Lord St. John v. Boughton* (1838), 9 Sim. 219; 7 L.J.Ch. 208; 2 Jur. 413; 59 E.R. 342; 32 Digest 411, 900.
- Hambro v. Hambro*, [1894] 2 Ch. 564; 63 L.J.Ch. 627; 70 L.T. 684; 43 W.R. 92; 8 R. 413; 39 Digest 202, 921.

Adjourned Summons.

By his will, dated Aug. 1, 1863, Thomas Turner, the testator, gave, devised, and bequeathed his real and residuary personal estate to trustees upon trust for sale and conversion and upon trust to invest the proceeds of such sale and conversion as therein declared, with a power to postpone the sale of the real estate, and out of the dividends and annual produce of the said trust moneys, stocks, funds, and securities to pay the clear annual sum of £700 to his wife Eleanor Turner during her life for her separate use and without power of anticipation. Subject to the annuity of £700 the testator directed the trustees to stand possessed of the said trust moneys, stocks, funds and securities and the dividends, interest and annual produce thereof in trust for all his children living at his death who should attain the age of twenty-one years.

The testator died on Sept. 9, 1863. The estate was never sufficient to pay the annuity of £700 to the testator's wife in full, but the trustees of the will paid to her all the income arising from the residuary estate which amounted to £400 a year. Eleanor Turner died on April 22, 1916.

This summons was taken out by the plaintiffs, the present trustees of the testator's will, to determine whether the annuity of £700 bequeathed to Eleanor Turner was chargeable on the corpus of the testator's estate or was a charge continuing after her death on the income of such estate, or was payable only out of the income of such estate accruing during her life. On Nov. 23, 1916, the case was argued, and his Lordship gave a judgment that the words used in the will of the testator pointed to a charge on corpus more directly than any of the cases cited in the argument, and therefore the arrears of the annuity were payable out of the corpus of the estate. The case was then adjourned for the trustees of the testator's will to make a search among the papers relating to the estate for any acknowledgments in writing by the trustees of the will of indebtedness to Eleanor Turner, or other conclusive evidence of an admission in that behalf. No such acknowledgments or evidence were discovered, and on Jan. 15, 1917, the summons was again before the court for argument as to whether the amount of arrears of the annuity recoverable by the executors of the will of Eleanor Turner were limited, and, if so, how far limited, by the Statutes of Limitation.

By s. 42 of the Real Property Limitation Act, 1833 :

"No arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages

A in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent . . .”

B By s. 1 of the Real Property Limitation Act, 1833, the word “rent” extends to annuities.

E. Beaumont (for *J. W. F. Beaumont*, serving with His Majesty’s forces) for the plaintiffs.

Ward Coldridge, K.C., and *W. A. Jolly* for the defendant *C. F. Selby*.

G. M. Hildyard for the defendant *Edith Caroline Groombridge*.

C *Jenkins, K.C.*, and *S. L. Lamb* for the defendant *Edward Simson Groombridge*.

Jan. 31, 1917. **NEVILLE, J.**, read the following judgment: The first question which arises here is whether the annuity given by the testator to his widow is charged upon land within the meaning of s. 42 of the Real Property Limitation Act, 1833. It is charged upon the proceeds of sale of the real and personal estate; and there is a power to postpone the sale of the real estate. It was conceded in argument that I am bound by authority to hold that it is charged upon land within the meaning of the section. The widow is now dead, and the question arises whether the arrears recoverable from the estate of the testator are limited to six years by virtue of the section. The point has, I think, been decided in that sense in Ireland in *Dower v. Dower* (2) and *Re Nugent’s Trusts* (3). In my opinion, however, notwithstanding what was said in *Re Hartland*, *Banks v. Hartland* (4), English judges are not entitled to follow decisions in the Irish courts, although, no doubt, the reasoning upon which such decisions rest may be of great assistance. I am glad in the present case to have arrived at a similar conclusion to that expressed in the cases just referred to. In *Sutton v. Sutton* (5) it was held with regard to a mortgage that s. 8 of the Real Property Limitation Act, 1874, re-enacting s. 40 of the Real Property Limitation Act, 1833, limits the personal remedy on the covenant in a mortgage deed, as well as the remedy against the land to recovery of twelve years’ arrears. Mr. Macnaghten in that case argued that the section only applied to the recover of the money by enforcing the charge on the land, and I confess that to my mind there was much to be said for that argument; but the Court of Appeal held otherwise, and *BOWEN, L.J.*, says, referring to the words of the section (22 Ch. at p. 520):

G “Does not that mean that no action shall be brought to recover any sum of money, which is secured by way of mortgage?”

The words of s. 42 of the Act of 1833 are so like the words of s. 8 of the Act of 1874, which re-enacts s. 40 of the former Act, that I think that no distinction can fairly be drawn between them. I think what *BOWEN, L.J.*, says with regard to s. 8 of the Act of 1874 applies with equal force to the wording of s. 42 of the Act of 1833. In *Henry v. Smith* (1) it was held that under s. 42 the remedy was barred in six years, not only against the real estate, but against the personal estate to the same extent. That was the case of a judgment debt, and the Lord Chancellor there says (2 Dr. & War. at p. 387):

I “Then it is said that if it is held that judgments are within the forty-second section, the creditors will have a more extensive right against the personal than against the real estate of their debtors, but I am clearly of opinion the rights are in this respect equal, and, so far as the bar operates for the protection of real estate, the personal estate is equally protected.”

This case, I think, decides the present question except with regard to one point. [His LORDSHIP then considered whether the fact that there was an express trust made any difference. This part of the judgment was overruled by the Court of Appeal in *Re Jordison, Raine v. Jordison*, [1922] 1 Ch. 440.]

It is said that here the annuity is not only charged upon land, but on the continuing rents of land, and therefore that it is not within s. 42. If there be any difference between the two cases, as to which, see the remarks of PARKER, J., in *Re Young, Brown v. Hodgson* (6), the decisions above referred to show, I think, that, if once you find that the annuity is charged upon land, all remedies, whether against the real or personal estate, are subject to the same limitation. In my opinion there was no acknowledgment within s. 42 of the Act of 1833. I think the trustees acted upon the supposition that the annuity was payable only out of income of the testator's estate, for the whole of which they accounted to the widow, and that they could not therefore have intended to acknowledge any greater liability. Whether this was so or not, I am of opinion that no acknowledgment was given within six years from these proceedings. I do not think it was competent for the trustees, had they so intended, to alter the rights of the parties after the issue of the summons by an acknowledgment. I hold, therefore, that arrears for six years only prior to the death of the widow are recoverable from testator's estate. I should perhaps say I am unable to follow the decision in *Hughes v. Coles* (7) as reported. Why six years' arrears were not recoverable there I do not understand. I have not here, however, to consider whether s. 8 of the Act of 1874 affects the payment of an annuity which has not been recovered for twelve years.

Solicitors: *Church, Rendell, Bird & Co.; Emmet & Co.*, for *J. Robertson Owen, Brigham*.

[Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.]

WELLAWAY v. COURTIER

[KING'S BENCH DIVISION (A. T. Lawrence and Atkin, JJ.), November 26, 27, 1917]

[Reported [1918] 1 K.B. 200; 87 L.J.K.B. 299; 118 L.T. 256;
34 T.L.R. 115; 62 Sol. Jo. 161]

Trespass—Growing crop—Right of purchaser to maintain action—Exclusive possession—Purchaser bound to consume part of crop on the land.

The purchaser of a growing crop has such exclusive right of possession as to enable him to maintain an action for trespass, notwithstanding that he is bound to consume part of the crop on the land.

The plaintiff purchased a crop of swedes, half of which he was by agreement bound to consume on the field. The defendant purchased a crop of grass in an adjoining field in which he put sheep to graze. The plaintiff or his servants negligently left a gate open between the fields and the sheep got into the field where the swedes were growing and ate a quantity of them. The following day the sheep broke through the fence between the fields and did more damage. In an action for damages for trespass,

Held: (i) the plaintiff had such exclusive possession as to enable him to maintain an action for trespass; and (ii) the fact that the entry of the sheep into the field was occasioned by the plaintiff's negligence on the first day did not prevent him from recovering for the damage done the following day.

Notes. Referred to: *Richards v. Davies*, [1920] All E.R. Rep. 144.

As to the rights of a purchaser of a growing crop and trespass by animals, see 1 HALSBURY'S LAWS (3rd Edn.) 446, 447, 668 et seq., and for cases see 2 DIGEST (Repl.) 39, 309 et seq. As to trespass and sufficiency of possession, see 32 HALSBURY'S LAWS (2nd Edn.) 6 et seq., and for cases see 43 DIGEST 377 et seq.

A Cases referred to in argument :

Crosby v. Wadsworth (1805), 6 East 602; 2 Smith, K.B. 559; 102 E.R. 1419; 30 Digest (Repl.) 528, 1658.

Cox v. Burbidge (1863), 13 C.B.N.S. 430; 1 New Rep. 238; 23 L.J.C.P. 89; 9 Jur. N.S. 970; 11 W.R. 435; 143 E.R. 171; 2 Digest (Repl.) 334, 240.

Rylands v. Fletcher (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 282, 334.

B *Holgate v. Bleazard*, [1917] 1 K.B. 443; 86 L.J.K.B. 270; 115 L.T. 788; 33 T.L.R. 116; 2 Digest (Repl.) 311, 153.

Burt v. Moore (1793), 5 Term Rep. 329; 101 E.R. 184; 18 Digest (Repl.) 437, 1819.

Emmerson v. Heelis (1809), 2 Taunt. 38; 127 E.R. 989; 2 Digest (Repl.) 35, 159.

C *Churchill v. Evans* (1809), 1 Taunt. 529; 127 E.R. 939; 18 Digest (Repl.) 438, 1825.

Appeal from Exeter County Court.

On Mar. 27, 1917, the plaintiff purchased at an auction a crop of growing swedes in a field, and the defendant at the same time bought a crop of grass in an adjoining field from the same vendor. The plaintiff was under agreement to remove only half the swedes from the land, the other half to be consumed on the ground. The defendant put a flock of sheep to graze in his field and on April 5, 1917, the plaintiff having left the gate open between the two fields, some of the sheep entered and ate a quantity of swedes. On two successive days the sheep broke through the hedge between the two fields and entered in large numbers and did considerable damage. There was evidence that sheep having once tasted swedes were likely to try and do so again. In an action for damages for trespass, the county court judge gave judgment for the defendant, holding that trespass does not lie unless there has been some breach of duty by the defendant, and the defendant was guilty of no such breach. The plaintiff appealed.

Hawke, K.C. (Jowitt with him) for the plaintiff.

F *Footo, K.C.* (Dummett with him) for the defendant.

A. T. LAWRENCE, J., stated the facts and continued: It has been argued that the defendant was not liable in trespass inasmuch as the plaintiff was not in exclusive possession of the crop. This contention was based upon the fact that, when he purchased the crop, it was made a condition that he should only remove half the roots, leaving the rest on the land. It is admitted that trespass would have lain had the plaintiff had the exclusive right, but I think his right to possession was none the less exclusive because as to part of the crop it had to be dealt with in a particular way. Counsel for the defendant has made an ingenious point, but I do not think there is the difference between "trespass" and "case" for which he has contended. If one reverses the position, and considers the defendant's right in relation to his pasture field, he could clearly have maintained trespass whether he had merely a right of agistment or a right to take the hay.

One other point arises. It is said that, as to the damage done on the first day, which arose through the gate being left open, the defendant cannot be held liable. I think that is so. It was the plaintiff or his men who left the gate open, and the sheep came in, so to speak, per invitum. But I do not agree with the learned county court judge, who has found, in effect, that the fact of the sheep having entered per invitum on one day altered or lessened the defendant's duty to keep them within bounds thereafter. His duty remained, unless the act done by the plaintiff was one which would have made a repetition of the trespass inevitable. I think the county court judge came to a wrong conclusion, and that the case must go back to him to assess the damage sustained by the plaintiff, excluding that which was caused on the first day. The plaintiff will have the costs of this appeal.

ATKIN, J.—In this case the plaintiff had a clear cause of action if he had such an exclusive right of possession that trespass would lie. It appears to me that, by reason of the rights he had acquired, he had such an exclusive right to possession as would entitle him to bring trespass. The law is thus stated in *COKE UPON LITTLETON*, 4:

“If a man hath twenty acres of land, and by deed granteth to another and his heirs vesturum terræ and maketh livery of seisin secundum formam chartæ, the land itself shall not passe, because he hath a particular right in the land; for thereby he shall not have the houses, timber-trees, mines, and other reall things parcell of the inheritance, but he shall have the vesture of the land, (that is) the corne, grasse, underwood, swepage, and the like, and he shall have an action of trespasse quare clausum fregit.”

It seems to me impossible to distinguish the exclusive right to a crop of swedes from the exclusive right to a crop of corn, and the plaintiff's exclusive right is not affected by the fact that there is a limited right of disposing of the crop when gathered. If he has the right to bring an action for trespass he may recover damages by reason of the adjoining owner's sheep trespassing, wholly apart from the duty to fence. That being so, he was entitled to recover for the damage done on the Friday and Saturday. In my opinion, the damage on those two days was not occasioned by the plaintiff's negligence in leaving the gate open on the first day. The cause was too remote. This appeal must be allowed with costs.

Appeal allowed.

Solicitors: *Kenneth Brown, Baker, Baker & Co.*, for *Dunn & Baker*, Exeter; *Mann & Crimp*, for *Kitsons, Hutchings, Easterbrook & Co.*, Torquay.

[Reported by W. V. BALL, ESQ., Barrister-at-Law.]

Re STANLEY'S SETTLEMENT. MADDOCKS v. ANDREWS

[CHANCERY DIVISION (Sargant, J.), March 13, 1916]

[Reported [1916] 2 Ch. 50; 85 L.J.Ch. 809; 114 L.T. 933; 60 Sol. Jo. 478]

Settlement—Estate for life by implication—Tenants in common—Estate in survivor.

By a deed dated May 29, 1860, S. settled leasehold property in trust for his daughters M. and R. “for and during the term of their natural lives as tenants in common and not as joint tenants,” and “from and immediately after the decease of the survivor of them . . . then to the use of their [sic] respective child or children of the said M. and R. share and share alike as tenants in common and not as joint tenants.” M. died in 1867 leaving children. R. died in 1914 without issue.

Held: on the death of M., R. took a life estate by implication in the moiety of M., and on the death of R. the children of M. took the whole of the settled property.

Notes. Applied: *Re Davies, Public Trustee v. Davies*, [1950] 1 All E.R. 120.

As to an estate for life arising by implication, see 32 HALSBURY'S LAWS (3rd Edn.) 295, and *ibid.*, vol. 34, p. 607; and for cases see 40 DIGEST (Repl.) 609, 610.

Cases referred to:

(1) *Tunstall v. Trappes* (1830), 3 Sim. 286; 57 E.R. 1005; 40 Digest (Repl.) 609, 1072.

(2) *Allin v. Crawshaw* (1851), 9 Haro 382; 21 L.J.Ch. 873; 68 E.R. 555; 40 Digest (Repl.) 609, 1073.

- A** (3) *Mara v. Brown*, [1895] 2 Ch. 69; 64 L.J.Ch. 594; 72 L.T. 765; 11 T.L.R. 352; on appeal [1896] 1 Ch. 199; 65 L.J.Ch. 225; 73 L.T. 638; 44 W.R. 330; 12 T.L.R. 111; 40 Sol. Jo. 131, C.A.; 32 Digest 497, 1577.
- (4) *Armstrong v. Eldridge* (1791), 3 Bro. C.C. 215; 29 E.R. 497, L.C.; 44 Digest 989, 8458.
- B** (5) *Pearce v. Edmeades* (1838), 3 Y. & C. Ex. 246; 8 L.J.Ex. Eq. 61; 3 Jur. 245; 160 E.R. 693; 44 Digest 994, 8524.
- (6) *Re Richerson, Scales v. Heyhoe* (No. 2), [1893] 3 Ch. 146; 62 L.J.Ch. 708; 69 L.T. 590; 41 W.R. 583; 37 Sol. Jo. 560; 3 R. 643; 44 Digest 983, 8393.
- (7) *Re Hutchinson's Trusts* (1882), 21 Ch.D. 811; 51 L.J.Ch. 924; 47 L.T. 573; 44 Digest 1003, 8602.

- C** Also referred to in argument:
- Pringle v. Pringle* (1856), 22 Beav. 631; 52 E.R. 1251; 28 Digest (Repl.) 560, 756.
- Re Browne's Will Trusts, Landon v. Brown*, [1915] 1 Ch. 690; 84 L.J.Ch. 623; 113 L.T. 39; 44 Digest 1215, 10506.
- Re Hobson, Barwick v. Holt*, [1912] 1 Ch. 626; 106 L.T. 507; 56 Sol. Jo. 400; 44 Digest 1205, 10426.

D **Originating Summons** by the surviving children of A. L. Morgans.

- By an indenture dated May 29, 1860, and made between W. Stanley of the first part, M. Morgans, A. L. Morgans his wife, and W. Rees and M. J. Rees his wife of the second part, and R. Stanley and J. Stanley, trustees, of the third part, W. Stanley, in consideration of the natural love and affection which he had to his daughters A. L. Morgans and M. J. Rees and of 10s. paid to him by the
- E** trustees, assigned to the trustees, their executors, administrators, and assigns six leasehold houses for the residue of a term of 999 years upon trust to "receive and take the rents, issues, and profits thereof" "and, after deducting the ground rent, interest, and other outgoings, to pay the balance half-yearly" in June and December in each year "into the proper hands for the sole use and benefit of the said A. L. Morgans and M. J. Rees for and during the terms of their natural
- F** lives as tenants in common and not as joint tenants separately and apart from their respective husbands the said M. Morgans and W. Rees," and so that the same or any part thereof might not be within their control or subject to their debts, contracts, or engagements. And it was thereby declared that the receipts of A. L. Morgans and M. J. Rees "for all or any of the rents, profits, and benefits of the
- G** said moneys, hereditaments, and premises or any part thereof" should, notwithstanding their coverture, "be a good and sufficient discharge" for the money which should be then due and payable and expressed to be received. "And upon further trust that from and immediately after the decease of the survivor of them, the said A. L. Morgans and M. J. Rees, whether in the lifetime of their husbands or not, then to the use of their [sic] respective child or children of the said A. L.
- H** Morgans and M. J. Rees, share and share alike, as tenants in common and not as joint tenants." A. L. Morgans died on Aug. 17, 1867, leaving three children alive, namely, Anne Maddock, William H. S. Morgans, and Agnes Taylor, and another son, who had died in 1899 leaving two children. M. J. Rees died on Feb. 14, 1914, without having had any children.

- I** This originating summons was taken out against the legal personal representative of the last surviving trustee of the settlement, some of the next of kin of the settlor, and one of the next of kin of M. J. Rees raising the following questions: (i) whether M. J. Rees as the survivor of two tenants for life was entitled during the remainder of her life to the whole of the net income of the settled property or to some and what part thereof, and, if not entitled to the whole net income, to whom and in what proportions what she was not entitled to belonged; and (ii) whether the whole of the settled property belonged to the plaintiffs, who were the children and representatives of deceased children, or whether a moiety or some other and

what proportion thereof reverted to the settlor and passed on his death to his next of kin.

A. L. Morris for the plaintiffs.

Alfred Adams for the legal personal representative of the deceased child.

Dighton Pollock for one of the next of kin of the settlor.

R. H. Roope Reeve for one of the next of kin of M. J. Rees.

SARGANT, J., after stating the questions raised by the summons, continued: The settlement which I am asked to construe is a badly drawn document. The settlor thereby assigned certain leasehold property to trustees upon trust, after paying the outgoings, to pay the balance of the income thereof to his two daughters, Mrs. Morgans and Mrs. Rees, for their natural lives "as tenants in common and not as joint tenants." Then the settlement says:

"And upon further trust that from and immediately after the decease of the survivor of them the said Anne Lexley Morgans and Mary Jane Rees (whether in the lifetime of their husbands or not), then to the use of their [sic] respective child or children of the said Annie Lexley Morgans and Mary Jane Rees share and share alike, as tenants in common and not as joint tenants."

As regards the first question raised by the summons, counsel for the plaintiffs has contended that on Mrs. Morgans' death there was no survivorship of her interest for life to Mrs. Rees, and on the second question he says that on Mrs. Rees' death the surviving children of Mrs. Morgans, who are the plaintiffs in the proceedings, and the legal personal representatives of her deceased child became entitled to the whole of the property. Counsel for the legal personal representative of the deceased child, in arguing in the same interest, has attempted to support the general proposition that in a deed there cannot be an estate by implication of law. In *FEARNE ON CONTINGENT REMAINDERS* (10th Edn.) vol. 1, p. 49, there is the statement that

"No estate for life can arise by implication, or by way of resulting use, to a person who was not the owner of the estate granted"

and *NORTON ON DEEDS*, referring to this passage, says (at p. 377):

"No estate or trust can arise by implication of law, and no estate or trust by way of resulting use or trust can arise in favour of a person who was not the owner of the property conveyed by the deed."

I doubt whether an estate arising by implication from the particular language of a deed would be an estate arising by implication of law at all; but, assuming that it would, there is no authority to the wide effect of the proposition advanced by counsel for the legal personal representative of the deceased child. *Tunstall v. Trappes* (1) is one authority against the proposition. There, under the trusts of a settlement, the interest of a fund was to be paid to Mrs. Tunstall "for her separate use during her coverture with William Tunstall," and in case she should die in his lifetime it was to be paid to him for life, and after the death of the survivor the principal was to be held in trust for the issue then living as Mrs. Tunstall should appoint, in trust for such equally; and it was held that Mrs. Tunstall was entitled to the interest, not only during the coverture, but for her life. *Allin v. Crawshaw* (2) is an authority which appears to me to be dead in the teeth of the general proposition advanced by counsel. He says that the point was never argued in that case. But *TURNER, V.-C.*, there thought that the wife took a life estate by implication under a deed, but declined to decide the point in the absence of the settlor's personal representatives. When, however, they appeared and declined to argue the question, as no doubt their counsel thought it was too clear for argument, the Vice-Chancellor held that the wife took a life estate. In *Mara v. Browne* (3) the decision of *NORTH, J.*, was against counsel's contention,

A for there NORTH, J., was unaware of the existence of any such proposition as that now advanced. He says ([1895] 2 Ch. at p. 81):

B "The instrument in question is a deed, and it must be construed according to its tenor, and I cannot find anything within the four corners of the instrument from which I can gather that the settlement was intended to give her the income during that period" [namely, the remainder of the wife's lifetime after her husband's death].

After referring to *Tunstall v. Trappes* (1), NORTH, J., held that there was not enough in the deed to justify his finding a life estate by implication, but he obviously looked into the deed to see whether he could do so.

C Is there enough in the deed before me from which to imply a life interest to Mrs. Rees? Mrs. Morgans had four children, and died many years ago. Mrs. Rees never had any child, and died in 1914. In my opinion it is right to hold that Mrs. Rees took a life interest in her sister's share on that sister's death, not on the ground that there was a joint tenancy, because that is expressly excluded, but following the rule of construction laid down in *Armstrong v. Eldridge* (4), *Pearce v. Edmeades* (5), and *Re Richerson* (6), all authorities which are to be explained on the view that a life interest is to be implied in the survivor of the tenants in common rather than on the earlier view. It is better to say that they are tenants in common for life with a life interest in remainder to the survivor. The words "the same or any part thereof" may be held to point definitely to the times when two are receiving the income, and subsequently when one only is receiving it. It is sufficient to say that there is enough in the settlement to enable me to hold that each sister took a life estate in remainder in the other sister's share on that sister's death.

F As regards the second question, is the gift in remainder of the corpus to the child or children of one sister in that sister's share only, or is it a gift in remainder of the whole corpus to all the children of both sisters as one class? The fact that the corpus is given over at one time, namely, the death of the surviving sister, strongly favours the view that the gift is to the children as one class. There is nothing to point to the intention that one moiety is to go only to the children of the tenant for life of that moiety except the word "respective," and that is not enough of itself to have the required effect. The words "as tenants in common" point to a gift to the whole class of children of either sister on the death of the surviving sister. A large number of cases was reviewed by KAY, J., in *Re Hutchinson's Trusts* (7), but in that case there were absolute gifts to persons which were held to be cut down only in favour of their children if they had any. In the present case I hold that the children of the one who left children are entitled to the whole property, and that there is no resulting trust in favour of the settlor.

G Solicitors: Burton, Yeates & Hart, for G. F. Willett, Cardiff, and for Morgan Davies, Pontardawe; Bell, Brodrick & Gray, for C. & W. Kenshole & Prosser, Aberdare.

[Reported by L. MORGAN MAY, Esq., Barrister-at-Law.]

R. v. BURNLEY JUSTICES. Ex parte LONGMORE

[KING'S BENCH DIVISION (Darling, Avory and Low, JJ.), July 25, 1916]

[Reported 85 L.J.K.B. 1565; 115 L.T. 525; 80 J.P. 382; 32 T.L.R. 695; 14 L.G.R. 960]

Cinematograph—Licence—Condition—Reasonableness—Discretion of justices—Opening hours—Character of films shown—Exclusion of schoolchildren if epidemic of infectious disease—Cinematograph Act, 1909 (9 Edw. 7, c. 30), s. 2.

In pursuance of their powers under the Cinematograph Act, 1909, justices granted a licence to L. for the purpose of using certain premises for a cinematograph exhibition. The licence was granted subject to certain conditions, namely, (i) that the premises should be open only between the hours of 6 p.m. and 10.30 p.m., (ii) that the films shown should not be of a licentious or indecent character, and (iii) that no film should be shown if it was objected to by three justices. In addition the licensee was asked to give two undertakings, (i) that children should not be tempted to spend time in the cinematograph exhibition by gifts of sweets, souvenirs, etc., and (ii) that on the notification by a medical officer of health that any department of a public elementary school had been closed owing to the prevalence of an infectious disease, the licensee should exclude from the cinematograph exhibition all children attending school. A rule nisi for a mandamus directing the justices to hear and determine the application for a licence according to law, and a rule nisi for prohibition against their issuing a licence with these conditions and undertakings attached, having been obtained,

Held: with the exception of the condition that no film should be shown if it was objected to by three justices, the conditions were reasonable and within the discretion of the justices to impose; the undertakings were also reasonable, but the second undertaking should be confined to the exclusion of children attending the particular school in which there had been an outbreak of disease.

Notes. The Cinematograph Act, 1909, has been amended by the Cinematograph Act, 1952. For the duty of the licensing authority in connection with the admission of children, see the Cinematograph Act, 1952, s. 3.

Considered: *Ellis v. Dubrowski*, [1921] All E.R. Rep. 272. Referred to: *Harman v. Butt*, [1944] 1 All E.R. 558; *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corpn.*, [1947] 2 All E.R. 680.

As to the licensing of cinemas see 32 HALSBURY'S LAWS (2nd Edn.) 72 et seq., and for cases see 42 DIGEST 920 et seq. For the Cinematograph Act, 1909, see 25 HALSBURY'S STATUTES (2nd Edn.) 39, and for the Cinematograph Act, 1952, s. 3, see *ibid.*, vol. 32, pp. 1023, 1024.

Cases referred to:

- (1) *L.C.C. v. Bermondsey Bioscope Co., Ltd.*, [1911] 1 K.B. 445; 80 L.J.K.B. 141; 103 L.T. 760; 75 J.P. 53; 27 T.L.R. 141; 9 L.G.R. 79, D.C.; 42 Digest 921, 164.
- (2) *Ex parte Stott*, [1916] 1 K.B. 7; 85 L.J.K.B. 502; 114 L.T. 234; 80 J.P. 169; 32 T.L.R. 84; 60 Sol. Jo. 418, D.C.; 42 Digest 921, 167.
- (3) *Theatre de Luxe (Halifax) Ltd. v. Gledhill*, [1915] 2 K.B. 49; 112 L.T. 519; 79 J.P. 238; 31 T.L.R. 138; 13 L.G.R. 541; 24 Cox, C.C. 614; sub nom. *Halifax Theatre de Luxe, Ltd. v. Gledhill*, 84 L.J.K.B. 649, D.C.; 42 Digest 920, 160.
- (4) *R. v. L.C.C., Ex parte London and Provincial Electric Theatres, Ltd.*, [1915] 2 K.B. 466; 84 L.J.K.B. 1787; 113 L.T. 118; 79 J.P. 417; 31 T.L.R. 329; 59 Sol. Jo. 382; 13 L.G.R. 847, C.A.; 42 Digest 920, 154.

A Also referred to in argument :

R. v. Dodds, [1905] 2 K.B. 40; 74 L.J.K.B. 599; 93 L.T. 319; 69 J.P. 210; 53 W.R. 559; sub nom. *R. v. Dodds, Ex parte Roberts and Walker & Son*, 21 T.L.R. 391, C.A.; 42 Digest 622, 228.

Huish v. Liverpool Justices, [1914] 1 K.B. 109; 83 L.J.K.B. 133; 110 L.T. 38; 78 J.P. 45; 30 T.L.R. 25; 58 Sol. Jo. 83; 12 L.G.R. 15, D.C.; 42 Digest 920, 156.

B

Rules Nisi for mandamus and prohibition directed to Burnley justices.

On Mar. 22, 1916, at a meeting of the justices for the borough of Burnley, certain alterations of the conditions to be imposed upon, and the undertakings to be given by, all licensees of cinematograph exhibitions on the renewal of their licences, under the Cinematograph Act, 1909, were adopted, subject to any arguments that might be urged by or on behalf of such licensees at the petty sessions to be held on Mar. 29, 1916. The conditions so adopted were as follows :

C

(i) The hours of opening and closing will be respectively 6 p.m. and 10.30 p.m. (ii) Nothing shall be represented or shown that is objectionable, licentious, or indecent, or likely to produce riot, tumult, or breach of the peace, and no offensive representations of living persons shall be permitted in the licensed premises. (iii)

D

No film shall be exhibited if notice has been given to the licensee that any three justices sitting in petty sessions object to such film. If the said three justices sitting in such petty sessions request the licensee to exhibit to them any such film so objected to, he shall do so at such reasonable time and place as the said three justices shall in writing direct. The undertakings to be required were as follows :

E

(i) That no tickets shall be distributed to children under fourteen years of age either for free or reduced admission to the licensed premises, and that no refreshments, sweets, or souvenirs, or other things by way of inducement to children under sixteen years of age shall be given away. (ii) That upon notification in writing being received from the medical officer of health of the county borough of Burnley that any department of a public elementary school has been closed

F

owing to the prevalence of infectious disease the licensee shall forthwith exclude or cause to be excluded from the licensed premises all children who are attending school. The justices instructed their clerk to send a copy of the conditions and undertakings, set out above, to all licensees of premises for the exhibition of cinematograph films, in order that they might have an opportunity of considering any objection to the same to be urged at the annual licensing meeting in petty

G

sessions to be held on Mar. 29, 1916. The clerk accordingly sent such letter and gave notice to the various licensees in the following terms :

"The justices will deal with this renewal on Mar. 29, 1916. The enclosed conditions have been adopted and will form part of the regulations under which cinematograph licences will be granted."

H

On Mar. 29, 1916, a petty sessions was held at the borough police court for the purpose of renewing cinematograph licences. The clerk to the justices informed the applicants for licences in open court that there was a full opportunity accorded to them to be heard as to the conditions and regulations of which they had had notice, and that the whole matter of the conditions and regulations under which licences would be granted would be considered. Arguments were then addressed to the justices, both as to their jurisdiction and as to the effect that the conditions and undertaking were unreasonable and ultra vires. The justices decided that they would renew the licences upon the conditions set out above, and also upon the first of the undertakings, but they intimated that they would give further consideration to the second undertaking.

I

Rules nisi were obtained on behalf of Austin Harry Longford (i) directed to the justices to show cause why a writ of mandamus should not issue commanding them to hear and determine an application by Austin Harry Longford for the renewal of a licence under the Cinematograph Act, 1909, in respect of the Pavilion Picture

Hall, Burnley; and (ii) for a prohibition against the justices issuing a licence with certain conditions and undertakings attached. Both rules were obtained on the following grounds: (i) that the justices had failed to hear and determine the application according to law; (ii) that the conditions imposed by the justices were unreasonable and ultra vires; (iii) that the undertakings proposed to be exacted were unreasonable and void; (iv) that the justices had no power to make the grant of the licence conditional upon the giving of undertakings as to matters upon which they could not insist as conditions; and (v) that the justices had no power to insist upon conditions or undertakings except when sitting in petty sessions.

By the Cinematograph Act, 1909:

"Section 2 (1). A county council may grant licences to such persons as they think fit to use the premises specified in the licence for the purposes aforesaid (i.e., the exhibition of pictures or other optical effects by means of a cinematograph or other similar apparatus, for the purposes of which inflammable films are used) on such terms and conditions and under such restrictions as, subject to regulations of the Secretary of State, the council may by the respective licences determine."

By s. 5 of the Cinematograph Act, 1909, the county council is empowered to delegate their powers to justices sitting in petty sessions; and by s. 6 the provisions of that Act are stated to apply to a borough council as if it were a county council.

Langdon, K.C., and *Guy Lushington* showed cause.

Hogg in support of the rules.

DARLING, J.—In this case a rule nisi was obtained for a mandamus to be directed to the justices of Burnley to hear and determine according to law an application by Mr. Longmore for the renewal of a cinematograph licence, and, at the same time that the rule nisi for the mandamus was obtained, there was also a rule nisi for prohibition granted directed to the same justices against their attaching to the licence certain conditions or exacting certain undertakings from the licensee. It is necessary, in order to arrive at a correct determination, to examine first of all the words of the Cinematograph Act, 1909. [His Lordship read s. 2 (1) of the Act of 1909 and continued:] At one time it was considered that the conditions and restrictions referred to in the section were confined to those matters which affected the safety of the building in which cinematograph exhibitions were held, and the security of people attending the same. It was decided, however, in *L.C.C. v. Bermondsey Bioscope Co., Ltd.* (1) that this idea is incorrect, and since that case was decided it is quite impossible to submit a proposition of this kind to the court. The Secretary of State has, however, ample power to make regulations regarding the safety of premises and the management of exhibitions.

What is the position of the justices? Are they fettered in any way, except so far as the regulations of the Secretary of State are concerned? In my view they are not. It seems to me that the justices are absolutely free as to the grant or the refusal of a licence. It is clear that they are under no obligation to grant a licence to any person at all. The section which I quoted says that the licensing authority "may grant licences to such persons as they think fit" for the purpose of cinematograph exhibitions. This leaves the justices a very free hand in the matter of imposing conditions or asking for undertakings when an application is made for a licence. If they name certain conditions or undertakings, the applicant for the licence can accept or refuse them. If he accepts them, all well and good. But if he declines to be bound by them, the justices are fully entitled to say that they do not consider him to be a person fit to hold a licence, and the legislature has said that the justices are only to grant a licence to a person if they think that he is fit to hold one. In the present case the justices have said that they will grant licences for cinematograph exhibitions subject to certain conditions. The first

A of these conditions is that the hours of opening and closing shall be respectively 6 p.m. and 10,30 p.m. No objection is taken to this condition. The second is that "nothing shall be represented or shown that is objectionable, licentious, or indecent, or likely to produce riot, tumult, or breach of the peace, and no offensive representations of living persons shall be permitted in the licensed premises."

B Again, no objection is taken to this second condition up to this point, but then comes the proviso that

"no film shall be exhibited if notice has been given to the licensee that any three justices sitting in petty sessions object to such film."

C I think that this proviso is not a reasonable one. It has been pointed out in the course of the argument that this would be certain to lead to a state of confusion, and I think that the argument is well founded. If the decision as to the fitness or unfitness of a film for exhibition was to be left in the hands of any three justices sitting on a particular day, there could be no certainty about the matter at all. Three justices might allow a film to be shown on one day, and on the following day three other justices might strongly object to the continuance of the exhibition.

D A condition of this kind is not, in my view, reasonable, when it leaves the decision of the whole matter in doubt. This court has had to consider the question of the objection of justices to a particular film before. The case to which I refer is that of *Ex parte Stott* (2). In that case the borough of St. Helens, through the justices, attached a condition to the grant of a licence for cinematograph exhibitions, that no film should be exhibited if notice was given to the licensee that the justices objected to it. If the condition imposed in the present case had been in the form adopted by the justices of St. Helens, it would have been reasonable and certain, and if we had been asked to-day to prohibit the imposition of a condition of the same character, we should have declined to do so, as the imposition of such a condition is most certainly within the powers of the justices. But this case is different. It leaves the discretion in the hands of three justices who happen to be sitting upon a particular day. As the matter stands, therefore, I think that the prohibition should go, but without costs. There will, then, be a prohibition against imposing a condition in the form of that which is in question in the present case; but if a condition is imposed by the justices in the form adopted by the justices of St. Helens, such a condition will be within their powers.

G As to the other part of the case, namely, the undertakings, I am of opinion that it is unnecessary to decide whether they would be good as conditions. It has been argued before us that they would be bad as conditions, and reliance has been placed upon the decision in *Theatre de Luxe (Halifax), Ltd. v. Gledhill* (3). Speaking for myself, I prefer the judgment of ATKIN, J., to the judgments of the other two members of the court, and if I was at liberty to follow the judgment of ATKIN, J., I should most certainly do so. But when the judgments of the majority are closely examined, it is clear that they only apply to conditions and not to undertakings. The view which was taken by the justices in the present case was undoubtedly a reasonable one. The justices were first of all called upon to decide as to who was a fit person to hold a licence, and they have, in my view, a perfect right to determine in what way children who go to a theatre shall be treated. They are perfectly entitled to say that if the applicant for a licence desires to bribe children in order to induce them to visit his exhibition, they will refuse to grant him a licence. That disposes of the first of the undertakings demanded of the proposed licensee. As to the second, namely, that on the notification by a medical officer of health that any department of a public elementary school has been closed owing to the prevalence of an infectious disease the licensee should exclude all children attending school from the cinematograph exhibition, I think that that is a proper undertaking if the word "that" is inserted before the word "school." The justices were asked by the applicant for a licence which would give him the

power of attracting a number of persons into one room, and it is quite reasonable for the justices to require that if an infectious disease is prevalent, and if the licensee has received notice that in consequence of the disease the school has been closed, he should take care to see that children who are attending this particular school should not be admitted to the cinematograph exhibition. There is no hardship in such an undertaking. If the licensee breaks it, the only result is that when he makes an application for a renewal of his licence the justices can say that if he gives undertakings and breaks them and spreads infectious diseases, they will not grant him a renewal of the licence.

The result is that, in our opinion, the conditions are good, except that part of the second which leaves the exhibition subject to the approval of any three justices sitting in petty sessions on a particular day. If the form used by the justices of St. Helens, as set out in *Ex parte Stott* (2), is adopted, there can be no objection to such a condition. As to the undertakings, subject to the modification I have stated, there is nothing objectionable in them. The rule for a mandamus, therefore, cannot be made absolute, as the justices have not refused to hear and determine the application for a licence, but have granted it. The rule for a prohibition, however, will be made absolute with regard to that portion to which I have called attention, namely, the proviso which leaves it to the discretion of three justices sitting in petty sessions on any particular day whether a certain film shall or shall not be exhibited.

AVORY, J.—I am of the same opinion. There are technical difficulties in the way of a mandamus which are a sufficient reason for refusing to make the rule nisi for a mandamus absolute. As to the rule nisi for prohibition, I have had considerable hesitation as to whether there is sufficient ground for prohibition in view of the fact that the justices were willing to hear any arguments with regard to the modification of these conditions, and but for the letter of Mar. 23, 1916, written to the applicants for renewals by the clerk to the justices, that fact might have been an answer to the application for a prohibition. That letter, however, gives notice to all applicants for the renewal of cinematograph licences in these terms:

"The justices will deal with this renewal on Mar. 29, 1916. The enclosed conditions have been adopted and will form part of the regulations under which cinematograph licences will be granted."

There is the formal announcement sent out by the justices to the effect that licences would only be granted subject to those conditions as a whole. If any of these conditions are ultra vires, the case is a proper one for prohibiting the imposition of those which are such. It has been contended before us that these new conditions are all ultra vires, because they have been resolved upon by the justices in the absence of the applicant. I do not think that there is anything at all in this contention. It was quite open to the justices to arrive at the conclusion that the public interest demanded the imposition of fresh conditions, and they were perfectly entitled to say to any person who desired to come before them as an applicant for a licence that they would give him an opportunity of arguing as to whether the conditions should be imposed in his particular case. I think that the justices are bound by the statute to consider each licence separately, and that they are not entitled to say that no licence shall be granted unless it conforms to all the conditions and regulations already made. This is quite in accord with s. 2 of the Cinematograph Act, which says that licences may be granted on such terms and conditions and under such restrictions as the licensing authority may by the respective licences determine. From the wording of the statute I think that it was the intention of the legislature that the licensing authority should exercise their discretion in the case of each licence. Now, what has happened in the present case? The justices gave an indication that it was their intention to enforce a

A condition as to the exhibition of any film which was objected to by any three justices. I am entirely in accord with the judgment that has just been delivered that such a condition is altogether uncertain in its operation, and for that reason I think that it is quite invalid. It is unreasonable because the licensee might be permitted to exhibit his film on one day and be prohibited to exhibit it on the next. A condition of this kind could not fail to be absurd. My Lord has referred to *Ex parte Stott* (2), and has stated the form of the condition imposed by the justices of St. Helens in the case of cinematograph exhibitions. I think that a condition in the form adopted by the St. Helens' justices would be quite good, and if the justices of Burnley were to alter their conditions so as to bring them into accord with those of St. Helens, i.e., at least, as far as this particular point is concerned, no objection could be raised to the same, and the objection as to uncertainty would be removed.

As to the undertakings, I think that both of them would be good as conditions. And if they are good as conditions, they are also good as undertakings. It does not seem to me that they in any way violate the principle laid down in the case of *Theatre de Luxe (Halifax), Ltd. v. Gledhill* (3). That case has been criticised, and I must say that I think that it is only an authority which should be followed when the same facts are in question as they were there. We are bound by the decision there given if the same state of facts exists, but the present case is different. The decision in *L.C.C. v. Bermondsey Bioscope Co., Ltd.* (1) is of much wider authority than that of *Theatre de Luxe (Halifax), Ltd. v. Gledhill* (3), and certainly gives a larger scope to the licensing authority, and I notice also that the *Bermondsey Case* (1) has received the approval of the Court of Appeal in *R. v. L.C.C.* (4). If, then, there can be said to be any discrepancy between the *Bermondsey Case* (1) and the *Halifax Case* (3), the former is to be preferred to the latter. Now, how does this affect the present case? I do not think that the undertakings infringe any principles laid down in the decided case. The provision that no tickets shall be distributed to children under fourteen years of age for free or reduced admission, and that refreshments, sweets, etc., shall not be given as an inducement to visit cinematograph exhibitions, seems to me to be a regulation which affects the use of the premises by the licensee; and if that is so, such an undertaking is quite in accord with the principles approved by the court in the *Bermondsey Case* (1). The same thing may be said as to the exclusion of children who are attending a school in which an infectious disease has broken out. I think that this is also an undertaking as to the use of the premises, and as it would, in my opinion, be good as a condition, I think it is also good as an undertaking. The result, then, will be as my Lord has stated. The rule for a mandamus will be discharged, and the rule for a prohibition will also be discharged, except as to that part of it which is concerned with the condition imposed by the justices as to any objection being raised to a film by any three justices sitting in petty sessions.

LOW, J.—I agree.

Rule for mandamus discharged. Rule for prohibition made absolute in part.

Solicitors: W. J. & E. H. Tremellen, for Nowell, Meller & Nowell, Burnley; Hargrave, Son & Barrett, for March, Pearson & Akenhead, Manchester.

[Reported by J. A. SLATER, ESQ., Barrister-at-Law.]

IN THE ESTATE OF STANLEY

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Bargrave Deane, J.), March 20, May 15, July 3, 1916]

[Reported [1916] P. 192; 85 L.J.P. 222; 114 L.T. 1182; 32 T.L.R. 643; 60 Sol. Jo. 604]

Will—Soldier's will—"Actual military service"—Army nurse under orders to embark on hospital ship—Letter containing testamentary dispositions—Wills Act, 1837 (7 Will. 4 & 1 Vict., c. 26), s. 11.

On Oct. 8, 1915, the deceased, an Army nurse, who was under orders to embark in a hospital ship, wrote a letter to her niece containing testamentary dispositions. On Oct. 10, 1915, the deceased left England for the Near East. She returned in December, 1915, and on the voyage home she was taken ill. She died in England on Dec. 23, 1915.

Held: the deceased was a "soldier being in actual military service" within the meaning of s. 11 of the Wills Act, 1837, and the niece to whom the letter was addressed was entitled to probate of the letter as the executrix according to the tenor.

Notes. Considered: *In the Goods of Newland*, [1952] 1 All E.R. 841. Referred to: *In the Estate of Ripon*, [1943] 1 All E.R. 676; *Blyth v. Lord Advocate*, [1944] 2 All E.R. 375.

As to soldiers' wills see 16 HALSBURY'S LAWS (3rd Edn.) 176 et seq., and for cases see 39 DIGEST 332 et seq. For the Wills Act, 1837, s. 11, see 26 HALSBURY'S STATUTES (2nd Edn.) 1335.

As to executors according to the tenor see 16 HALSBURY'S LAWS (3rd Edn.) 123, 124, and for cases see 23 DIGEST (Repl.) 27.

Cases referred to in argument:

In the Goods of Donaldson (1840), 2 Curt. 386; 163 E.R. 448; 39 Digest 336, 223.

In the Goods of Hale, [1915] 2 I.R. 362; 44 Digest 304, b.

In the Goods of Hiscock, [1901] P. 78; 70 L.J.P. 22; 84 L.T. 61; 17 T.L.R. 110; 39 Digest 334, 202.

Gattward v. Knee, [1902] P. 99; 71 L.J.P. 34; 18 T.L.R. 163; sub nom. *In the Goods of Knee*, *Gattward v. Knee*, 86 L.T. 119; 46 Sol. Jo. 123; 39 Digest 334, 197.

Herbert v. Herbert (1855), Dea. & Sw. 10; 26 L.T.O.S. 153; 2 Jur. N.S. 24; 4 W.R. 182; 164 E.R. 486; 39 Digest 335, 210.

Probate Motion by Ada Louise Stanley to prove, as executrix according to its tenor, the will of Ada Stanley, an army nurse.

The deceased, who, before the war, was a member of the Territorial Force Nursing Service, was mobilised for duty in January, 1915, at the Third Northern General Hospital, Sheffield. On July 18, 1915, she volunteered for service abroad, and was seconded for service under the Queen Alexandra Imperial Military Nursing Service. On that date she entered into an agreement with His Majesty's Principal Secretary of State for the War Department whereby she agreed to serve for twelve months or until her services were no longer required, whichever should first happen. From July, 1915, the deceased was employed on hospital ships proceeding to and from the Near East. She arrived at Devonport on His Majesty's hospital ship *Northland* on Oct. 1, 1915, and proceeded to London on short leave "pending further instructions." On Oct. 5, 1915, orders were despatched to the deceased by post from the War Office to embark on a hospital ship on Oct. 9, 1915. On Oct. 8, 1915, she wrote out in London the following letter, addressed to her niece, Ada Louise Stanley, who was the present applicant:

A "My dear Ada,—I give you full liberty to deal with my affairs. Give Miss Horrocks £10 and anything of mine she cares to have for a keepsake; £250 that is invested with Mr. Clark and my post-office money for yourself, minus the £10 for Miss H., and £5 each for Dorothy and Nellie and Kathleen, and Mr. Clark whatever you care to give him as a little remembrance from me, and Mrs. Clark something of my personal belongings, also Mrs. Whittaker, my housekeeper; £50 invested in mill for Mary Iredale. You will find the address, etc., in my box. My insurance money for my sister Emma Fairbairn, to be used just for her own personal comfort, not otherwise. Policy in my trunk, Kershaw-street. Divide as you think my belongings, but please make no fuss. With love, Yours, Ada.—P.S. I have no bills to pay."

C On Oct. 10, 1915, the deceased embarked on His Majesty's hospital ship *Egypt* and left England for the Near East. In December, 1915, she returned to England in His Majesty's hospital ship *Mauretania*, and on the voyage was taken ill. On arrival in England she was moved to the Royal Victoria Hospital, Netley, where she died on Dec. 23, 1915. Her estate consisted entirely of personalty of the value of £550. The applicant, Ada Louise Stanley, now moved, as executrix according to its tenor, for probate of the letter of Oct. 8, 1915, under s. 11 of the Wills Act, 1837.

W. O. Willis for the applicant.

J. H. Murphy for the next of kin.

E BARGRAVE DEANE, J.—As the deceased at the time she wrote the letter of Oct. 8, 1915, was under orders to embark, I think that brings her within the section. The Wills Act, 1837, refers to "any soldier being in actual military service" and to "any mariner or seaman being at sea." I am not sure in which category the deceased should be regarded. I do not think that it very much matters. She was under contract with the War Department, and was employed by that department to serve at sea. I shall treat her as a "soldier being in actual military service." There will be a grant of probate to the applicant of the letter of Oct. 8, 1915, as the executrix according to its tenor. The costs of all parties will be paid out of the estate.

Order accordingly.

Solicitors: H. G. Campion & Co., for Clegg & Sons, Sheffield; Neave, Morton & Co., for T. Smailes, Huddersfield.

[Reported by D. COTES-PREEDY, Esq., Barrister-at-Law.]

Re WILLIAMS. WILLIAMS v. BALL

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Warrington and Scrutton, L.JJ.),
October 25, 1916]

[Reported [1917] 1 Ch. 1; 86 L.J.Ch. 36; 115 L.T. 689; 61 Sol. Jo. 42]

Insurance—Life assurance—Assignment of policy—Indorsement authorising purported assignee to draw insurance “in event of my predeceasing her.”

W. handed over a policy of life assurance to his housekeeper A. M. B., telling her that it was for her to put by. W. subsequently indorsed the policy as follows: “I authorise A. M. B., my housekeeper, and no other person to draw this insurance in the event of my predeceasing her, this being my sole desire and intention at the time of taking this policy out,”

Held: the indorsement was merely an authority to draw the policy moneys which determined on the assignor's death; the assignment was ineffective to operate as a testamentary gift as it was not complete; and, therefore, no valid assignment of the policy had been effected.

Decision of ASTBURY, J., [1917] 1 Ch. 1, affirmed on different grounds.

Notes. Considered: *Re Westerton, Public Trustee v. Gray*, [1919] 2 Ch. 104; *Holt v. Heatherfield Trust, Ltd.*, [1942] 1 All E.R. 404. Applied: *Re Rose, Rose v. I.R. Comrs.*, [1951] 2 All E.R. 959. Referred to: *Re Fry, Chase National Executors and Trustees Corp., Ltd. v. Fry*, [1946] 2 All E.R. 106.

As to assignment of choses in action, see 4 HALSBURY'S LAWS (3rd Edn.) 483 et seq., and for cases see 8 DIGEST (Repl.) 569 et seq. As to assignment of life policies see 22 HALSBURY'S LAWS (3rd Edn.) 281 et seq., and for incomplete gifts see *ibid.*, vol. 18, pp. 396 et seq. For cases see 25 DIGEST 532 et seq.

Cases referred to in argument:

Gorringe v. Irwell India Rubber and Gutta Percha Works (1886), 34 Ch.D. 128; 56 L.J.Ch. 85; 55 L.T. 572; 35 W.R. 86, C.A.; 8 Digest (Repl.) 583, 301.

Newman v. Newman (1885), 28 Ch.D. 674; 54 L.J.Ch. 598; 52 L.T. 422; 33 W.R. 505; 1 T.L.R. 211; 8 Digest (Repl.) 603, 468.

Re King, Sewell v. King (1879), 14 Ch.D. 179; 49 L.J.Ch. 73; 28 W.R. 344; 8 Digest (Repl.) 629, 663.

Re Griffin, Griffin v. Griffin, [1899] 1 Ch. 408; 68 L.J.Ch. 220; 79 L.T. 442; 15 T.L.R. 78; 43 Sol. Jo. 96; 8 Digest (Repl.) 578, 266.

Fortescue v. Barnett (1834), 3 My. & K. 36; 3 L.J.Ch. 106; 40 E.R. 14; 25 Digest 532, 217.

Appeal from a decision of ASTBURY, J., reported [1917] 1 Ch. 1, on an originating summons for a declaration as to the validity of an assignment of a policy of insurance.

On Dec. 8, 1913, the assignor, Henry James Williams took out a policy for £1,000 on his life with an insurance company and handed the policy when effected over to the defendant Ada Maud Ball, telling her it was for her to put by. Subsequently the defendant, having read the terms of the policy, told the assignor that she would not be able to receive the policy moneys when they became payable, and thereupon he indorsed the policy as follows:

“I authorise Ada Maud Ball, my housekeeper, and no other person, to draw this insurance in the event of my predeceasing her, this being my sole desire and intention at the time of taking this policy out, and this is my signature.”

He then signed his name over a penny stamp. No notice of this transaction was given to the insurance company. The assignor died on Feb. 16, 1916, and by his will dated Oct. 31, 1911, he appointed the plaintiff, Arthur Watkins Williams, sole executor.

A On April 10, 1916, an originating summons was taken out by the plaintiff, asking that it might be declared whether or not the policy of insurance was validly assigned to and was the property of the defendant. The summons was adjourned into court and came on to be heard before ASTBURY, J., on June 6, 1916. ASTBURY, J., held that this was not a valid assignment as there were no present words of gift, and as the transfer was conditional, and no consideration was given or expressed to be given, it did not pass any right of action under the Policies of Assurance Act, 1867, or the Judicature Act, 1873.

The defendant appealed.

Owen Thompson for the defendant.

C *Dighton Pollock* for the widow and children of the assignor, *J. F. Carr* (for *H. A. Hind*, now serving with His Majesty's forces) for Herbert Williams, brother of the assignor, and *Percy F. Wheeler* for the plaintiff executor, were not called upon to argue.

D LORD COZENS-HARDY, M.R.—This is rather a curious case. Mr. Williams, the assignor, had effected a policy of assurance upon his life. It was taken out in December, 1913. Soon after that date he handed the policy to his housekeeper, the defendant. He indorsed upon the policy itself this memorandum. [His LORDSHIP read the indorsement on the policy and continued:] What is the effect of that? Is it an assignment of the policy? In my opinion, on the question of construction, it is not an assignment at all. On a question of a valid gift what has always to be regarded is, not what the donee intended, but what was the form of the transaction. What is this authority to draw the insurance in the event of the assignor predeceasing the defendant? If anything, that seems to me to be a power of attorney for the defendant to obtain the policy moneys. But a power of attorney becomes inoperative upon the death of the donor; and inasmuch as it was given without consideration she cannot claim after the death of the donor. It is not, I repeat, an assignment at all. It is a mere mandate to the defendant to draw the policy moneys. Then there is this further point. It seems to me that it is in the nature of a mere testamentary document which is intended to operate in the event of the donor predeceasing the donee. I asked counsel for the defendant if there was anything which could have been done between the date of the document and the date of the death of the assignor, and he replied that he thought not. It is impossible to say that this document, which did not confer any power or right during the life of the assignor, was an assignment of the policy in the present case. That being so, it seems to me quite plain that the transaction cannot be supported on any one of the grounds that have been put forward. In my opinion the conclusion arrived at by ASTBURY, J., was quite right, though his reasons for it are not the same as ours. That leaves the subsequent question as to whom the policy moneys passed under the terms of the will.

H WARRINGTON, L.J.—I agree. The defendant is a volunteer, who claims to have received in the assignor's lifetime an assignment of a chose in action. Claiming as she does as a volunteer she can only succeed if she can show that the assignor in making the gift did everything that was necessary to transfer the property. Has the defendant made out that the assignor did all that was necessary? I The mere form of the gift is immaterial. If the assignor has used any words to effect a transfer that would be sufficient. He need not use the word "assign." No particular words are essential. All the assignor has done, however, is to sign a particular document. [His LORDSHIP read the indorsement on the policy, and continued:] That in terms is a mere authority to draw the policy moneys. Not only that, but it is an authority the effect of which would determine ipso facto if the assignor had died in the defendant's lifetime. There is nothing to show that it was irrevocable. One must read the authority as if it were revocable. That is the conclusion one would arrive at of the assignor's intention. On its true

construction it is a mere revocable authority to the defendant, which only becomes operative after the death of the assignor. On the whole, therefore, I am of opinion that the decision of ASTBURY, J., is right, although, like the Master of the Rolls, I think that the reasons that ASTBURY, J., has assigned for his decision are not quite those which we have given in our judgments.

SCRUTTON, L.J.—I agree.

Appeal dismissed.

Solicitors: *M. A. Orgill, for Llewellyn & Son, Tunstall; Henry Clarkson & Son, for W. Huntbach, Hanley.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

R. v. BANKS

[COURT OF CRIMINAL APPEAL (Ridley, Avory and Atkin, JJ.), July 4, 1916]

[Reported [1916] 2 K.B. 621; 85 L.J.K.B. 1657; 115 L.T. 457;
80 J.P. 432; 25 Cox, C.C. 535; 12 Cr. App. Rep. 74]

Criminal Law—Carnal knowledge—Girl between thirteen and sixteen years—Defence—"Reasonable cause to believe girl of or above age of sixteen"—Need of accused to prove actual belief by him—Duty of counsel for prosecution—Irregularity in address to jury—Appeal to "protect girls from men like prisoner."

Section 5 (2) of the Criminal Law Amendment Act, 1885, provides that it is a defence to a charge of carnal knowledge of a girl of or above the age of thirteen years and under the age of sixteen years, if the accused can prove that he "had reasonable cause to believe that the girl was of or above the age of sixteen years." It is not sufficient for the accused to show merely that he had reasonable cause for such belief. He must also prove that he did in fact believe the girl to be of or above that age.

Duty of counsel for the prosecution commented upon.

Notes. The Criminal Law Amendment Act, 1885, s. 5, has been replaced by the Sexual Offences Act, 1956. The defence is now provided by s. 6 (3) of the 1956 Act, which expressly states that the accused must also believe the girl in question to be of the age of sixteen years or over.

Followed: *R. v. Harrison, R. v. Ward, R. v. Wallis, R. v. Gooding*, [1938] 3 All E.R. 134.

As to the duty of counsel for the prosecution, see 3 HALSBURY'S LAWS (3rd Edn.) 75, and *ibid.*, vol. 10, 416; and for cases see 3 DIGEST (Repl.) 388, and *ibid.*, vol. 14, 304.

As to unlawful carnal knowledge of a girl over thirteen and under sixteen years of age, see 10 HALSBURY'S LAWS (3rd Edn.) 751; and for cases see 15 DIGEST (Repl.) 1018, 1019. For the Sexual Offences Act, 1956, see 36 HALSBURY'S STATUTES (2nd Edn.) 219.

Case referred to:

(1) *R. v. Puddick* (1865), 4 F. & F. 497; 14 Digest (Repl.) 324, 3136.

Also referred to in argument:

R. v. Rudland (1865), 4 F. & F. 495; 15 Digest (Repl.) 1012, 9967.

Appeal against a conviction before BRAY, J., at Worcester Assizes for having had unlawful carnal knowledge of a girl under sixteen years of age. At the trial the

accused did not deny the offence, but set up as a defence that he had reasonable cause to believe that the girl was of or above the age of sixteen years. He said that she had the appearance of a girl of seventeen.

Counsel for the prosecution in addressing the jury made an appeal to them "to protect young girls from men like the prisoner."

S. R. C. Bosanquet for the appellant.

F. J. Tucker and *D. Cotes-Preedy* were not called on to argue.

AVORY, J., delivered the following judgment of the court.—The defence set up to the charge on the trial of the appellant was that he had reasonable cause to believe that the girl was of or above the age of sixteen years, which is a statutory defence under the proviso to s. 5 (2) of the Criminal Law Amendment Act, 1885. In the opinion of this court the phrase "had reasonable cause to believe" means "had reasonable cause to believe and did in fact believe," which is equivalent to saying that the person charged did believe on reasonable grounds that the girl was sixteen years of age or over.

It was urged on behalf of the appellant that at the trial counsel for the prosecution made several observations which would have the effect of prejudicing the jury. In particular counsel was stated to have appealed to the jury "to protect young girls from men like the prisoner." It cannot be said that such an observation was in good taste, but it is not sufficiently irregular to afford ground for setting aside the conviction. It has been properly said that counsel for the prosecution should not press for a conviction: In *R. v. Puddick* (1) **CROMPTON, J.**, said that counsel should regard themselves as "ministers of justice" assisting in its administration rather than as advocates. Although the observation referred to may not have been in good taste, this court cannot say that it had the effect of misleading the jury and inducing them to find the appellant guilty. We think that they would not have returned a verdict of guilty unless they were satisfied by the evidence before them that their verdict was the right one. The appeal must be dismissed.

Appeal dismissed.

Solicitors: *T. A. Matthews*, Hereford; *Director of Public Prosecutions*.

[*Reported by R. F. BLAKISTON, ESQ., Barrister-at-Law.*]

HEATH'S GARAGES, LTD. v. HODGES

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Pickford, L.J., and Neville, J.),
May 11, 12, June 3, 1916]

[Reported [1916] 2 K.B. 370; 85 L.J.K.B. 1289; 115 L.T. 129;
80 J.P. 231; 32 T.L.R. 570; 60 Sol. Jo. 554; 14 L.G.R. 911]

Animal—Highway—Domesticated animals straying on highway—Sheep—Gaps in hedge—Damage to plaintiff's motor car—Liability of occupier of land adjoining highway—Negligence—Nuisance.

In ordinary circumstances in an ordinary highway it is no breach of duty on the part of the owner or occupier of land adjoining the highway not to prevent harmless domesticated animals like sheep from straying on the highway, and so he is not liable for damage caused to a user of the highway by such straying animals, and it makes no difference whether an action brought against him in respect of such straying is based on negligence or nuisance. But this in nowise affects the right of the owner of the soil of the highway to recover in respect of damage caused by harmless domesticated animals using the road not for the purpose of a highway.

Animal—Highway—Animal straying on—No civil action for damage conferred by Highways Acts.

The provisions of the Highways Act, 1835, s. 14, and the Highways Act, 1864, s. 25 [see now Highways Act, 1959, s. 135 (1)], **held** not to confer a civil action for damage caused by animals straying on the highway.

Notes. Considered: *Turner v. Coates*, post p. 264; *Brackenborough v. Spalding U.D.C.* [1942] 1 All E.R. 34; *Wright v. Callwood* (1950), 66 (pt. 2) T.L.R. 72. Referred to: *Manton v. Brocklebank*, [1923] All E.R. Rep. 416; *Deen v. Davies*, [1935] All E.R. Rep. 9; *Toogood v. Wright*, [1940] 2 All E.R. 306; *Hughes v. Williams*, [1943] 1 All E.R. 535; *Searle v. Wallbank* [1947] 1 All E.R. 12; *Carmarthenshire County Council v. Lewis*, [1955] 1 All E.R. 565.

As to animals trespassing on the highway, see 1 HALSBURY'S LAWS (3rd Edn.) 670-672, and for cases see 2 DIGEST (Repl.) 316-326, 26 DIGEST (Repl.) 490, 491.

Cases referred to:

- (1) *Goodwyn (Goodwin) v. Cheveley* (1859), 4 H. & N. 631; 28 L.J.Ex. 298; 33 L.T.O.S. 284; 23 J.P. 487; 7 W.R. 631; 157 E.R. 989; 2 Digest (Repl.) 312, 157.
- (2) *Jones v. Lee* (1911), 106 L.T. 123; 76 J.P. 137; 28 T.L.R. 92; 56 Sol. Jo. 125; 2 Digest (Repl.) 320, 193.
- (3) *Ellis v. Banyard* (1911), 106 L.T. 51; 28 T.L.R. 122; 56 Sol. Jo. 139, C.A.; 2 Digest (Repl.) 320, 195.
- (4) *Higgins v. Searle* (1909), 100 L.T. 280; 73 J.P. 185; 25 T.L.R. 301; 7 L.G.R. 640, C.A.; 2 Digest (Repl.) 320, 192.
- (5) *Cox v. Burbidge* (1863), 13 C.B.N.S. 430; 1 New Rep. 238; 32 L.J.C.P. 89; 9 Jur. N.S. 970; 11 W.R. 435; 143 E.R. 171; 2 Digest (Repl.) 319, 187.
- (6) *Bradley v. Wallaces, Ltd.*, [1913] 3 K.B. 629; 82 L.J.K.B. 1074; 109 L.T. 281; 29 T.L.R. 705; 6 B.W.C.C. 706, C.A.; 2 Digest (Repl.) 327, 211.
- (7) *Hadwell v. Righton*, [1907] 2 K.B. 345; 76 L.J.K.B. 891; 97 L.T. 133; 71 J.P. 499; 23 T.L.R. 548; 551 Sol. Jo. 500; 5 L.G.R. 881; 2 Digest (Repl.) 320, 191.
- (8) *Harris v. Mobbs* (1878), 3 Ex.D. 268; 39 L.T. 164; 42 J.P. 759; 27 W.R. 154; 26 Digest (Repl.) 500, 1826.
- (9) *Fletcher v. Rylands* (1866), L.R. 1 Exch. 265; 4 H. & C. 263; 35 L.J.Ex. 154; 14 L.T. 523; 30 J.P. 436; 12 Jur. N.S. 603; 14 W.R. 799, Ex.Ch.; affirmed sub nom. *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 2 Digest (Repl.) 313, 164.

Also referred to in argument :

- Benjamin v. Storr* (1874), L.R. 9 C.P. 400; 43 L.J.C.P. 162; 30 L.T. 362; 22 W.R. 631; 2 Digest (Repl.) 337, 265.
- Wilkins v. Day* (1883), 12 Q.B.D. 110; 49 L.T. 399; 48 J.P. 6; 32 W.R. 123, D.C.; 36 Digest (Repl.) 209, 1105.
- Metropolitan Rail. Co. v. Jackson* (1877), 3 App. Cas. 193; 47 L.J.Q.B. 303; 37 L.T. 679; 42 J.P. 420; 26 W.R. 175, H.L.; 36 Digest (Repl.) 35, 168.
- Golding v. Stocking* (1869), L.R. 4 Q.B. 516; 10 B. & S. 348; 38 L.J.M.C. 122; 20 L.T. 479; 33 J.P. 566; 17 W.R. 722; 26 Digest (Repl.) 491, 1761.
- Freestone v. Casswell* (1869), L.R. 4 Q.B. 519; 10 B. & S. 351; 20 L.T. 918; 33 J.P. 581; 26 Digest (Repl.) 491, 1762.
- Dovaston v. Payne* (1795), 2 Hy. Bl. 527; 126 E.R. 684; 26 Digest (Repl.) 326, 443.
- Hudson v. Roberts* (1851), 20 L.J.Ex. 299; 6 Exch. 697; 17 L.T.O.S. 158; 155 E.R. 724; 2 Digest (Repl.) 332, 231.
- Davies (Davis) v. Mann* (1842), 10 M. & W. 546; 12 L.J.Ex. 10; 7 J.P. 53; 6 Jur. 954; 152 E.R. 588; 2 Digest (Repl.) 319, 185.
- Couch v. Steel* (1854), 3 E. & B. 402; 23 L.J.Q.B. 121; 22 L.T.O.S. 271; 18 Jur. 515; 2 W.R. 170; 2 C.L.R. 940; 118 E.R. 1193; 42 Digest 750, 1739a.
- Atkinson v. Newcastle Waterworks Co.* (1877), 2 Ex.D. 441; 46 L.J.Ex. 775; 36 L.T. 761; 42 J.P. 183; 25 W.R. 794, C.A.; 42 Digest 759, 1850.
- Groves v. Lord Wimborne*, [1898] 2 Q.B. 402; 67 L.J.Q.B. 862; 79 L.T. 284; 47 W.R. 87, C.A.; 42 Digest 759, 1858.
- David v. Britannic Merthyr Coal Co.*, [1909] 2 K.B. 146; 78 L.J.K.B. 659; 100 L.T. 678; 25 T.L.R. 431; 53 Sol. Jo. 398, C.A.; on appeal sub nom. *Britannic Merthyr Coal Co., Ltd. v. David*, [1910] A.C. 74; 79 L.J.K.B. 153; 101 L.T. 833; 26 T.L.R. 164; 54 Sol. Jo. 151, H.L.; 34 Digest 219, 1816.
- Watkins v. Naval Colliery Co. (1897), Ltd.*, [1911] 2 K.B. 162; 80 L.J.K.B. 746; 104 L.T. 439; 55 Sol. Jo. 347, C.A.; reversed, [1912] A.C. 693; 81 L.J.K.B. 1056; 107 L.T. 321; 28 T.L.R. 569; 56 Sol. Jo. 719, H.L.; 42 Digest 661, 698.
- Butler (Black) v. Fife Coal Co., Ltd.*, [1912] A.C. 149; 81 L.J.P.C. 97; 106 L.T. 161; 28 T.L.R. 150; 5 B.W.C.C. 217, H.L.; 34 Digest 218, 1809.

Appeal by plaintiffs from a decision of the Divisional Court (AVORY and LUSH, JJ.).

The facts appear in the judgment of the MASTER OF THE ROLLS.

J. B. Matthews, K.C., and *W. Dawson Sadler* for the plaintiffs.

H. H. Joy for the defendant.

Cur. adv. vult.

June 3, 1916. The following judgments were read.

LORD COZENS-HARDY, M.R.—This appeal raises a curious and important question of law. The plaintiffs sued in the county court for damage to a motor car caused by the negligence of the defendant in the following circumstances. While the car was being driven along the highway in the daylight, at a speed which is not found to be excessive, the driver saw in front of him some sheep unattended. He put on his brakes, and almost immediately thereafter a sheep jumped from the bank, and in some way ran into the car and broke part of the steering apparatus. The car was overturned and substantially damaged. The learned county court judge found that the sheep escaped on to the highway from an adjoining field in the occupation of the defendant in which the rest of the flock still remained. They escaped through some gaps in the hedge. He held that it was the duty of the defendant to keep his sheep from being on the highway except for the purpose of passing along the highway, and he gave judgment for

the plaintiffs for £100. The defendant appealed to the Divisional Court. The Divisional Court allowed the appeal.

The first question to be considered is: What is the duty of the owner or occupier of land adjoining a highway. Is he bound to maintain a hedge or fence for the purpose of preventing sheep from straying on to the highway? I put aside the cases where either by the provisions of a local Inclosure Act or by prescription or otherwise a duty to fence is imposed, and I treat the highway on which the accident occurred as an ordinary highway. It is somewhat remarkable that there is no direct decision on this point. But there are dicta which have to be considered. In *Goodwyn v. Cheveley* (1) BRAMWELL, B., said (4 H. & N. at p. 634): "A person is not bound to fence his land." POLLOCK, C.B., agreed. In *Jones v. Lee* (2) BANKES, J., said (106 L.T. at p. 126):

"First of all, what is the duty of the owner or occupier of land adjoining a highway with regard to keeping animals off the highway or fencing his land so as to prevent animals getting on to the highway? By common law there is no such duty at all; and we have not today heard any argument as to whether any duty can be created under the Highway Act. I am not going to consider that for the purpose of my judgment. Suffice it to say, by common law the owner or occupier of land adjoining a highway is under no duty to fence so as to keep his animals off the highway. The plaintiffs, therefore, in this case seem to me to fail in establishing the first point which is necessary to establish, namely, any duty as between the owner of this animal and themselves."

In *Ellis v. Banyard* (3) (106 L.T.R. at p. 53) BUCKLEY, L.J., expressly approved this doctrine; and KENNEDY, L.J., though not so strongly, took the same view. VAUGHAN WILLIAMS, L.J., on the other hand, dissented, at least if the sheep or cattle were so numerous as to obstruct the highway. This court in *Higgins v. Searle* (4)—the sow case—indicated their approval of the doctrine laid down by BANKES, J.

I am prepared to hold that under ordinary circumstances in an ordinary highway it is no breach of duty not to prevent harmless animals like sheep from straying on to the highway, and that it makes no difference whether the action is sought to be based on negligence or on a nuisance to the highway. An animal like a sheep, by nature harmless, cannot fairly be regarded as likely to collide with a motor car, and the owner of the sheep cannot be held liable on that footing. The reasoning of the Court of Common Pleas in the leading case of *Cox v. Burbidge* (5) seems to me to cover the present case. I do not forget that under the Highways Acts of 1835 and 1864 certain penalties may be imposed upon anyone whose cattle are found straying on the road. That was a new remedy given for the protection of the public. But I do not think that a man whose cattle has strayed renders himself to an action at law. The fine imposed by the justices is the only remedy available. It was conceded by counsel that there is no trace of any duty having been established against the occupier of land adjacent to a highway towards a member of the public such as the plaintiffs assert to exist. This is a strong argument that no such duty exists. In the course of centuries the straying of sheep and other harmless domestic animals on the highway must have been common; yet there is no trace of any indictment for a nuisance by permitting cattle to stray. Nothing that I have said will affect the right of the owner of the soil of the highway to recover damages, if any, by sheep using the road not for the purpose of a highway. He would be in the same position as the owner of any land not being a highway into which the sheep entered. The appeal must be dismissed.

PICKFORD, L.J.—This action was brought by the owner and hirer of a motor car which was damaged under the following circumstances. The car was being driven along a highway near Kenilworth, when the driver saw some sheep untended ahead of him in the road. He put on his brakes, but almost immediately two sheep which he had not seen jumped from the bank near him, and one ran into

the car and caused an accident from which the damage claimed resulted. I agree with LUSH, J., that the judgment of the county court judge should be treated as finding that the defendant was negligent in not keeping his sheep from straying, and that the driver of the motor car was not negligent. He also found, and I think there was evidence to support the finding, that it is the natural tendency of sheep to run across or otherwise endanger vehicles passing along the highway on which they are straying, and also that, if some get separated from the flock, they have what he calls almost a mania for rejoining it regardless of obstacles. I cannot find any evidence specifically supporting this second finding, and I shall confine myself in dealing with the case to the former finding as to the tendency of sheep. I do not take it as a finding that sheep always behave in that way, but that it is their nature to do so at times. Anyone dealing with sheep would, therefore, be presumed to know it. There is no finding in evidence that there was any vicious or wild tendency to run into vehicles in these particular sheep.

This question therefore seems to be distinctly raised: Is the owner of domesticated animals which he negligently allows to stray on a highway liable for damage occasioned by their obstructing a vehicle on the highway by reason of an action which is a natural and ordinary action of an animal of that kind? The learned county court judge held that the defendant was liable, and the Divisional Court reversed that decision and entered judgment for the defendant. The learned judges did not put their judgments quite on the same ground, AVORY, J., holding that the case was governed by *Cox v. Burbidge* (5), and LUSH, J., that the damage was too remote, and not the natural consequence of the negligence. Both learned judges laid some stress upon the speed of the motor car. But with respect I cannot see how that is relevant if the finding of the county court judge that there was no negligence—i.e., no want of reasonable precaution to avoid danger on the part of the driver—be accepted. The pace at which motor cars are driven on roads where cattle are or may be expected to be straying is often evidence and strong evidence of such want of precaution, but, as that is negatived in this case, the speed seems to me immaterial. If there be no obligation to restrain animals from so obstructing vehicles the introduction of fast traffic cannot create one, and, on the other hand, if there be such an obligation, the introduction of fast traffic cannot do away with it, although it makes the consequences more serious and the obligation in that way more onerous. I confess to a difficulty in seeing the distinction in principle between the two cases mentioned by LUSH, J., of a sheep obstructing a vehicle in the dark and one obstructing a vehicle in daylight, if it be once found that the driver of that vehicle was taking proper precautions to avoid accidents.

I have great doubts whether this case is governed by *Cox v. Burbidge* (5). That case decided that the owner of an animal straying on a highway was not responsible for damage occasioned to a person using the highway where such damage was occasioned by a vicious act of that animal inconsistent with the usual nature of such animals. In my opinion, it left entirely untouched the question whether he would be liable if the damage was caused by an obstruction to the highway resulting from an action of the animal in accordance with the nature of such domesticated animals. The learned judges in that case said that the law of highways had nothing to do with the case, because it was no more to be expected that the animal would commit a vicious act on a highway than anywhere else: see per WILLES, J., 13 C.B.N.S. at p. 441. The suggestion that the driver might be indictable looks a little the other way, for I do not think WILLES, J., meant to say that damage resulting from an indictable nuisance could not give rise to an action, but it is only a suggestion of a possibility, and I do not think it is of importance except as showing that the case was not meant to decide this point, and that the basis of the decision was that the act was a vicious act not natural to the class of animals and not known to the owner to be likely to occur in the case of that particular animal. I think that *Jones v. Lee* (2), so far as this point is concerned, proceeds

on the same ground, as both learned judges seemed to consider the act of the horse in that case a vicious act not natural to a horse. *Bradley v. Wallaces, Ltd.* (6) turns on the same points, and in *Hadwell v. Righton, Ltd.* (7) the damage was caused, not by the natural tendency of the hen, but by its being frightened and driven towards the bicycle by a dog. It may well be that it is not the natural consequence of letting a hen stray that there will be a dog there and a passing bicycle at the same time, and that the one will chase the hen into the other.

The cases which seem to me important are *Jones v. Lee* (2), so far as the dictum of BANKES, J., is concerned; *Higgins v. Searle* (4), and *Ellis v. Banyard* (3). In the last-named case BUCKLEY, L.J., laid down the same doctrine as BANKES, J., and I take that to go to this extent—that there is no obligation to fence so as to keep animals from straying upon a highway, and, therefore, no liability in respect of them if they do so, no matter how inevitable and how great the destruction they cause. This seems to me to be in direct contradiction to the opinions expressed by the majority of the Court of Appeal in *Ellis v. Banyard* (3). I do not think it is necessary in this case to decide which is the right view, as I think that *Higgins v. Searle* (4) and *Ellis v. Banyard* (3) are expressions of opinion in this court that the owner of an animal is not responsible under the circumstances of this case. It is true that in both those cases the court held that there was no evidence of negligence, and the plaintiffs' counsel, therefore, argued that we should disregard any expressions of opinion beyond that. I do not think that is right. The court proceeded to deal with the case on the assumption that there was negligence, and, although that part of the judgment was not necessary to support the decision, I do not think we can disregard it.

In *Higgins v. Searle* (4) the damage was caused by a sow, which had strayed on to a highway and was lying down, getting up suddenly when the horn of a motor car was sounded, which made a horse, also on the road, shy into the motor car and occasion damage. It might have been said that the combination of sow, horse, and motor car at the same time could not have been anticipated any more than the combination of dog, hen, and bicycle in *Hadwell v. Righton* (7). But the case was not decided on that ground. It was found by the jury that the shying of the horse was the probable result of the action of the sow, and that there was no peculiarity about this sow which differentiated it in its action or otherwise from other sows. To place an inanimate object upon a highway so as to cause a horse to shy was held to be actionable in *Harris v. Mobbs* (8), and it was argued in *Higgins v. Searle* (4) that to allow an animal to stray on to a highway and so cause a horse to shy was in the same measure actionable where what the animal did was only what it might be expected that such an animal might do. In *Ellis v. Banyard* (3) the damage was occasioned by the natural act of some cattle in obstructing the road, and again the court held that there was no evidence of negligence. But BUCKLEY and KENNEDY, L.JJ., expressed opinions that even if it had been proved, there would have been no liability. It seems to me that the result of these two cases is that, although to place an inanimate object so as to be an obstruction to a highway is actionable if damage results, to allow an animal to stray on a highway, which becomes an obstruction by an act of its own, even though one natural to such an animal, is not. This, however, is qualified by VAUGHAN WILLIAMS and KENNEDY, L.JJ., to the extent that if the animals are allowed to stray in such large numbers as inevitably to be an obstruction an action will lie. The ground of the distinction is not very specifically expressed, but perhaps it is that although the animal may probably so act as to cause an obstruction it will not necessarily do so, and whether it so acts or not depends upon its own will, and that, therefore, the owner cannot expect an obstruction to be the natural consequence of its straying, whereas in the case of large numbers the obstruction is inevitable merely by reason of the numbers. Otherwise it is difficult to see, if there is liability for an obstruction, how there is any difference between its being caused by many or by few. In the case of an inanimate object it

is placed where it is by the owner, and there is no question whether it will become an obstruction or not. But, whatever the reasons, I think that those cases show that, according to the opinions expressed in this court in the recent cases, the defendant is not liable here.

It was also argued that the defendant had been guilty of a breach of the Highway Act, and, therefore, he was liable. That must, I think, depend upon whether, looking at the whole of the Act, it intended to confer a right of action, and I do not think it did. I think the appeal must be dismissed.

NEVILLE, J.—The question is whether the owner of the car is entitled to recover damages from the owner of the sheep. This depends upon two things: first, was the defendant under a duty to the plaintiffs as a member of the public using the road to keep his sheep from straying on to the road; and, secondly, was the accident and consequent damage the natural result of the failure to perform the duty? If the duty exists, negligence has been found, and in that case the only remaining question is: Was the damage too remote?

We are now in the year 1916, and during the preceding centuries no such duty has ever been established against the occupier of land adjacent to a highway. It was suggested in argument that that might be accounted for by the rarity of the occurrence of accident of the nature of the one in question. If this is so, it may have an important bearing on the second question in the case. It was considered that no such duty exists where a road runs across open land. But this is sought to be explained on the ground that in such cases the road must be presumed to have been dedicated subject to straying cattle being upon it. This explanation does not appear to me satisfactory, inasmuch as in the case of fenced roads many, if not most, of them must have been dedicated before they were fenced, and it seems to me impossible to hold that, by subsequently fencing, the adjoining owner made any further dedication or in any way enlarged the rights of the public using the road against him. Even in the case of fenced roads grazing rights by the wayside have always been recognised; cottagers have been ever in the habit of allowing their animals the benefit of the pasturage with no fear before their eyes greater than that of the pound. No single instance has been, or, I believe, can be, produced of anyone having been indicted for nuisance by permitting cattle to stray upon the road, no case has ever established liability in civil courts, and the strongest authority that can be produced for the proposition is a dictum of a learned judge that such an action might possibly lie, while it seems to me there is a great body of judicial opinion against it, including that of VAUGHAN WILLIAMS, L.J., BUCKLEY, L.J., KENNEDY, L.J., BANKES, L.J., MOULTON, L.J., and others.

In my opinion, the experience of centuries has shown that the presence of domestic animals upon the highway is not inconsistent with the reasonable safety of the public using the road. I am unable to draw any distinction in this respect between domestic animals; I think horses, cattle, sheep, pigs, fowls, and dogs all fall into the same category for this purpose. There is no doubt that the advent of motor cars has greatly increased the danger resulting from the presence of loose animals on the road owing to the speed at which cars travel, and the difficulty shared by man and beast of avoiding them. It is only yesterday, however, that as mechanically propelled carriages the right of motor cars to use the roads was subject to conditions which rendered great speed unattainable. And I think that to-day those who use them now take the roads as they find them and put up themselves with such risks as the speed of their cars occasions not only to themselves but to others. The *prima facie* harmlessness of domestic animals as frequenters of the highway is, I think, established as a legal doctrine. This is what I think BLACKBURN, J., is referring to when he says in *Fletcher v. Rylands* (9) (L.R. 1 Exch. at p. 280): "The wisdom of our ancestors has established that bulls do not gore nor horses kick." If LORD BLACKBURN had added, "and that domestic animals of normal character do not by straying on the roads obstruct traffic" it

would have been an accurate statement, and, at that date, free from the suspicion of irony which attaches to the statement which he did make, and which might attach to the suggested addition to his statement were it made to-day. It seems to me impossible to suppose that the question whether domestic animals are dangerous or harmless by the wayside where they have ever been common objects can have been one to be left to the jury, for that would have been to leave the character of domestic animals undeterminate for all time.

There can be little doubt, I think, that our ancestors showed true wisdom in the conclusion they arrived at in this respect. The instinct of the normal animal is to fear man and to endeavour to avoid danger, and in the days when roads were bad and traffic slow their capacity was sufficient to enable them to do so. As roads improved and the pace of traffic increased it was thought that certain measures of protection in the roads against straying animals were desirable, and these were afforded by the provisions of the Highways Acts of 1835 and 1864. If the character of domestic animals with regard to highways had come to be considered for the first time when roads were tarred and motor traffic abounded, it is possible that a different view might have prevailed with regard to their harmlessness on the highway, for, however strongly the instinct of self-preservation may appeal to them, their perceptions may prove inadequate to such a judgment of the speed of the prevailing traffic as will always ensure their safety and consequently the safety of the road traffic. But, in my opinion, it is not competent to the courts to reconsider the classification of former times and to include domestic animals of blameless antecedents in the class of dangerous animals even when wandering on the roadsides. It appears, I think, from *Cox v. Burbidge* (5) that in the case of animals not of a fierce disposition the owner is not under any duty to the public to prevent them straying on the highway: see the judgment of ERLE, C.J.

The Highways Acts, 1835 and 1864, ss. 14 and 25 respectively, do not, in my opinion, impose any civil liability in respect of animals trespassing upon the highway. So far as I know they have never been held so to do, and from their form I do not think they could have been intended so to do. They impose no positive obligation and contain no positive prohibition, but merely impose certain penalties upon the happening of certain events. I should be sorry to hold for the first time at this date that farmers were liable to a grave and unlimited liability in case of inadvertently or even wilfully permitting their cattle to trespass on the highway. Even if there was a duty owed by the defendant to the public using the road to keep his sheep safely inclosed (I have already said I think there was no such duty), I do not think that the charge of the sheep upon the motor car was the natural consequence of its presence on the highway, and that the damage is too remote to be recoverable.

Appeal dismissed.

Solicitors: *Clifford, Turner & Hopton*, for *W. J. Rabnett*, Birmingham; *Griffiths & Gardner*, for *Maddocks, Ogden & Co.*, Coventry.

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

A

MARSHALL v. MALCOLM

[KING'S BENCH DIVISION (Darling, Avery and Sankey, JJ.), October 16, 1917]

[Reported 87 L.J.K.B. 491; 117 L.T. 752; 26 Cox, C.C. 129; 82 J.P. 77]

Bastardy—"Single woman"—Wife of seaman serving on board his ship—*Bastardy Laws Amendment Act, 1872* (35 & 36 Vict., c. 65), s. 3.

B

The respondent, who was married in October, 1914, lived till December, 1914, with her husband, who then joined the Royal Navy, and between that date and August, 1916, was serving on board his ship and never had access to his wife. In March, 1916, the wife was delivered of a child of which the husband could not have been the father. On becoming aware of the birth, the husband stopped payment of his allotment to the wife, and the separation allowance paid by the government also ceased. In August, 1916, the husband was at home on leave for a week and forgave his wife and lived with her. The husband went back to his ship in September, 1916, and the payment of his allotment and of the government allowance was renewed. He had since been serving on board his ship and had been unable to live with his wife, but she expected that when he got leave he would return to her. In July, 1917, the wife took out a summons against the appellant, alleging that he was the father of the child and had within twelve months after its birth paid money for its maintenance. On the question whether the wife was a "single woman" within the meaning of the *Bastardy Laws Amendment Act, 1872*, s. 3,

D

E

Held: the material date to look at in deciding whether the wife was a "single woman" for the purposes of s. 3 of the Act of 1872 was the date of the application, and, as the wife could not be said to be living separate and apart from her husband when their separation was due to his being on active service, she was not such a "single woman."

F

Notes. The *Bastardy Laws Amendment Act, 1872*, s. 3, has been repealed by the *Affiliation Proceedings Act, 1957*. For s. 3 of the Act of 1872, see ss. 1 and 2 of the Act of 1957.

Referred to: *Jones v. Evans*, [1945] 1 All E.R. 19.

As to affiliation proceedings, see 3 HALSBURY'S LAWS (3rd Edn.) 110 et seq.; and for cases see 3 DIGEST (Repl.) 441 et seq. For the *Affiliation Proceedings Act, 1957*, ss. 1 and 2, see 37 HALSBURY'S STATUTES (2nd Edn.) 37, 38.

Cases referred to:

G

(1) *R. v. Pilkington* (1853), 2 E. & B. 546; 21 L.T.O.S. 165; 17 Jur. 554; 1 W.R. 410; 17 J.P. Jo. 388; 1 C.L.R. 945; 118 E.R. 872; sub nom. *Ex parte Grimes*, 22 L.J.M.C. 153; 3 Digest (Repl.) 443, 350.

(2) *Jones v. Davies*, [1901] 1 K.B. 118; 70 L.J.Q.B. 38; 83 L.T. 418; 65 J.P. 39; 49 W.R. 136, D.C.; 3 Digest (Repl.) 443, 351.

H

Also referred to in argument:

Stacey v. Lintell (1879), 4 Q.B.D. 291; 48 L.J.M.C. 108; 40 L.T. 553; 43 J.P. 510; 27 W.R. 551, D.C.; 3 Digest (Repl.) 442, 342.

Tozer v. Lake (1879), 4 C.P.D. 322; 41 L.T. 280; 43 J.P. 656; 3 Digest (Repl.) 443, 344.

I

Sotheran v. Scott (1881), 6 Q.B.D. 518; 44 L.T. 522; 45 J.P. 423; 29 W.R. 666; sub nom. *Southeran v. Scott*, 50 L.J.M.C. 56; 3 Digest (Repl.) 466, 488.

Healey v. Wright, [1912] 3 K.B. 249; 81 L.J.K.B. 961; 107 L.T. 413; 28 T.L.R. 439; 23 Cox, C.C. 173, D.C.; 3 Digest (Repl.) 443, 345.

Case Stated by justices for the borough of Stockton-on-Tees.

At a court of summary jurisdiction sitting at Stockton-on-Tees on July 11, 1917. the respondent, Annie Malcolm, preferred an information against the appellant, Wilfred Marshall, charging that she had been delivered of a female bastard child on Mar. 19, 1916, of which child she alleged that the appellant was the father, and had within twelve calendar months next after its birth paid money for its

maintenance. It was proved or admitted that (i) the respondent was married on Oct. 25, 1914, and she lived with her husband for two or three months, when he had to join the navy, he having been in the Royal Naval Reserve. (ii) Between December, 1914, and August, 1916, the respondent's husband was serving on his ship and never during that time lived with his wife or had access to her. (iii) On Mar. 19, 1916, the respondent was delivered of a female child of which her husband could not have been the father. (iv) Her husband, on becoming aware of the birth of the child stopped the payment of his allotment to her, and the separation allowance paid by the government also ceased, and this continued for a period of five or six months until his return to Stockton at the end of August, 1916. (v) Her husband came home on leave for seven days at the end of August, 1916, when he forgave his wife and lived with her during this period of leave, and, on returning to the navy, took steps again to make his allotment to her, and the government allowance was also renewed, and she was receiving the same, but did not receive any allowance for the child. (vi) Since Sept. 1, 1916, up to the present time, the respondent's husband had been serving on his ship and had never during that time lived or been able to live with his wife, though the respondent expected that when her husband got leave he would at once return to her.

It was contended on behalf of the appellant that the respondent was not, for the purposes of the Bastardy Laws Amendment Act, 1872, a single woman at the time when the application was made, and was, therefore, not entitled to an order, as, subsequently to the birth of the child, her husband had forgiven her and had lived with her just before he last went to sea, and she was receiving an allotment from her husband and separation allowance from the government, and had in fact all the rights of a married woman, and was, therefore, not living separate and apart from her husband, and that, to enable a married woman to be deemed to be a single woman for the purpose of the Act, it was necessary that she should be living separate and apart from her husband at the time when the application was made. It was contended on behalf of the respondent that, as it was proved and admitted that her husband for more than twelve months before the birth of the child had not lived with his wife, and, with the exception of the seven days' leave in August, 1916, had not lived with his wife since he left her to join his ship in December, 1914, and was not living with her at the time when she laid the information—viz., on July 11, 1917—the respondent was a single woman within the meaning of the Bastardy Laws Amendment Act, 1872, and was entitled to lay an information against the putative father of the child.

The justices made an order adjudicating that the appellant was the father of the child, holding that the respondent was a single woman within the meaning of the Bastardy Laws Amendment Act, 1872, and was entitled to an order.

By the Bastardy Laws Amendment Act, 1872, s. 3:

"Any single woman who may be with child or who may be delivered of a bastard child after the passing of this Act may either before the birth or at any time within twelve months from the birth of such child, or at any time thereafter, upon proof that the man alleged to be the father of such child has within the twelve months next after the birth of such child paid money for its maintenance, make application to any one justice of the peace acting for the petty sessional division of the county, or for the city, borough, or place in which she may reside, for a summons to be served on the man alleged by her to be the father of the child, . . . and such justice of the peace shall thereupon issue his summons to the person alleged to be the father of such child to appear at a petty session to be holden upon a day specified in such summons for the petty sessional division, city, borough, or other place in which such justice usually acts."

G. F. Mortimer for the appellant.

The respondent did not appear.

- A** **DARLING, J.**, stated the facts, and continued: The material date to look at in deciding whether the respondent was to be deemed a single woman within the meaning of the Bastardy Laws Amendment Act, 1872, is the date of the application. The question, therefore, is whether the respondent was to be deemed a single woman on July 11, 1917. Although in fact married, she might, for the purposes of the Act, be treated as a single woman in certain circumstances. In *Ex parte Grimes* (1) **LORD CAMPBELL** said (22 L.J.M.C. at p. 154):

“in contemplation of law a married woman living separate from her husband may be within the meaning of the Act, which was passed for the purpose of providing for the support of the child.”

- C** It is a complete misuse of language to say that this woman was living separate and apart from her husband. A wife is not living separate and apart from her husband merely because he is absent on a journey. Judges and barristers on circuit are not living separate and apart from their wives. In *Jones v. Davies* (2), **KENNEDY, J.**, said ([1901] 1 K.B. at p. 121):

- D** “We ought not, I think, to deviate from the plain words of an enactment further than we are obliged to do, nor ought we to create exceptions upon exceptions.”

- E** The magistrates have decided this case in a manner contrary to authority. They decided that a woman who was living with her husband as much as the wife of a soldier or sailor can live with him when he is on active service was living separate and apart from her husband. In that, the magistrates were wrong and the appeal must be allowed.

AVORY and **SANKEY, JJ.**, concurred.

Appeal allowed and order set aside.

Solicitors: *Gibson & Weldon, for Townsend & Bertram Watson, Stockton-on-Tees.*

[*Reported by J. F. WALKER, Esq., Barrister-at-Law.*]

SCHWANN v. COTTON AND ANOTHER

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Pickford and Warrington, L.JJ.),
June 27, 28, 29, July 13, 1916]

[Reported [1916] 2 Ch. 459; 85 L.J.Ch. 689; 115 L.T. 168; 60 Sol. Jo. 654]

Easement—Water—Supply to lower tenement by underground pipe from upper tenement—Separation of tenements “and appurtenances” by devise—Conveyance by devisee of upper tenement without notice—Implied grant of supply of water—Right to supply of owner of lower tenement.

By his will, made in 1898, the testator devised M. “and its appurtenances” to the predecessor in title of the defendants, and B. (of which he was in occupation) “and the appurtenances” to the predecessor in title of the plaintiff. B. was supplied with water by an underground pipe which was laid down in 1893 from a well in N. through M. By 1914 the source from which the water came and the existence of the pipe passing through M. would seem to have been forgotten, though the supply was continuously used by the owners of B. and its source and the pipe could easily have been ascertained. The defendants purchased M. without notice of the pipe or that the plaintiff’s land obtained water through M. In 1914 a new drive was made to the house at M., and the pipe was discovered and cut by the defendants, thus depriving the plaintiff of the supply of water from M. In an action by the plaintiff for an injunction and damages,

Held: the effect of the will was to devise B. with the right of passage of such water as might flow through the pipe and the devise of M. was a devise subject to that right: *Phillips v. Low* (1), [1892] 1 Ch. 47, applied; since the easement depended on an implied grant from which the grantor could not derogate, the plaintiff was entitled to the relief claimed, and the defendants could not rely on the equitable defence of being purchasers for value without notice.

Decision of ASTBURY, J., [1916] 2 Ch. 120, affirmed.

Notes. Considered: *Bartlett v. Tottenham*, [1932] 1 Ch. 114. Referred to: *Simpson v. Weber*, [1925] All E.R. Rep. 248; *Beauchamp v. Frome R.D.C.*, [1937] 4 All E.R. 348; *Re Webb, Sandom v. Webb*, [1951] Ch. 142.

As to the creation of easements, see 12 HALSBURY’S LAWS (3rd Edn.) 529 et seq.; and for cases see 19 DIGEST 22 et seq.

Cases referred to:

- (1) *Phillips v. Low*, [1892] 1 Ch. 47; 61 L.J.Ch. 44; 65 L.T. 552; 8 T.L.R. 23; 19 Digest 52, 290.
- (2) *Nicholas v. Chamberlain* (1606), Cro. Jac. 121; 79 E.R. 105; 19 Digest 33, 161.
- (3) *Wheeldon v. Burrows* (1879), 12 Ch.D. 31; 48 L.J.Ch. 853; 41 L.T. 327; 28 W.R. 196, C.A.; 19 Digest 45, 253.
- (4) *Arkwright v. Gell* (1839), 5 M. & W. 203; 2 Horn. 17; 8 L.J.Ex. 201; 151 E.R. 87; 19 Digest 64, 363.
- (5) *Tulk v. Moxhay* (1848), 2 Ph. 774; 1 H. & Tw. 105; 18 L.J.Ch. 83; 13 L.T.O.S. 21; 13 Jur. 89; 41 E.R. 1143, L.C.; 40 Digest (Repl.) 342, 2774.
- (6) *Cable v. Bryant*, [1908] 1 Ch. 259; 77 L.J.Ch. 78; 98 L.T. 98; 19 Digest 175, 1256.
- (7) *Ewart v. Cochrane* (1861), 5 L.T. 1; 25 J.P. 612; 7 Jur. N.S. 925; 10 W.R. 3; 4 Macq. 117, H.L.; 19 Digest 44, 247.
- (8) *Pearson v. Spencer* (1863), 3 B. & S. 761; 8 L.T. 166; 11 W.R. 471; 122 E.R. 285; sub nom. *R. v. Pearson*, 1 New Rep. 373, Ex.Ch.; 19 Digest 51, 287.

(9) *Wood v. Waud* (1849), 3 Exch. 748; 18 L.J.Ex. 305; 13 L.T.O.S. 212; 13 Jur. 472; 154 E.R. 1047; 19 Digest 153, 1054.

Also referred to in argument:

Tickle v. Brown (1836), 4 Ad. & El. 369; 1 Har. & W. 769; 6 Nev. & M.K.B. 230; 5 L.J.K.B. 119; 111 E.R. 826; 19 Digest 70, 407.

Southampton and Itchin Floating Bridge and Roads Co. v. Southampton Local Board of Health (1858), 8 E. & B. 801; 28 L.J.Q.B. 41; 4 Jur. N.S. 1298; 120 E.R. 298; sub nom. *Itchin Bridge Co. v. Southampton Local Board of Health*, 30 L.T.O.S. 256; 6 W.R. 223; 38 Digest (Repl.) 9, 29.

Partridge v. Scott (1838), 3 M. & W. 220; 1 Horn. & H. 31; 7 L.J.Ex. 101; 150 E.R. 1124; 19 Digest 69, 400.

Cocker v. Cowper (1834), 1 Cr. M. & R. 418; 5 Tyr. 103; 149 E.R. 1143; 19 Digest 27, 120.

Keppell v. Bailey (1834), 2 My. & K. 517; Coop. temp. Brough. 298; 39 E.R. 1042, L.C.; 19 Digest 22, 89.

Appeal by defendants from a decision of ASTBURY, J., reported [1916] 2 Ch. 120. The facts are set out in the judgment of LORD COZENS-HARDY, M.R.

H. M. Givven for the defendants.

Micklem, K.C., and *A. F. Topham* for the plaintiff.

Cur. adv. vult.

July 13, 1916. The following judgments were read.

LORD COZENS-HARDY, M.R.—There are at or near Freshwater in the Isle of Wight three properties known as (i) Nugent's, (ii) Malta, and (iii) Braxton. Nugent's is the highest and Braxton is the lowest. In 1893, a pipe was laid down from a well in Nugent's through Malta to Braxton. The plaintiff is now tenant in occupation of Braxton. The defendants are in occupation of Malta. The well is not deep. But the lie of the land is such that water flows down from the well through a one inch delivery pipe to Braxton. The pipe, so far as I can judge from a plan, was several hundred yards in length. It was laid down openly and at considerable cost. It crossed a public road, but, as is almost always the case with pipes, it was not visible after the pipe was laid down throughout its whole course. The well is fed by a spring, and from 1893 until 1914 water passed continuously and without interruption to Braxton. There are two standpipes in Braxton. For some years, it was the sole supply of water to Braxton House. After a time, water for the house was obtained from some neighbouring water company, and thenceforward the water from the well was used for the garden and for the stables. The defendants cut this pipe where it passes through Malta, and thus deprived the plaintiff of this supply of water. Hence this action.

The first question is as to the relations existing between the plaintiff and the defendants. Colonel Cotton, who lived at Braxton, by his will in 1898 devised Malta "and its appurtenances" to his son, through whom the defendants claim. He also devised his freehold hereditaments, known as Braxton Cottage, "and the appurtenances" to persons through whom the plaintiff claims. The testator died in 1902. At the date of the will, the testator was in actual occupation of Braxton, which was supplied by water passing through the pipe. It seems to me that, in these circumstances, it must be held that the effect of the will was to devise Braxton, with the right of passage of such water as might flow through the pipe, and that the devise of Malta was a devise subject to that right. The decision of CHITTY, J., in *Phillips v. Low* (1) is an express authority on this point. He applied to a case of a devise of two portions of property by the same will the well-established doctrine where there are two conveyances of the same date, and held that there is an implied grant where one of the two properties is so constructed as that parts of it involve a necessary dependence, in order to its enjoyment in the state in which it was when devised, on the adjoining tenement. So, here, Braxton was, at the

date of the testator's will and death, in fact enjoying the passage of water through the pipe passing through Malta. In my opinion, it is not necessary to consider whether the property in the pipe itself was, so far as it passed through Malta, vested in the devisee of Braxton (see *Nicholas v. Chamberlain* (2)) as part of the house, according to the view expressed by JAMES, L.J., in *Wheeldon v. Burrows* (3) (12 Ch.D. at p. 60), or whether, without passing the property in the iron pipe, the devise of Braxton gave an easement allowing the passage of water through the pipe. In either view the defendants cannot justify the interference with the pipe.

The decision of this court in *Wheeldon v. Burrows* (3) seems to me greatly to assist the plaintiff. THESIGER, L.J., in delivering the judgment of the court, says (*ibid.* at p. 49) :

"On the grant by the owner of a tenement of part of that tenement as it is then in fact used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean quasi-easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted."

It is said, however, that the law does not recognise such a right because there is nothing to show that, as against Nugent's, there is any right to the flow of water, and that, therefore, the alleged easement or quasi-easement is precarious and such as the law does not recognise. In my opinion, the objection is not valid. The circumstances in which the pipe was inserted in the wall of the well and the pipe was laid down in 1893 have not been proved. If the plaintiff was claiming, as against Nugent's, a right to a flow of water from the well, the burden would of course be on the plaintiff. But I am disposed to think that, when the plaintiff has established an uninterrupted user and enjoyment for more than twenty years, the onus may be shifted, and the defendants, who seek to escape from the effect of such enjoyment, may have cast on them the burden of showing what did happen in 1893. I see no reason why a grant by deed in 1893 from Nugent's to Colonel Cotton should not be presumed. I do not, however, base my decision on this theory. There is no legal difficulty in an implied grant of a right of passage through the pipe of such water as may come to the pipe, without reference to the question whether the owner of the spring head might not have a right to divert it altogether. It is one thing to say that the owner of Nugent's might divert the spring, and it is another thing to say that the devisee of Malta can divert and interfere with the pipe through which water passes to Braxton.

On principle, I cannot see why the precarious origin of an artificial course should have any bearing on the rights of persons lower down as against each other. In *Arkwright v. Gell* (4) LORD ABINGER, C.B., after deciding that no right can be acquired as against water passing from a mine through a sough, says (5 M. & W. at p. 233) :

"No right is acquired as against the owner of the property from which the course of water takes its origin : though, as between the first and any subsequent appropriator of the watercourse itself, such a right may be acquired."

It is true that this is a dictum not necessary for the decision of the case, but it seems to me to be entitled to great weight and to be in accordance with good sense.

It is then said that, although the defendant Mrs. Cotton's predecessor claims under the same will as the plaintiff's predecessor, yet that defendant is a purchaser for value without notice, and cannot be affected by the right claimed by the plaintiff. And it is urged that, for some years, the existence of the pipe and the watercourse, though visible at Braxton, was not visible at Malta, and, further, that a stone at the top of the well prevented anyone from seeing that there was a pipe in Nugent's. I am not satisfied that this is any answer to the plaintiff's case, which rests, not on an implied covenant, but on implied grant. A grantor must not

A derogate from his grant. That is a common law doctrine, and must be enforced irrespective of the equitable doctrine of notice. If, for example, an actual deed of grant could now be produced from Nugent to Colonel Cotton, the owner of Braxton and Malta, it would be no defence for the present owner of Malta to say, "I never heard of it before I purchased." If the case depends on the implied grant contained in the will, I think *Tulk v. Moxhay* (5) and similar cases have no application. This view is in accordance with NEVILLE, J.'s, judgment in *Cable v. Bryant* (6).

B It was argued, though faintly, that it was wrong to burden Malta with a right in the nature of an easement which was not necessary for the use and enjoyment of Braxton. But the word "necessary" must not be taken in a rigid sense. The better phrase is that which is used by LORD CAMPBELL in *Ewart v. Cochrane* (7) (4 Macq. at p. 123), "convenient and comfortable enjoyment of the property," and it cannot be doubted that a constant supply of water, available either for the house or for the garden, is within those words. It can make no difference that Braxton has a right on payment to obtain water from a water company.

C Various other points were raised in argument before the learned judge in the court below, who granted relief to the plaintiff. But I do not think it necessary D further to refer to the numerous authorities cited. In my opinion, for the reasons I have indicated, the plaintiff is entitled to the relief granted by the learned judge, and the appeal must be dismissed.

PICKFORD, L.J.—In 1893, Colonel Cotton, whom I shall call the testator, owned a piece of land at Freshwater in the Isle of Wight on which there were two E houses, one called Malta and one called Braxton. In that year, he leased a part of this land on which the house Braxton stood to Colonel Money, and agreed to give him a supply of water to that house. He retained for himself the rest of the land with the house Malta. Adjoining this land, but separated from it by a highway, there was some land belonging at that time to a Mr. Hatcher, which F afterwards became the property of Mr. Nugent, and was referred to during the argument as Nugent's land. I shall refer to these three pieces of land as Malta, Braxton, and Nugent's land respectively. The supply of water was obtained by the insertion of a pipe into a well on Nugent's land which passed through that land for some distance, then under the highway separating it from Malta, through G Malta and a part of Braxton, and into the cistern of that house and to standpipes in the garden belonging to it. At first, the water passing through this pipe was the only water supply to Braxton, but after a time Colonel Money obtained a supply for the house from a local water company, and the water passing through the pipe was only used for garden purposes. This user continued till the year 1914, by H which time the source from which the water came and the existence of the pipe passing through Malta seems to have been forgotten, or, at any rate, not known to the then occupiers of the three pieces of land, though the supply was continuously used by the occupiers of Braxton, and the source of the supply and the course of the pipe could easily have been ascertained. In 1902, Colonel Cotton died, leaving Malta with its appurtenances to his son, and Braxton with its appurtenances to his wife and daughters. The plaintiff derives her title from the wife and daughters, and the defendant A. W. Cotton's wife, in whose interest he defends this action, I from the wife.

In 1914, the defendant Cotton made a new drive from the house Malta, and, in doing so, the workmen discovered the pipe leading to Braxton and cut it while making the drive. The defendant Cotton was then away from home, and his gardener, on the remonstrance of the plaintiff, very properly repaired the pipe till he received instructions from his master. The defendant Cotton ordered the pipe to be cut again, and the plaintiff instructed his solicitor to write to him claiming a right to have the supply of water restored. The defendant Cotton replied in a tone which practically made litigation inevitable. There may have been some

reason for his adopting this tone, though I see none in the evidence, and, therefore, I shall say no more about it. But I think there is little doubt that an arrangement could have been made which would not have materially interfered with the interests of either party. However, none was made, and we have now to decide the right of the parties. There is no doubt that, at the time the pipe was inserted into the well on Nugent's land and carried across the road through Malta to Braxton, it was done openly and with the knowledge of all concerned in the land through which the pipe passed. But there is nothing to show on what terms the supply was obtained from the then owner of Nugent's land.

The defendant Cotton contends that, under these circumstances, the plaintiff has not proved any rights against Nugent's land to a supply of water, and, therefore, the rights claimed to a passage of that water through the pipe under the defendant's land is a right not known to the law, and cannot be enforced against him who, as representing his wife, is a purchaser without notice. He also contends that the supply was precarious, as it might have been cut off by the owner of Nugent's land, and that it was not apparent or necessary to Braxton. I do not think it necessary to decide the plaintiff's rights against Mr. Nugent, who has up to now not interposed in the dispute at all, though he was a witness at the trial. He is not a party to the action or before the court at all, and I wish to say nothing that may prejudice the question between him and the plaintiff if it ever should arise. I will assume for the purposes of this case that the plaintiff has not such a right against him.

Under these circumstances, has the plaintiff a right as against the defendants? I think he has. A great part of the able argument of the defendants' counsel was devoted to showing that such a right could not be acquired by user and prescription. I do not think it necessary to deal with this part of the argument, because I do not think that the plaintiff's right depends on user or prescription, but on grant. I can see no objection in law to a grant by the testator of a right to pass through a pipe under his land a supply of water in fact existing, even though a third party may have a right if he wish to cut off that supply.

When the testator devised Malta and its appurtenances to the defendant Cotton's predecessor in title, and Braxton and its appurtenances to the plaintiff's predecessor, the effect was, in my opinion, the same as if he had made two simultaneous conveyances to the same effect, and in that case Braxton would pass with the rights of passage of such water as in fact flowed through the pipe, and Malta subject to such right: see *Phillips v. Low* (1). If this were a case where Braxton had been conveyed and Malta retained, the owner of the latter could not derogate from his grant of the right to use the pipe. And, in the case of separate devises of the two pieces of land, I think the effect is the same, and that the defendant Cotton, as claiming under the testator by virtue of the devise of Malta and purchase from the devisee, is in the same position. I think, therefore, that the appeal should be dismissed. I have not thought it necessary to discuss the authorities at any length, as they are sufficiently dealt with by the other members of the court.

WARRINGTON, L.J.—The plaintiff is the occupier of a parcel of land near Freshwater in the Isle of Wight with a house thereon. I shall refer to this as "the plaintiff's land." The defendant Cotton and his wife are in the occupation of, and that defendant's wife is the owner of, a piece of land adjoining the plaintiff's land. This I shall refer to as "the defendant's land." The defendant Cotton is in substance defending this action on behalf of his wife. The plaintiff claims, as an easement appurtenant to his land, the right to maintain a pipe in the defendant's land and to the uninterrupted flow through such pipe of water from a well in the land of a third person with which the pipe is connected. The pipe has been cut and the water supply thus interrupted by the defendant Cotton and the defendant Hayes, who is his servant and acted under his instructions. This action has been

A brought for the purpose of establishing the right claimed by the plaintiff and for an injunction protecting that right. *ASTBURY, J.*, has decided in favour of the plaintiff. The defendants appealed. The plaintiff does not claim the easement by prescription either at common law or under the statute, but as having been created by disposition of the common owner of the plaintiff's and the defendant's land. [His LORDSHIP stated the facts, and continued:]

B The first question is: Did the will, upon its true construction, operate to confer on the devisees of the plaintiff's land the right to insist on the maintenance of the pipe in the defendant's land and the uninterrupted flow of water through it? In my opinion, it clearly did. The owner of the two pieces of land enjoyed in respect of the plaintiff's land a supply of water by means of the pipe in the defendant's land. The plaintiff's land was in fact (to adopt the expression used by *EARLE, C.J.*, in *Pearson v. Spencer* (8), 3 B. & S. at p. 767) necessarily dependent, in order to its enjoyment in the state it was in when devised, on the defendant's land. That being the case, I think it is clear that the devise of the plaintiff's land with the appurtenances operated to create as a right appurtenant to the plaintiff's land that which had been previously enjoyed as an incident to the common ownership, and to impose a correlative burden on the defendant's land: *Pearson v. Spencer* (8).

D But the defendants contend that the right so created was not a legal easement, but was dependent on a merely equitable obligation imposed on the devisee of the defendant's land, and that, as Mrs. Cotton purchased without notice of the existence of the circumstances giving rise to the obligation, she is not bound thereby. There is nothing in the nature of the right in question which would prevent its being a valid legal easement. The right to the free passage of water through my neighbour's land, and for that purpose to maintain a pipe or other channel therein, is one of the commonest forms of easement. So far as any objection founded on the nature of the right itself is concerned, any such objection would fail, and the right must, in my opinion, be held to be validly created as a legal easement.

But the defendants contend that the plaintiff has failed to establish as against the owner of Nugent's land the right to the continuance of the supply of water from the well, and that, as against him the plaintiff's enjoyment must be taken to be precarious, and they maintain that this circumstance renders the enjoyment precarious as against the defendants also, and prevents the possibility of the right being claimed as a legal easement. In my opinion, the question whether or not as against the owner of Nugent's land the plaintiff can establish a legal right to a continuance of the supply is irrelevant to the question whether he is entitled as against the defendants to the right to the free passage of the water. Many artificial watercourses must depend for their supply on springs or percolating water, and it has never, as far as I am aware, been suggested that a grant by an upper proprietor to a lower of a right to the accustomed flow is in any way affected by the fact that the supply might at any time be cut off by the lawful interference of a third person with the flow of percolating water. So, in this case, I cannot think that the right of the plaintiff as against the defendants can be affected by the fact, if it be so, that the owner of Nugent's land might lawfully cut off the supply. He is not before the court, and I think it is undesirable to discuss on necessarily incomplete materials the question whether the plaintiff has in fact any legal right as against him; on the assumption that this should be answered in the negative, I should still be of opinion that the plaintiff must succeed.

I The fact is that the well-known condition that enjoyment must be *nec vi, nec clam, nec precario* is a condition necessary to the acquisition of an easement by prescription, and has no reference to and is in fact in the nature of things excluded where the acquisition is by grant. Reliance was placed on a dictum contained in the judgment of *POLLOCK, C.B.*, delivering the judgment of the court in *Wood v. Waud* (9). Dealing with Bowling Sough, an artificial watercourse constructed by certain mineowners for the purpose of draining their mine and the rights of the landowners through which the sough passed, he says (3 Exch. at p. 779):

"The proprietor of the land through which the Bowling Sough flows has no right to insist on the colliery owners causing all the water from their works to flow through their land. These owners merely get rid of a nuisance to their works by discharging the water into the sough, and cannot be considered as giving it to one more than another of the proprietors of the land through which that sough is constructed; each may take and use what passes through his land, and the proprietor of land below has no right to any part of that water until it has reached his own land—he has no right to compel the owners above to permit the water to flow through their land for his benefit; and, consequently, has no right of action if they refuse to do so."

But all that this statement comes to is this, that, where the right claimed by the several proprietors depends on user only, the precarious nature of the original supply may affect the user of all the owners and prevent the acquisition by mere user of any legal right to a continuance, but he does not say that such a circumstance would prevent an owner from creating such a legal right by grant. No other authority which in any way touches the point has been cited, and I do not believe that an authority in support of the defendants' proposition could be found. On the whole, I am of opinion that the appeal fails, and must be dismissed.

Appeal dismissed.

Solicitor: *Cohen & Cohen; Beale & Co.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

JACOBS v. DAVIS

[KING'S BENCH DIVISION (Shearman, J.), June 11, 12, July 2, 1917]

[Reported [1917] 2 K.B. 532; 86 L.J.K.B. 1497; 117 L.T. 569;
33 T.L.R. 488; 61 Sol. Jo. 613]

Marriage—Gift in contemplation of marriage—Engagement ring—Engagement broken off by woman—Obligation to return ring to donor.

Where a man gives an engagement ring to a woman, the ring is given on an implied condition that it shall be returned if the engagement is broken off by the woman.

Notes. Considered: *Cohen v. Sellar*, [1926] All E.R. Rep. 312.

As to gifts to intended spouses, see 18 HALSBURY'S LAWS (3rd Edn.) 390, 391, and for breach of promise generally, see *ibid.*, vol. 19, p. 769; and for cases see 25 DIGEST 523-526, and 27 DIGEST (Repl.) 25 et seq.

Case referred to:

(1) *Robinson v. Cumming* (1742), 2 Atk. 409; 26 E.R. 646, L.C.; 25 Digest 525, 174.

Action tried before SHEARMAN, J., without a jury.

The plaintiff, Mr. Moss Jacobs, sued the defendant, Miss Fanny Davis, for the return of a three-stone diamond engagement ring given by the plaintiff to the defendant. The facts are set out in the judgment.

Austin Farleigh for the plaintiff.

Ernest Wild, K.C., and *R. Woodfin* for the defendant.

SHEARMAN, J.—The plaintiff alleges that on the day of the engagement he gave the defendant an engagement ring on the express condition that it should be

A returned in the event of the marriage not taking place. If I were dealing with the psychology of a class of people with whom I am more familiar than I am with Jews, I should not hesitate to disbelieve that story. As it is, I am not satisfied that the plaintiff has given a true account of the express terms on which the ring was given. The case is, therefore, reduced to one in which the defendant in the ordinary way wore the engagement ring for some months until the engagement was broken off. These people were living under the Mosaic law, but that is not the law which must be applied here. In order to decide the question at issue between the parties, I have to apply the English law. The question for my decision is, therefore, what is the law of this country with regard to engagement rings? Usually good sense secures the return of the engagement ring with other presents.

C The only English authority is *Robinson v. Cumming* (1). In that case, LORD HARDWICKE, L.C., said (2 Atk. at p. 409):

D "I think, in cases of this nature, these rules may be laid down. That if a person has made his addresses to a lady for some time, upon a view of marriage, and, upon reasonable expectation of success, makes presents to a considerable value, and she thinks proper to deceive him afterwards, it is very right that the presents themselves should be returned, or the value of them allowed to him: but, where presents are made only to introduce a person to a woman's acquaintance, and by means thereof to gain her favour, I look upon such person only in the light of an adventurer, especially where there is a disproportion between the lady's fortune and his, and therefore, like all other adventurers, if he will run risks, and loses by the attempt, he must take it for his pains."

E That deals with presents generally, and not engagement rings merely. The history of the engagement ring is interesting. We read in the Book of Genesis that, before the time of Moses, Abraham presented earrings to Rebecca on her betrothal to Isaac; and, no doubt, the story represents the ring in those days as a sign or symbol of an agreement to carry out a bargain and sale of the woman. When one comes to the time of civilised law, the woman ceases to be a chattel, and we find in JUSTINIAN the ring used as an arrhabo, or a pledge for the contract of marriage, or sponsalia. This found its way into early English law. The times are changed now, however, but, though the origin of the engagement ring has been forgotten, it still retains its character of a pledge or something to bind the bargain or contract to marry, and it is given on the understanding that a party who breaks the contract must return it. Whether the ring is a pledge or a conditional gift, the result is the same. The engagement ring given by the plaintiff to the defendant was given on the implied condition that it should be returned if the defendant broke off the engagement. The defendant did break off the engagement and, therefore, she must return the ring.

Judgment for plaintiff.

Solicitors: *R. Raphael; W. B. Glasier.*

[Reported by T. W. MORGAN, Esq., Barrister-at-Law.]

R. v. ROBINSON

[COURT OF CRIMINAL APPEAL (Viscount Reading, C.J., Avory and Rowlatt, JJ.), April 2, 1917]

[Reported [1917] 2 K.B. 108; 86 L.J.K.B. 773; 117 L.T. 160; 81 J.P. 152; 25 Cox, C.C. 762; 12 Cr. App. Rep. 226]

Criminal Law—Appeal—Fresh evidence—Admissibility—Matter occurring after trial—Letter containing confession written by convicted man in prison—Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 9—R.S.C., Ord. 58, r. 4.

By the Criminal Appeal Act, 1907, s. 9: "... the Court of Criminal Appeal may, if they think it necessary or expedient in the interest of justice . . . exercise in relation to the proceedings of the court any . . . powers which may for the time being be exercised by the Court of Appeal on appeals in civil matters . . ." By R.S.C., Ord. 58, r. 4: "The Court of Appeal shall have . . . full discretionary power to receive further evidence upon questions of fact . . . in any case as to matters which have occurred after the date of the decision from which the appeal is brought . . ."

After the conviction of the appellant of murder, he wrote from the prison where he was confined a letter containing a confession which, it was admitted, had a most material bearing on the case. The recipient of the letter had destroyed it, but the prison authorities, following their usual practice, had taken a copy before posting it. The appellant applied to the Court of Criminal Appeal for leave to appeal against his conviction, and the prosecution gave him notice that, on the hearing of the application, they would apply for leave to call evidence showing that the original letter had been destroyed and to produce a copy in evidence.

Held: the evidence was admissible and no privilege attached to the letter.

Notes. As to procedure on appeal to the Court of Criminal Appeal, see 10 HALSBURY'S LAWS (3rd Edn.) 524 et seq.; and for cases see 14 DIGEST (Repl.) 599 et seq. For the Criminal Appeal Act, 1907, s. 9, see 5 HALSBURY'S STATUTES (2nd Edn.) 932.

Application for leave to appeal against a conviction for murder.

The appellant was convicted of murder before COLERIDGE, J., at the Central Criminal Court on Mar. 6, 1917. He was sentenced to death and confined in Brixton Prison, and on Mar. 9 he wrote to a woman a letter which contained important admissions with reference to the crime charged against him. This letter was destroyed by the recipient, but the prison authorities, following their usual practice, took a copy of the letter before posting it. On Mar. 29, the appellant received notice that, on the hearing of his appeal, the prosecution would apply for leave to call evidence showing that the original letter had been destroyed, and for leave to produce a copy in evidence. The application for leave to appeal against conviction was dealt with as if it were the hearing of the appeal.

R. D. Muir and Percival Clarke in support of the application for leave to call further evidence.

Arthur Bryan for the appellant.

VISCOUNT READING, C.J., delivered the following judgment of the court: We are of opinion that this court has power to admit the proposed evidence under s. 9 of the Criminal Appeal Act, 1907. That section gives to this court the same powers as those which the Court of Appeal possesses in regard to civil matters. Clearly the Court of Appeal in civil matters has power to admit evidence which has a material bearing on the issue, although such power must always be exercised with great care. In the present case, it is admitted that the evidence which it is proposed

A to give is most material, and we think it ought to be admitted. The value of the evidence can be arrived at when the evidence has been given.

[Evidence was then formally given showing that the original letter had been destroyed, and that the copy which the prosecution wished to adduce in evidence was a true copy.]

B Muir submitted that the copy of the letter, having been formally proved, could be read.

Arthur Bryan submitted that the letter, which was written after conviction, was privileged.

VISCOUNT READING, C.J.—We are of opinion that no privilege attaches to the letter, and that evidence of its contents is admissible.

C [A copy of the letter was then read. It contained passages which stated that the appellant was guilty of the crime, that he was satisfied with his sentence, and that the motive of the crime was not robbery, but that the appellant had mistaken the murdered man for a man with whom he had had a quarrel the day before. The appellant was then called and gave evidence to this effect. He did not deny that he signed the letter, but said that he had no recollection of signing it.]

D *Appeal dismissed.*

Solicitors: Registrar of the Court of Criminal Appeal; Director of Public Prosecutions.

[Reported by R. F. BLAKISTON, Esq., Barrister-at-Law.]

E

F

Re HUMPHERY AND HUMPHERY

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., and Scrutton, L.J.), March 27, 1917]

G [Reported [1917] 2 K.B. 72; 86 L.J.K.B. 775; 117 L.T. 7; 61 Sol. Jo. 382]

Husband and Wife—Property—Dispute—Jurisdiction of judge on originating summons to refer whole subject-matter to official referee—Married Women's Property Act, 1882 (45 & 46 Vict., c. 75), s. 17.

H On an originating summons under the Married Women's Property Act, 1882, s. 17, which provides that any question between husband and wife as to the title to or possession of property may be referred to a judge of the High Court who may make such order with respect to the property in dispute or direct any inquiry touching the matters in question as he thinks fit, the judge has no jurisdiction to refer the whole subject-matter to an official referee for trial.

I **Notes.** The Arbitration Act, 1889, s. 14, was repealed by the Supreme Court of Judicature (Consolidation) Act, 1925, and replaced by s. 89 of that Act, which has been repealed by the Administration of Justice Act, 1956. See now s. 15 of the Act of 1956, which came into force on Oct. 1, 1957.

Referred to: *Bernbaum v. Bernbaum*, [1949] 1 All E.R. 344.

As to summary proceedings between husband and wife as to property, see 19 HALSBURY'S LAWS (3rd Edn.) 898 et seq.; and for cases see 27 DIGEST (Repl.) 247 et seq. For the Married Women's Property Act, 1882, s. 17, see 11 HALSBURY'S STATUTES (2nd Edn.) 804, and for the Administration of Justice Act, 1956, s. 15, see *ibid.*, vol. 36, p. 206.

Cases referred to in argument :

Dunbar v. Dunbar, [1909] 2 Ch. 639; 79 L.J.Ch. 70; 101 L.T. 553; 26 T.L.R. 21; 27 Digest (Repl.) 152, 1111.

Thornley v. Thornley, [1893] 2 Ch. 229; 62 L.J.Ch. 370; 68 L.T. 199; 41 W.R. 541; 9 T.L.R. 254; 3 R. 311; 27 Digest (Repl.) 106, 786.

Appeal by the wife from an order made by RIDLEY, J., on an originating summons taken out by the wife under s. 17 of the Married Women's Property Act, 1882. The facts are set out in the judgment of LORD COZENS-HARDY, M.R.

Disturnal, K.C. (with him *St. John Field*), for the wife.

Colam, K.C. (with him *Douglas M. Hogg* and *R. Fortune*), for the husband.

LORD COZENS-HARDY, M.R.—This is an appeal from an order of RIDLEY, J., in chambers on an originating summons taken out by the wife under s. 17 of the Married Women's Property Act, 1882, and it raises a point of some interest. The wife says that there is certain property to which her husband and she are entitled jointly. It is not a trivial matter as the property in question is of considerable value. There is a sum of £1,000 in their joint names at a bank. There is a house of which the value may be £4,000 or £5,000—at any rate it is a very substantial amount. A third item is a motor car of the value of some £600. The appellant says that all those items are joint property and she asks for a declaration to that effect. Then there is a further claim in respect of some furniture in the house, of which there are a good many items of comparatively small value, and as to which considerable detailed investigation and evidence may be necessary. The appellant wants a declaration that the same are all joint property.

It is conceded by the wife that this is a matter on which the learned judge is entitled to have the assistance of a report. But the judge has made this order.

"It is ordered that the whole of the subject-matter of the originating summons herein dated Feb. 14, 1917 be referred to an official referee for trial."

This is, of course, not an application in an action but in a matter. But there are the provisions of s. 17 of the Married Women's Property Act, 1882, which are very peculiar, and I have come to the conclusion that they confer a very special jurisdiction which is given to the judge alone. It is not before the master but before the judge that the application has to be made. He may "hear any such application in his private room." He may direct "any inquiry touching the matters in question to be made in such manner as he shall think fit." But I look in vain in s. 17 for any power given to the judge to refer the originating summons and all the questions raised by it to any other tribunal for trial. The judge cannot, of course, be expected to go into all the various items of the furniture. Those are matters of detail with regard to which the judge is entitled to be assisted by means of a report by some qualified person. It is quite a different matter, however, to say that it is competent for the judge under the provisions of that section to refer the whole matter to an official referee.

We have been referred to s. 14 of the Arbitration Act, 1889, and it is said that that section shows that the court has jurisdiction in any cause or matter

"if the question in dispute consist wholly or in part of matters of account . . . to order the whole cause or matter or any question or issue of fact arising therein to be tried before a special referee or . . . an official referee or officer of the court."

Speaking for myself, I do not think it is necessary to decide that point. My present view is that there is grave doubt whether the provisions of s. 14 of the Arbitration Act, 1889, have any application to any matters arising under the special and peculiar jurisdiction given by s. 17 of the Married Women's Property Act, 1882. I think that that special and peculiar jurisdiction negatives the idea that

A s. 14 of the Arbitration Act, 1889, can be applicable. However that may be, and even assuming that the matters in the originating summons could be referred under s. 14 of the Arbitration Act, 1889, there is at any rate nothing in the present case which justifies such an order as has been made. The items in dispute between the parties are now, besides the furniture, only three in number. And they are certainly not of such a nature as to need a reference under s. 14. If the judge should, B in the course of hearing the case, take the view that he requires assistance on any question of account, he can request the official referee to report to him.

With great respect to RIDLEY, J., I think the learned judge has exceeded his jurisdiction by delegating his powers as a judge in chambers to an official referee. The case must go back to the judge in chambers, who will have full power to obtain, if desirable, further assistance by way of report. Care must be taken in drawing up C the order, which should provide for reference to an official referee or to a master to report as to the furniture, and for the judge in chambers to deal with the rest of the matter.

SCRUTTON, L.J.—I agree. This originating summons is one of a kind which frequently comes before judges of the King's Bench Division, and it asks for the D determination of the title to and the possession of six items of property—a house and the land on which it stands, a sum of £1,000 being on deposit at a bank, a wherry and dinghey, a motor car, a sum of money lent to a Mr. Hancock, and certain furniture and household effects. When the summons came before RIDLEY, J., sitting in chambers, he referred the whole matter to an official referee for trial. The summons was taken out under the peculiar jurisdiction which is conferred E by s. 17 of the Married Women's Property Act, 1882. That section provides that:

"In any question between husband and wife as to the title to or possession of property, either party . . . may apply by summons or otherwise in a summary way to any judge of the High Court . . . and the judge . . . may make such order with respect to the property in dispute . . . as he thinks fit, or may F direct . . . any inquiry touching the matters in question to be made in such manner as he shall think fit. . . . Provided also, that the judge . . . if either party so require, may hear any such application in his private room. . . ."

That section seems to me to contemplate that the judge should keep control over the whole matter, and that he should determine all questions relating to it, although he may have assistance. But he is to keep his hand on the whole matter, hearing G the proceedings in his private room if so required by either party. I agree with the Master of the Rolls that it is not necessary for us finally to decide whether it is ever possible for the judge to use the powers given by s. 14 of the Arbitration Act, 1889, and to send the whole subject-matter of the summons to an official referee for trial. But, in view of the very peculiar provisions of s. 17 of the Married H Women's Property Act, 1882, I think that a very strong case would have to be made out to enable him to relieve himself of his responsibility under that section.

Of the six items mentioned in the summons, two of them—namely, the wherry and dinghey, and the money lent to Mr. Hancock—have been disposed of and are now admitted to be joint property, and as regards the furniture it is agreed that all questions concerning it should be sent for inquiry into before an official referee. I But there remain three items in dispute which are, nevertheless, items of considerable value—that is to say, the house and land, the money in the bank, and the motor car. It may be necessary to look into accounts in respect of these items. But the matters of account are so subordinate to the questions of ownership of the items themselves that, in my opinion, there is not sufficient to justify the relegation of the whole matter to a subordinate tribunal. I agree, therefore, with the Master of the Rolls that the appeal should be allowed, the effect of which will be that those matters will go back to the judge in chambers to be dealt with. It may be that he will think right to order further inquiries. We only say that these items I

prima facie are such that they should be dealt with by the judge himself and not by a subordinate tribunal. A

Appeal allowed.

Solicitors: *Kenneth Brown, Baker, Baker & Co.; Whitford & Thorp, for Greene & Greene, Bury St. Edmunds.*

[Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.] B

GRAY v. LORD ASHBURTON

[HOUSE OF LORDS (Earl Loreburn, Viscount Haldane, Lord Atkinson and Lord Shaw), November 23, 1916] C

[Reported [1917] A.C. 26; 86 L.J.K.B. 224; 115 L.T. 729; 81 L.J.P. 17; 61 Sol. Jo. 129] D

Agriculture—Agricultural holding—Arbitration—Costs—Discretion of arbitrator—Successful party ordered to pay costs—Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), Sched. 2, r. 14, r. 15.

By the Agricultural Holdings Act, 1908, Sched. II, r. 14, the costs of and incidental to an arbitration under that Act "shall be in the discretion of the arbitrator, who may direct to and by whom and in what manner these costs or any part thereof are to be paid." By r. 15 the arbitrator, in awarding costs, "shall . . . take into consideration the reasonableness or unreasonableness of the claim of either party, either in respect of amount or otherwise." E

In an arbitration under the Act of 1908 a landlord claimed £744 for dilapidations against a tenant, and it was ultimately decided that the tenant was liable. The arbitrator awarded the landlord £71, and directed that he should pay the costs of the arbitration and of the award. F

Held: the arbitrator had acted in the exercise of his discretion, and, there being no ground for suggesting either misconduct or want of jurisdiction on his part, his award must be upheld. G

Decision of the Court of Appeal, [1916] 2 K.B. 353, reversed.

Notes. The Agricultural Holdings Act, 1908, was repealed by the Agricultural Holdings Act, 1923, which in turn has been repealed by the Agricultural Holdings Act, 1948. For Sched. II, r. 14 and r. 15, to the Act of 1908, see now Sched. VII, r. 21 and r. 23 to the Act of 1948. H

Applied: *Bradshaw v. Air Council*, [1926] Ch. 329. Referred to: *Ellesmere v. I.R. Comrs.* (1918). 88 L.J.K.B. 337; *Haynes v. Aldridge Colliery Co.* (1923), 130 L.T. 282; *Mansfield v. Robinson*, [1928] All E.R. Rep. 69; *Smeaton Hanscomb & Co. v. S. I. Setty Son & Co.* (No. 2), [1953] 2 All E.R. 1588; *Le Witt v. Cannon Brookes*, [1956] 3 All E.R. 676; *Heaven and Kesterton, Ltd. v. Sven Widacius A/B.*, [1958] 1 All E.R. 420. I

As to arbitration under the Agricultural Holdings Act, 1948, see 1 HALSBURY'S LAWS (3rd Edn.) 325 et seq.; and for cases see 2 DIGEST (Repl.) 45 et seq. For the Agricultural Holdings Act, 1948, Sched. VII, r. 21 and r. 23, see 28 HALSBURY'S STATUTES (2nd Edn.) 106.

Cases referred to:

- (1) *Cooper v. Whittingham* (1880), 15 Ch.D. 501; 49 L.J.Ch. 752; 43 L.T. 16; 28 W.R. 720; 13 Digest (Repl.) 124, 643.

(2) *Foster v. Great Western Rail. Co.* (1882), 8 Q.B.D. 25, 515; 51 L.J.Q.B. 51, 233; 45 L.T. 538; 46 L.T. 74; 30 W.R. 398; 4 Ry. & Can. Tr. Cas. 58, C.A.; 38 Digest (Repl.) 430, 902.

Also referred to in argument:

Re Fearon and Flinn (1869), L.R. 5 C.P. 34; 2 Digest (Repl.) 740, 2504.

Re Fisher, [1894] 1 Ch. 450; 63 L.J.Ch. 235; 70 L.T. 62; 42 W.R. 241; 3 Sol. Jo. 199; 7 R. 97, C.A.; 11 Digest (Repl.) 268, 1525.

Simpson v. I.R. Comrs., [1914] 2 K.B. 842; 83 L.J.K.B. 1318; 110 L.T. 909; 30 T.L.R. 436; 39 Digest 226, 60.

Civil Service Co-operative Society v. General Steam Navigation Co., [1903] 2 K.B. 756; 72 L.J.K.B. 933; 89 L.T. 429; 52 W.R. 181; 20 T.L.R. 10; 47 Sol. Jo. 877; 9 Asp. M.L.C. 477, C.A.; 12 Digest (Repl.) 463, 3459.

Williams v. Wallis and Cox, [1914] 2 K.B. 478; 83 L.J.K.B. 1296; 110 L.T. 999; 78 J.P. 337; 58 Sol. Jo. 536; 12 L.G.R. 726; 2 Digest (Repl.) 47, 250.

Hudson's, Ltd. v. De Halpert (1913), 108 L.T. 416; 29 T.L.R. 257, D.C.; 13 Digest (Repl.) 456, 799.

Higgins v. L. Higgins & Co., [1916] 1 K.B. 640; 85 L.J.K.B. 1224; 114 L.T. 59; 9 B.W.C.C. 122, C.A.; 34 Digest 486, 4009.

Appeal by the tenant from an order of the Court of Appeal (LORD READING, C.J., WARRINGTON, L.J., and LUSH, J.), reported [1916] 2 K.B. 353, reversing an order of the Divisional Court (RIDLEY and LORD COLERIDGE, JJ.), reported [1916] 1 K.B. 452, upholding the award of an arbitrator which the Winchester County Court, on a Special Case stated by the arbitrator, refused to set aside. The facts are set out in the opinion of EARL LOREBURN.

Clavell Salter, K.C., and *S. H. Emanuel* for the tenant.

Disturnal, K.C., and *W. Allen* for the landlord.

EARL LOREBURN.—My real and only difficulty in this case is that there has been a judgment of the Court of Appeal for which I and all your Lordships entertain the greatest respect, and, although to my mind the thing seems plain, I cannot help having my judgment arrested by the reflection that it has appeared differently to those learned judges.

In this case, in an arbitration under the Agricultural Holdings Act, 1908, the landlord claimed a sum of £744 for dilapidations against the tenant; the tenant disputed his liability, and the Court of Appeal decided that he was liable. Then the subject went under the statute to arbitration, and the arbitrator awarded that the costs of that litigation which I have already mentioned should be disposed of by the successful landlord and the unsuccessful tenant each paying his own costs. As regards the amount claimed for dilapidations, the arbitrator awarded the sum of £71 instead of the sum of £744 which had been demanded by the landlord. Then comes the order with regard to costs. The arbitrator directed that the landlord, although he had recovered £71 out of £744 which he claimed, should pay the costs of the arbitration and the costs of the award. The Divisional Court decided that that award could not be disturbed, but in the Court of Appeal the learned lords justices set aside that award. It was said by the Court of Appeal that it was wrong, in substance on the ground that the arbitrator was bound as regards costs by the same principles and rules as were applicable to a learned judge of the High Court. I do not wish to enter on the question what are the principles and rules which are binding on a judge of the High Court in regard to costs, although I must not be taken to assent to the statements that have been made as to that; but I do not enter on it because, with all respect, I do not see that the rules or practice of the learned judges have anything at all to do with this case. This case is regulated by an Act of Parliament of its own.

The Agricultural Holdings Act, to which I will not advert for a moment, contains two rules which I will not read at length; I will merely state in a sentence the substance of them. Schedule II, r. 14, says:

"The costs of and incidental to the arbitration and award shall be in the discretion of the arbitrator, who may direct to and by whom and in what manner these costs or any part thereof are to be paid";

and r. 15 says :

"The arbitrator shall, in awarding costs, take into consideration the reasonableness or unreasonableness of the claim of either party, either in respect of amount or otherwise."

That is the statutory discretion which is given to the arbitrator, and he has sworn in an affidavit that he did look at the statute; that he did consider that very thing, the reasonableness or unreasonableness of the claim, in coming to a decision as regards costs. The effect of those two rules is that, unless there is misconduct, which, of course, the court can always survey, the arbitrator cannot be overruled in regard to his discretion about costs, provided that he is acting in the exercise of his discretion and in a case arising within his jurisdiction. It is said that this order was not made in the exercise of his discretion. With all respect to counsel for the landlord, I think it was nothing else. It is said that it was not within his jurisdiction. I think the jurisdiction was intended for this particular class of case, and, to my mind, there is nothing more to be deprecated than placing a gloss on the quite simple language of an Act of Parliament by reference to other Acts which contain different language. There is the Arbitration Act, there is the Judicature Act, there is the Workmen's Compensation Act, to which reference has been made, each of which speaks about costs in its own language and makes its own rules. There are also rules to be observed by learned judges which speak for themselves. But this Act also speaks for itself, and it governs this case. In my view, there is no ground whatever for suggesting any misconduct at all in a legal or any other sense against the arbitrator, and I think that this is simply a case within that class which was intended to be decided by the arbitrator. Therefore, I think there was neither misconduct nor want of jurisdiction, and I think this judgment of the Court of Appeal ought to be reversed.

VISCOUNT HALDANE.—I agree. In this case, the landlord was virtually in the position of a plaintiff, and he has recovered a percentage out of a very large demand which he made, and the arbitrator, in the exercise of his discretion, has ordered him, although he succeeded as to a percentage, to pay the costs. The question is, was there power to make that order? Undoubtedly the words of the Agricultural Holdings Act, 1908, taken as they stand and read as a plain man would read them, confer on the arbitrator that discretion; but the Court of Appeal has held that these general words, occurring in this particular statute, are to be interpreted by analogy to the interpretation which has been placed on the rules made under the Supreme Court of Judicature Act.

In the case of the rules which govern the procedure of the courts, it is said that the costs are to be in the discretion of the judge or the court, but the very scheme of the Judicature Acts is that there should be an appeal from the judge who awards the costs to a Court of Appeal. That Court of Appeal also may, therefore, have to exercise the discretion which the rule confers. The Court of Appeal has laid down the practice, which is a rule of practice and not of principle restricting legal power, that it will not interfere with a discretion exercised by a judge of first instance in a matter in which discretion is intrusted to him such as costs. But the Court of Appeal only applies that limitation of its powers in cases where the judge has acted, in exercising his discretion, on judicial principle and on the proper principle. There are many cases in which the Court of Appeal interferes with costs, and it is always free to interfere as regards costs if it thinks that the judge has exercised his judicial discretion in a fashion that is not in accordance with settled principle. That is a very different thing from a case such as we have under this statute. The Court of Appeal seems to have first of all construed the statute by

analogy to the rules of procedure to which I have referred—an analogy which is a misleading one, because it is not a case in which a court is sitting to entertain an ordinary appeal. This very view is put in the judgments in another form, which appears most definitely in WARRINGTON, L.J.'s, judgment, and that is that the words conferring the discretion are so construed that no difficulty arises from the fact that there is no appeal, because it was ultra vires to act in the manner in which the arbitrator in this case has acted. He has, it is said, dealt with matters which he had no power to deal with because of an implied limitation, derived from the practice of the Supreme Court, which ought to be read into the words used. I again say that, for the reasons I have already given, I see no ground for reading in any such limitation. Even if you did read in the only limitation of the kind which I know of, it would not help in this case. This is an instance in which the plaintiff is being deprived of his costs, a very different thing from making a defendant who has been completely successful in resisting the action pay the costs. There is authority for saying that, under the unwritten practice of the old court of Chancery, and, I should think, of the old courts of common law too, the courts did not treat themselves as having jurisdiction to order a completely successful defendant to pay the costs. But I know of no authority, and certainly *Cooper v. Whittingham* (1), which was cited, is not adequate authority on the point, for saying that a plaintiff may not be made to pay the costs of an action even although he succeeds in a part of his claim.

Reliance was placed in the argument on *Foster v. Great Western Rail. Co.* (2). That was a remarkable case in many ways, and it may, or may not, have been rightly decided; it is not necessary for us to consider that here, for there were peculiar circumstances in the case. But, to begin with, it was a case in which the defendants, who had completely succeeded, were ordered by the commission to pay the costs, and the Court of Appeal thought there was no jurisdiction to do that. If the only ground of the decision in that case had been the broad one that was put forward, I should have thought it necessary to examine the reasons given for the judgment and to have asked the question whether BOWEN, J., had not taken the true view when, in the Divisional Court, he decided, what the Court of Appeal overruled, that the discretion which was conferred on the commissioners by the Regulation of Railways Act, 1873, was unfettered and bore no analogy to any rules of procedure in courts where there was an appeal. But there were other circumstances in the case which may, or may not, have sufficiently afforded a reason for saying that it was one where the commissioners had no jurisdiction. Certainly, so far as general expressions which are used in the judgments, both of BRETT, L.J., and CORRON, L.J., are to the effect that general words of discretion occurring in a statute which gives the commissioners or an arbitrator power to award costs are to be cut down by importing limitations derived from the analogy of courts of law, I should desire to guard myself against being supposed to give my approval to any such doctrine. When the Act of Parliament says that an arbitrator is to have full discretion as to costs, I think the Act of Parliament must be taken to mean what it says. It is not the case of giving jurisdiction to an ordinary court from which there is an appeal, and as to which there might be a review of the mode in which the discretion has been exercised contrary to some settled principle which governs the practice of the court. It is a case of purely statutory proceeding, and outside the limits of the statute you cannot go. For these reasons I am of opinion that the judgment of the Court of Appeal was wrong.

LORD ATKINSON.—I agree, and I have very little to add. In this case the only litigant was the landlord, because the tenant's claim was admitted and practically agreed on, and, therefore, he was the cause of all the litigation that ensued, and, having put forward a claim for £744, he succeeded in establishing £71.

The case has been argued as if you should import into Sched. II, r. 14 to the Agricultural Holdings Act, 1908, after the words "the costs of and incidental to the

arbitration and award shall be in the discretion of the arbitrator, who may direct to and by whom and in what manner these costs or any part thereof are to be paid," the words "according to the principles prevailing in the superior courts." The whole argument has been on that ground; it is to import those words as to the practice and rules of the superior courts in dealing with costs into this statute, which is couched in general language; and, having adopted that construction, counsel for the landlord goes on to argue that, as regards the words in r. 15, "the arbitrator shall, in awarding costs, take into consideration the reasonableness or unreasonableness of the claim of either party," the reasonableness or unreasonableness can only be taken into consideration in depriving a person of costs, which costs he would get under the rules of the superior courts. It does not seem to me that there is any authority for making that limitation. The words are general. They cannot be limited in the way suggested, and they afford an entire warrant, in my judgment, to the arbitrator for visiting with costs a plaintiff who persists in maintaining an extravagant and unreasonable demand. That is what the arbitrator has found has been done in this case, and, when a claim of that character has been made the subject for consideration, it is obvious that some effect must be given to those words "the reasonableness or unreasonableness of the claim." The effect that the arbitrator has given to them is to make this litigant pay costs. I think that was perfectly legitimate. I do not think there is anything whatever in the statute itself to justify the limitation that has been contended for.

My noble and learned friend who has preceded me has already pointed out that *Foster v. Great Western Rail. Co.* (2) is no authority whatever for the proposition that a plaintiff, though successful in a small degree, may not be made to pay the costs of the defendant. Visiting a successful defendant with costs is an entirely different thing, because, if he be successful, he succeeds along the whole line. For these reasons, and for the reasons which have been given by my noble and learned friends who have preceded me, I think the judgment of the Court of Appeal was wrong and should be reversed.

LORD SHAW.—I agree with all your Lordships, and I have but few words to add. I think the Act of Parliament in the present case is singularly plain. It does not confine itself to a declaration that the arbitrator shall have a discretion. Had it done so, probably the result of the appeal to-day might have been the same; but, after stating the discretion in the arbitrator, it proceeds to say what this arbitrator charged with the discretion may do. It expressly declares in Sched. II, r. 14, to the Agricultural Holdings Act, 1908, that he "may direct to and by whom and in what manner these costs or any part thereof are to be paid," and in r. 15 it declares that he "shall, in awarding costs, take into consideration the reasonableness or unreasonableness of the claim." Confronted with an Act of Parliament so comprehensive and almost so peremptory, I decline respectfully to follow the proposition that you must import into it, for the purpose of restricting or limiting the terms, certain rules derived from the common law of England or the practice of the superior courts with reference to the discretion vested in judges.

Foster v. Great Western Rail. Co. (2) has been cited, and I must express a certain surprise at the judgment of the Court of Appeal in regard to it. If *Foster's Case* (2) be fully analysed, it will be found that that case, even if it were admissible in the present on the argument of analogy, which I decline to follow, would be an authority in favour of the tenant and not in favour of the landlord. It was, in my view, apprehended in that sense by the learned Lord Chief Justice (LORD READING), because, after dealing with *Foster's Case* (2) and the rules applicable to the High Court of Justice, he sums up the proposition in this form ([1916] 2 K.B. at p. 358):

"You may, nevertheless, make the person who invokes the assistance of the court pay the costs notwithstanding that he is successful."

Applying that language to this case, I ask myself what more has the arbitrator

here done than to make the claimant who invoked his assistance pay the costs, notwithstanding that he was successful. I look to *Foster's Case* (2) as no authority in favour of the landlord.

But I have a second object in citing that case; it is that I may adopt for present use the general proposition on this part of the law laid down by the late Lord Bowen. He expressed himself in this language (8 Q.B.D. at p. 29):

"It appears to us that in establishing an extraordinary tribunal of the kind the legislature have in plain terms conferred upon them a wide discretion as to the manner in which they should deal with all questions of costs arising before them, and, provided that their decisions on such matters are bonâ fide, it is not for a court of law to examine the principle upon which such decisions are based."

I think this view entirely sound, and that it applies à fortiori to the case of an arbitrator. May I venture to say again that I decline to import into the terms of a statute so plain and so comprehensive any restriction or limitation derived from the general law of England, or any analogy between the position of an arbitrator and that of a judge. Analogies are dangerous. Why an analogy with a judge in a court of law? I might as well be asked to import an analogy between the discretion exercised by the pilot or the captain of a ship, or the discretion exercised by an auctioneer who is expressly elected to be judge in a sale. In regard to the actings of an arbitrator, whether under the Agricultural Holdings Act or otherwise, two things especially were in the view of the legislature—namely, first, finality; and, secondly, promptitude. The special danger of analogies with the case of a judge is particularly this, that, in the exercise of judicial discretion, there may be appeal from court to court. At this moment there is an appeal before this House depending on the question of an exercise of judicial discretion, and to import the analogy of any such appeal to a court of law as against the discretion exercised by an arbitrator would be to destroy the whole virtue of that finality which it was the object of the legislature to attain.

In conclusion, I would only say that the view expressed by Lord Coleridge, J., with regard to what the arbitrator had done in this case is exactly the view which I myself have adopted. I think, to use his Lordship's language ([1916] 1 K.B. at p. 459), that

"a very exorbitant claim was made, and it may be that the arbitrator might reasonably think that the arbitration was practically forced upon the tenant by its unreasonableness, and that if a reasonable claim had been put forward no arbitration would have resulted. If that be the case, then the discretion given him by the Agricultural Holdings Act would seem to be ample to enable him to do what he has done."

Appeal allowed.

Solicitors: Church, Adams, Prior & Balmer, for P. W. Snelling, Winchester; H. S. Knight Gregson.

[Reported by W. E. REID, Esq., Barrister-at-Law.]

M. ISAACS & SONS, LTD. v. SALBSTEIN AND ANOTHER

[COURT OF APPEAL (Swinfen Eady, Pickford and Bankes, L.J.J.), March 20, 21, 1916]

[Reported [1916] 2 K.B. 139; 85 L.J.K.B. 1433; 114 L.T. 924;
32 T.L.R. 370; 60 Sol. Jo. 444]

Judgment—Final or interlocutory—Final if finally determining rights of parties—Order for new trial.

An order, to be a final and not an interlocutory order, must finally dispose of the matters in litigation and the rights of the parties, and, therefore, an order directing a new trial of the matters in dispute cannot in its nature be a final order.

Bozson v. Altrincham U.D.C. (1), [1903] 1 K.B. 547, applied.

Estoppel—Estoppel by record—Judgment against fictitious person—Judgment against person not under liability.

Where an action has been brought in error against a fictitious person, or against a person who is not under any liability, it is not a bar to an action against the person who is alleged to be in fact liable, although the cause of action and the subject-matter concerned is in each case the same.

Notes. Considered: *Freshwater v. Bulmer Rayon Co.*, [1933] Ch. 162. Applied: *B. O. Morris, Ltd. v. Perrott and Bolton*, [1945] 1 All E.R. 567; *Peek v. Peek*, [1948] 2 All E.R. 297.

As to what is a final judgment or order, see 22 HALSBURY'S LAWS (3rd Edn.) 742-746, and as to estoppel by record see *ibid.*, vol. 15, p. 176 et seq. For cases see 30 DIGEST (Repl.) 153 et seq., and 21 DIGEST 159 et seq.

Cases referred to:

- (1) *Bozson v. Altrincham U.D.C.*, [1903] 1 K.B. 547; 72 L.J.K.B. 271; 67 J.P. 397; 51 W.R. 337; 19 T.L.R. 266; 47 Sol. Jo. 316; 1 L.G.R. 639, C.A.; 30 Digest (Repl.) 161, 144.
- (2) *Shubrook v. Tufnell* (1882), 9 Q.B.D. 621; 46 L.T. 749; 30 W.R. 740, C.A.; 30 Digest (Repl.) 154, 76.
- (3) *Collins v. Paddington Vestry* (1880), 5 Q.B.D. 368, C.A.; 30 Digest (Repl.) 154, 83.
- (4) *Salaman v. Warner* [1891] 1 Q.B. 734; 60 L.J.Q.B. 624; 39 W.R. 547, C.A.; 30 Digest (Repl.) 160, 143.
- (5) *Phillips v. Ward* (1863), 2 H. & C. 717; 3 New Rep. 92; 33 L.J.Ex. 7; 9 L.T. 345; 9 Jur. N.S. 1182; 12 W.R. 106; 159 E.R. 297; 21 Digest 219, 542.
- (6) *King v. Hoare* (1844), 13 M. & W. 494; 2 Dow. & L. 382; 1 New Pract. Cas. 72; 14 L.J.Ex. 29; 4 L.T.O.S. 174; 8 Jur. 1127; 153 E.R. 206; 21 Digest 218, 538.
- (7) *Watters v. Smith* (1831), 2 B. & Ad. 889; 1 L.J.K.B. 31; 109 E.R. 1373; 12 Digest (Repl.) 534, 4044.
- (8) *Bell v. Banks* (1841), 3 Man. & G. 258; 3 Scott, N.R. 497; Drinkwater, 236; 5 Jur. 486; 133 E.R. 1140; sub nom. *Bell v. Shuttleworth*, 10 L.J.C.P. 239; 30 Digest (Repl.) 192, 357.
- (9) *Lechmere v. Fletcher* (1833), 1 Cr. & M. 623; 3 Tyr. 450; 2 L.J.Ex. 219; 149 E.R. 549; 21 Digest 220, 551.
- (10) *Kendall v. Hamilton* (1879), 4 App. Cas. 504; 48 L.J.Q.B. 705; 41 L.T. 418; 28 W.R. 97, H.L.; 21 Digest 218, 540.
- (11) *Buckland v. Johnson* (1854), 15 C.B. 145; 2 C.L.R. 784; 23 L.J.C.P. 204; 23 L.T.O.S. 190; 18 Jur. 775; 2 W.R. 565; 139 E.R. 375; 21 Digest 222, 566.

- (12) *Cooke (Cook) v. Gill* (1873), L.R. 8 C.P. 107; 42 L.J.C.P. 98; 28 L.T. 32; 21 W.R. 334; 1 Digest (Repl.) 14, 114.
- (13) *Brunsdon v. Humphrey* (1884), 14 Q.B.D. 141; 53 L.J.Q.B. 476; 51 L.T. 529; 49 J.P. 4; 32 W.R. 944, C.A.; 21 Digest 207, 480.
- (14) *Re Hodgson, Beckett v. Ramsdale* (1885), 31 Ch.D. 177; 55 L.J.Ch. 241; 54 L.T. 222; 34 W.R. 127; 2 T.L.R. 73, C.A.; 21 Digest 219, 544.

Also referred to in argument:

- Blyth v. Fladgate, Morgan v. Blyth, Smith v. Blyth*, [1891] 1 Ch. 337; 60 L.J.Ch. 66; 63 L.T. 546; 39 W.R. 422; 7 T.L.R. 29; 21 Digest 223, 570.
- Brinsmead v. Harrison* (1871), L.R. 6 C.P. 584; 40 L.J.C.P. 281; 24 L.T. 798; 19 W.R. 956; affirmed (1872), L.R. 7 C.P. 547; 41 L.J.C.P. 190; 27 L.T. 99; 20 W.R. 784, Ex.Ch.; 21 Digest 584, 1615.
- Hirachand Punamchand v. Temple*, [1911] 2 K.B. 330; 80 L.J.K.B. 1155; 105 L.T. 277; sub nom. *Punamchand Shrichand & Co. v. Temple*, 27 T.L.R. 430; 55 Sol. Jo. 519, C.A.; 12 Digest (Repl.) 519, 3897.
- Hammond v. Schofield*, [1891] 1 Q.B. 453; 60 L.J.Q.B. 539; 7 T.L.R. 300, D.C.; 21 Digest 219, 546.

Appeal by defendants from an order of the Divisional Court (LUSH and ATKIN, JJ.) directing that there should be a new trial.

F. Newbolt, K.C. (*H. J. Turrell* with him) for the plaintiffs.—There is a preliminary objection to the hearing of this appeal, which in its nature is final and not interlocutory, and has therefore been entered in the wrong list.

R. V. Bankes, K.C., and *J. Flowers*, for the defendants, were not called on to argue.

SWINFEN EADY, L.J.—The preliminary point has been taken that this appeal has been wrongly entered in the interlocutory list. The plaintiffs brought the present action in the City of London Court, where the deputy judge gave judgment for the defendants. From that decision the plaintiffs appealed to the Divisional Court, who discharged the judgment and ordered a new trial. The present appeal was brought from that decision. The question turns upon what is the proper construction to put upon Ord. 58, r. 15, which deals with the time for bringing appeals. Rule 15 is as follows:

"Subject and without prejudice to the powers of the Court of Appeal under Ord. 64, r. 7, no appeal to the Court of Appeal from any interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action, shall be brought after the expiration of fourteen days, and no other appeal shall be brought after the expiration of six weeks unless the court or a judge, at the time of making the order or at any time subsequently or the Court of Appeal shall enlarge the time. . . ."

We have to determine whether the order under appeal is interlocutory or not. In my opinion, this is an interlocutory order; it does not finally dispose of the matters in litigation or the rights of the parties. No order directing a new trial of the matters in dispute can in its nature be a final order finally determining the rights of the parties, so that apart from authority I should have no difficulty in deciding that this was an interlocutory order. How do the authorities stand? *Bozson v. Altrincham U.D.C.* (1) was an appeal by the plaintiff from an order of WILLS, J. The facts shortly were these. An order had been made in an action brought to recover damages for breach of contract that the questions of liability and breach of contract only were to be tried, and that the rest of the case, if any, was to go to an official referee. At the trial the learned judge held that there was no binding contract between the parties, and made an order dismissing the action, upon which judgment was entered for the defendants. The plaintiffs appealed. Manifestly, on the facts, it was an appeal from a final judgment, which,

unless reversed on appeal, finally decided the rights of the parties. The EARL OF HALSBURY, L.C., said ([1903] 1 K.B. at p. 548):

"I think the order appealed from was a final order, and the appeal is therefore brought within the prescribed time."

LORD ALVERSTONE, C.J., said (*ibid.*):

"It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order."

Applying the test there laid down, I think the order which is appealed from in the present case is an interlocutory order.

Two earlier cases have been cited to us which, it is said, are difficult to reconcile with *Bozson v. Altrincham U.D.C.* (1). In *Shubrook v. Tufnell* (2), which was a Case stated for the opinion of the court, the plaintiff, who was a lessee of two houses, brought an action against the lessor to recover damages for structural damage caused to them by the defendant making a drain through adjoining land. The action was referred to arbitration, and the arbitrator stated a Case which only raised a point of law. In the Case so stated, if the defendant won the decision would finally dispose of the rights of the parties, but if the plaintiff won it would not, as the Case would have to go back to the arbitrator. The Divisional Court decided in favour of the plaintiff and referred the case back to the arbitrator. On appeal to the Court of Appeal the question arose whether the appeal was final or not. JESSEL, M.R., in giving judgment, said that his attention had been called to *Collins v. Paddington Vestry* (3), and he continued as follows (9 Q.B.D. at p. 623):

"The first clause of the headnote is too wide; the court did not decide the general proposition there laid down, but only held that where the decision of the court on the point submitted to it could not in any event necessitate the entering of final judgment for either party, the decision was interlocutory."

That explained the true effect of the decision in *Collins v. Paddington Vestry* (3); and he went on to add:

"Here, if we differ from the court below, final judgment has to be entered for the defendant, and there is an end of the action."

The effect of that decision is this, that if as the result of the appeal final judgment may be entered for either party, it is a final order. In *Salaman v. Warner* (4), it was held that a "final order" was one made on such an application or proceeding that, for whichever side the decision was given, it would, if it stood, finally determine the matter in litigation. If the decision finally determines the matter, then neither of the two last-mentioned cases seems quite consistent with *Bozson v. Altrincham U.D.C.* (1), which puts the matter upon the true footing, namely, that what you must look to is the order under appeal. In the present case I am of opinion that the order is clearly an interlocutory order, and that the appeal has been properly entered in the interlocutory list.

PICKFORD, L.J.—I am of the same opinion. Looking at *Shubrook v. Tufnell* (2), if the decision of the Court of Appeal is to make it a final decision, then the order under appeal is a final order, but *Salaman v. Warner* (4) decided that the order was only final if it finally determined the matter in litigation, which ever side the decision was given. In *Bozson v. Altrincham U.D.C.* (1) the Court of Appeal declined to follow the decision in *Salaman v. Warner* (4), and said that they preferred to follow the earlier decision of *Shubrook v. Tufnell* (2), but I do not think that they quite followed it. Thus LORD ALVERSTONE, C.J., said this ([1903] 1 K.B. at p. 548):

A "It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the right of the parties?"

In the present case it seems to me that the order which is appealed from does not finally determine the rights of the parties, and, therefore, this is an appeal from an interlocutory order and not from a final order.

B **BANKES, L.J.**—I agree.

The appeal was then heard.

R. V. Bankes, K.C., and J. Flowers for the defendants.

F. Newbolt, K.C., and H. J. Turrell for the plaintiffs.

C **SWINFEN EADY, L.J.**—The plaintiffs sued the defendant, Harry Salbstein, and Edith his wife, and contended that these defendants are, or one of them is, liable for the sum of £20 16s. 2d., being the balance which the plaintiffs say is due to them in respect of a contract for the sale of lemons, which contract was broken by the defendants. The plaintiffs' case is that they put up for sale by auction 138 cases of lemons which were knocked down to the defendant Harry Salbstein, but that he did not complete the purchase, with the result that there is a claim against him for £20 16s. 2d. in respect of these goods. It is in dispute who the person was for whom the goods were in fact purchased. The deputy-judge of the City of London Court held that the plaintiffs had failed to make out their case. There had been a previous action for the same sum of money in June, 1914. The plaintiffs in that action were the same as in the present action, but the defendants were a firm named Salbstein Bros. The writ which was issued against them was served upon Julius Salbstein, who was alleged to be a partner in Salbstein Bros. No appearance was entered, and judgment in default of appearance was recovered against Salbstein Bros. Execution was issued in due course, and certain goods were seized under a writ of *fi fa*. Joseph Salbstein put forward a claim against these goods and there were interpleader proceedings in which Joseph Salbstein maintained his claim, and he recovered damages for trespass, but the judgment which had been recovered against Salbstein Bros. still remained unsatisfied, and it is not agreed whether there was such a firm as Salbstein Bros. at all.

F The defence which was relied upon in the City of London Court was that the plaintiffs had already recovered judgment against some persons other than the defendants, and that any cause of action which they might have had against the defendants had thereby become merged. But a judgment recovered against one of several joint debtors cannot be pleaded as a defence to a subsequent action against another joint debtor in respect of the same cause unless the plea shows that the judgment was recovered on a ground which operated as a discharge at all: *Phillips v. Ward* (5). Here it is not shown that there was such a firm as Salbstein Bros. in existence at the time when the alleged debt was contracted or when the writ in the first action was issued or the judgment in that action was signed in default of appearance. The plaintiffs allege in the affidavits which were used before the deputy-judge that there were admissions to the effect that no such firm as Salbstein Bros. was in existence. On the other hand, the defendants deny that those affidavits were put in as admissions at all or that they were referred to in the county court. I think it is sufficient for the purposes of this case to say that, the burden of proof being upon the defendants, they did not adduce any evidence upon the point. If the defendant Harry Salbstein had established that the firm of Salbstein was in existence at the material times and that he was a partner in that firm and that any obligation of the partners was a joint obligation on behalf of the firm, it would have afforded a complete defence to the action. Again, if it had been shown that the plaintiffs, having a right of election between the parties, had sued one party and had recovered judgment, an action against the other party would be thereby barred. Again, if the defendants or either of them had been jointly liable

with a real firm of Salbstein Bros., this would have been a good defence to this action.

In *King v. Hoare* (6) it was decided that a judgment recovered against one of two joint debtors was a bar to an action against the other. PARKE, B., in delivering the judgment of the Court of Exchequer, said (13 M. & W. at pp. 503, 504):

"The matters of form being disposed of, the question is reduced to one of substance, whether a judgment recovered against one of two joint contractors is a bar to an action against another. It is remarkable that this question should never have been actually decided in the courts of this country. There have been, apparently, conflicting dicta upon it. LORD TENTERDEN, in the case of *Watters v. Smith* (7) (2 B. & Ad. at p. 892) is reported to have said that a mere judgment against one would not be a defence for another. My brother MAULE stated in that of *Bell v. Banks* (8) (3 Man. & G. at p. 267) that a security by one of two joint debtors would merge the remedy against both. In the case of *Lechmere v. Fletcher* (9) (1 Cr. & M. at p. 634) BAYLEY, B., strongly intimates the opinion of the Court of Exchequer, that the judgment against one was a bar for both of two joint debtors, though the point was not actually ruled, as the case did not require it. In the absence of any positive authority upon the precise question we must decide it upon principle and by analogy to other authorities, and we feel no difficulty in coming to the conclusion that the plea is good. If there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage, and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim, *transit in rem judicatam*—the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher."

This case was adopted and approved by the House of Lords in *Kendall v. Hamilton* (10). EARL CAIRNS, L.C., there pointed out that the result did not necessarily depend upon an election between two courses, which would imply that, in order to an election, the fact of both courses being open was known, but was because the right of action could not, after judgment obtained, co-exist with a right of action on the same facts against another person. The ground upon which the rule is founded "is the right of persons jointly liable to pay a debt to insist on being sued together." This was the principle contended for by counsel in *King v. Hoare* (6) and as expressed by PARKE, B. (13 M. & W. at p. 501):

"The principle is that a person who enters into a joint contract has a right to say he will not be sued but with his co-contractor, and the plaintiff by his act cannot deprive him of that right."

But where the obligation binds two or more persons severally a judgment against one is no bar to an action against another. In *Lechmere v. Fletcher* (9) BAYLEY, B., states the case thus (1 Cr. & M. at p. 635):

"There are many cases in the books as to joint and several bonds, from which it appears that, though you have entered judgment on a joint and several bond against one obligor, you are still at liberty to sue the other, unless indeed the judgment has been satisfied; but so long as any part of the demand remains due you are at liberty to sue the other, notwithstanding you have obtained judgment against one. This, I think, establishes the principle that where there is a joint obligation and a separate one also you do not by recovering judgment against one preclude yourself from suing the other."

That statement was recognised by PARKE, B., in *King v. Hoare* (6). If, then, the

law is as it has been stated by the learned judges to whom I have just referred, I can see no ground for saying that where an action is brought in error against a fictitious person, or against a person who is not under any liability, it is a bar to an action against the person who is alleged to be in fact liable, the cause of action in each case being the same.

For the defendants it was contended that if a person who had sold goods to A. afterwards sued a stranger for the price, he could not recover, and in order to support this proposition reliance was placed upon *Buckland v. Johnson* (11) in the Court of Common Pleas, where MAULE, J., said this (15 C.B. at p. 166):

"The circumstance of the present defendant having been a joint converter, or a stranger, makes, I think, no difference. If he were a stranger, the plaintiff, having once recovered in respect of the same goods, cannot recover again the same thing against somebody else. There is an end of the transaction. Having once recovered a judgment, his remedy was altogether gone; his claim was satisfied as against all the world. He was, in fact, in the position of a person whose goods had never been converted at all."

I do not think that that case is an authority for the proposition put forward by the defendants; it is clearly distinguishable on the facts. It appears that in that case the defendant and his son had wrongfully converted the goods of the plaintiff by selling them, and that the proceeds of the sale were received by the defendant alone. The plaintiff, having the election, then sued the son and recovered a verdict for the value of the goods so converted, and the court held that the plaintiff, having made his election to sue for the tort and having recovered what the jury considered the value of the goods at the time of the conversion, could not afterwards bring the action against the father for money had and received. In my opinion, the decision of the Divisional Court was right and must be affirmed, and there must be a new trial of the action.

PICKFORD, L.J.—I agree. The contention put forward on behalf of the defendants is that, if a plaintiff has recovered judgment against a person who turns out not to be liable, that judgment is a bar to his suing the real purchaser of the goods. The decision of the county court judge went somewhat further than that. It has been pointed out that there was no evidence whether there was a firm of Salbstein Bros. in existence or not. They were the defendants against whom judgment had been obtained in the first action, and the learned judge decided that the judgment so obtained was a bar to the action against the defendants. I do not think that that decision can possibly be right, because a judgment against a firm which has no existence cannot operate as a bar to an action against the person or persons in fact liable. Assuming, however, there was such a firm as Salbstein Bros. and that judgment had been duly obtained against that firm, in my opinion, such a judgment cannot be a bar to an action against the person really liable unless it can be shown that he was a partner or in some way jointly liable with the firm. If the firm of Salbstein Bros. and the defendants are either of them liable they must be liable either jointly or severally or alternatively. If they are jointly liable it is well established that a judgment recovered against one is a bar to an action against the other, but if they are severally liable it is clear that it is not a bar, because the course of action is not the same. If there is a joint liability there is only one cause of action, and that becomes merged in the judgment; if the liability is several there are two causes of action and there is no merger. It is possible in this case that the firm of Salbstein Bros. are not liable and that the defendant and his wife are; it is, therefore, a case of several liability. If the defendants contracted to pay for the goods and Salbstein Bros. did not, the judgment which has been recovered against Salbstein Bros. cannot be a bar to an action against the defendants. Therefore, that contention fails. The next point which is taken is that the plaintiffs elected to sue Salbstein Bros. as principals, and that, having so elected, they cannot now sue the agents. If there was evidence

to support that, it would be a good point, but there is no evidence one way or the other. If there was no firm of Salbstein Bros. in existence they could not, of course, be principals to anybody. For these reasons I am of opinion that the order made by the Divisional Court was right and that there must be a new trial.

BANKES, L.J., read the following judgment.—In the county court the defendants relied upon the fact that the plaintiffs had recovered judgment against Salbstein Bros. for the same sum of money for which they are being sued in this action. They did not attempt to set up either that the debt was a joint debt of themselves and Salbstein Bros. or that they acted as agents in the matter for Salbstein Bros. They were content to rest their defence upon the mere fact that judgment had been recovered, and they rested it upon the ground of the maxim *transit in rem judicatam*. The meaning of that maxim has been expounded by **PARKE, B.**, in *King v. Hoare* (6) (13 M. & W. at p. 504). The case has been argued for the defendants upon the assumption that, in considering what any particular cause of action is which is, changed into matter of record, it is sufficient to consider the nature and amount of the plaintiff's claim only without any reference to the nature of the obligation on the part of the person or persons against whom it is sought to establish the claim.

In my opinion, this contention is not well founded. A definition of "cause of action" is given by **BRETT, J.**, in *Cooke v. Gill* (12) where he says (L.R. 8 C.P. at p. 116):

" 'Cause of action' has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed—every fact which the defendant would have a right to traverse."

Some tests of whether a cause of action is the same in any two actions is referred to by **BOWEN, L.J.**, in *Brunsdon v. Humphrey* (13) (14 Q.B.D. at p. 147). As illustrations of what I have said I may refer to the following instances: A. lends money to B. and C. jointly. Here there is only one cause of action; this is clear: see *King v. Hoare* (6) (13 M. & W. at p. 505); *Re Hodgson, Beckett v. Ramsdale* (14), 31 Ch.D. at p. 188, per **BOWEN, L.J.** So also where A. contracts with B. acting as agent for C., here also there is only one cause of action. In either case A. can only recover one judgment because he has only one cause of action. But if A. lends money to B. and C. for which they are jointly and severally liable, there are two causes of action. A. can recover judgment for the debt against B. and, if it is not satisfied, he can recover judgment for the same sum of money against C. The rule which enables him to do this appears to me to be the rule that the judgment against B. is no estoppel as against C. Consequently, the plaintiff is entitled to prove what the facts really are—namely, that he has a separate and distinct cause of action against C. arising out of the several contract.

If this test is applied to the present case, what ground is there for saying that the plaintiffs are not entitled to go into the facts and to show, if they can, that they have a cause of action against the defendants or either of them separate and distinct from any cause of action they may have had against Salbstein Bros.? One way in which the plaintiffs could do this would be by showing that Salbstein Bros. were a non-existent firm, or that, although when they issued the writ and recovered judgment by default they were under the impression that they had a right of action against Salbstein Bros., they had since discovered that they were mistaken, and that the defendants were their real debtors, and they had no real cause of action against Salbstein Bros. Apart, therefore, altogether from the proposition that the onus lies upon the defendants of establishing some ground for saying that the cause of action relied on has merged in a judgment, there is, in my opinion, no ground for suggesting that it is not open to the plaintiffs to prove, if they can, that the defendants are the persons really liable to them for this debt. It is said that, if this is the rule of law, a person may recover a number of judgments against different persons for the same sum of money. I see no great objection to this,

having regard to the fact that a plaintiff cannot receive the amount claimed more than once; and the objection is less, in my opinion, than the objection that the defendant should escape a just liability upon the ground that the plaintiff made a mistake as to the proper person to sue. We have been referred to a number of dicta of learned judges, but, when read in reference to the facts of the particular cases in which those dicta occur, nothing I have said is, in my opinion, in conflict with them. The deputy-judge decided the case upon the question of law submitted to him. I think that the case must go back to be tried on the facts.

Appeal dismissed.

Solicitors: *Edgar & Co.*; *W. J. Wenham*, for *Cushman & Cunningham*, Brighton.

[*Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.*]

MORRISON v. SHEFFIELD CORPORATION

[COURT OF APPEAL (Viscount Reading, C.J., Pickford and Scrutton, L.J.J.), July 5, 1917]

[Reported [1917] 2 K.B. 866; 86 L.J.K.B. 1456; 117 L.T. 520;
81 J.P. 277; 33 T.L.R. 492; 61 Sol. Jo. 611; 15 L.G.R. 667]

Highway—Lighting—Duty of local authority—Duty to take reasonable care for safety of public in abnormal circumstances—Trees on highway surrounded by spiked guards—Street lighting subsequently prohibited under war-time regulations—Personal injury from collision with guard in darkness—Public Health Acts Amendment Act, 1890 (53 & 54 Vict., c. 53), s. 43.

The defendants, an urban authority, acting under powers conferred on them by the Public Health Acts Amendment Act, 1890, planted some trees in the highway and erected spiked iron guards around them. When the guards were erected there was normal lighting in the highway and the guards were reasonably safe for the public. Subsequently, the chief constable made an order under the Defence of the Realm Regulations requiring street lights to be put out at a certain hour, and after the order came into effect the plaintiff, while walking along the highway in the darkness, collided with one of the iron guards and suffered injury. In an action for damages for negligence the jury found that the guard was dangerous in the darkness and that the defendants had failed to take reasonable measures to avoid the danger, and judgment was entered for the plaintiff. On appeal,

Held: the defendants were under a continuing duty to take reasonable care to prevent the guards from being a danger to the public even when abnormal conditions prevailed; they were not absolved from their duty of care because of the altered conditions in the highway caused by the lighting order, and, accordingly, the verdict and judgment must stand.

Great Central Rail. Co. v. Hewlett (1), post p. 1027, distinguished.

Notes. Distinguished: *Ljus v. Stepney Borough Council*, [1940] 4 All E.R. 463. Approved and followed: *Fisher v. Ruislip-Northwood U.D.C.*, [1945] 2 All E.R. 458. Referred to: *Baldock v. Westminster City Council*, [1918–19] All E.R. Rep. 430; *Sheppard v. Glossop Corp.*, [1921] All E.R. Rep. 61; *Oldham v. Sheffield Corp.* (1927), 136 L.T. 681.

As to negligence in relation to statutory functions, see 28 HALSBURY'S LAWS (3rd Edn.) 6, para. 3, and as to interference with private rights by a public authority

exercising permissive powers, see *ibid.*, vol. 30, pp. 692 et seq. For cases on a public authority's duty to take care, see 38 DIGEST (Repl.) 6 et seq.

Case referred to:

- (1) *Great Central Rail. Co. v. Hewlett*, post p. 1027; [1916] 2 A.C. 511; 85 L.J.K.B. 1705; 115 L.T. 349; 32 T.L.R. 707; 60 Sol. Jo. 678; 14 L.G.R. 1015, H.L.; 38 Digest (Repl.) 6, 14.

Also referred to in argument:

- Moore v. Lambeth Waterworks Co.* (1886), 17 Q.B.D. 462; 55 L.J.Q.B. 304; 55 L.T. 309; 50 J.P. 756; 34 W.R. 559; 2 T.L.R. 587, C.A.; 38 Digest (Repl.) 41, 213.

Appeal by the defendants from a judgment of ROWLATT, J., who tried the action with a jury at Leeds.

By s. 43 of the Public Health Acts Amendment Act, 1890:

"Any urban authority may, if they see fit, cause trees to be planted in any highway repairable by the inhabitants at large within their district, and may erect guards or fences for the protection of the same, provided that this power shall not be exercised nor shall any trees so planted be continued so as to hinder the reasonable use of the highway by the public or any person entitled to use the same. . . ."

In 1902 the defendants, an urban authority, acting under the above powers, caused trees to be planted in various highways in Sheffield. The trees were protected with iron guards about 5 ft. 2½ in. high, the tops of the guards being bent outwards to prevent boys from climbing over the guards. By an order made under the Defence of the Realm Regulations, power was given to local authorities to regulate the lighting of their districts, and on April 3, 1916, the chief constable of Sheffield ordered all the street lights in Sheffield to be put out at a certain hour. On April 20, seventeen days after the order came into effect, the plaintiff at night, without negligence on his part, seriously injured his eye by coming into contact with one of these tree guards. The particulars of the negligence alleged were as follow. (a) Maintaining on the causeway an erection with prongs or spikes in the position and at the elevation of the fence complained of. (b) Leaving the erection in such a position wholly unlighted or insufficiently lighted. (c) Omitting to paint the guard with luminous paint or white paint. (d) Taking no steps or precautions whatever to prevent the erection from being a danger to persons using the highway. The statement of claim alleged both nuisance and negligence, but the following questions were put to the jury on negligence only: (i) Was the guard dangerous in the circumstances of the darkness that existed? (ii) Ought the defendants, if they exercised reasonable foresight, to have taken reasonable measures to have neutralised the danger before the date of the accident? The jury answered both these questions in the affirmative, and awarded the plaintiff £660 damages. ROWLATT, J., gave judgment for the plaintiff. The defendants appealed. For the defendants it was contended that no duty lay on them to make the tree guards reasonably safe in the abnormal circumstances arising from the making of the lighting order. The plaintiff contended that the defendants were under a duty to take care to make the streets reasonably safe in all circumstances.

Tindal Atkinson, K.C., and *Waddy* for the defendants.

Waugh, K.C., and *T. E. Ellison* for the plaintiff.

VISCOUNT READING, C.J., having stated the facts and referred to the questions put to the jury, continued: The defendants have appealed to this court on the ground that there was no evidence to justify the verdict of the jury, inasmuch as there was no evidence of want of care by the defendants, or of any nuisance committed by them; and it is argued that the learned judge ought to have entered judgment for the defendants at the end of the plaintiff's case, or at the end of

A the defendant's case, because it had not been shown that the defendants had committed any breach of duty. The basis of that argument is that the trees were planted, and the guards erected round them, by virtue of statutory authority; and reliance was placed for this purpose upon s. 43 of the Public Health Acts Amendment Act, 1890, which gives power to an urban authority, if they see fit, to cause trees to be planted in a highway, and to erect guards or fences for the protection of the same,

B "provided that this power shall not be exercised nor shall any trees so planted be continued so as to hinder the reasonable use of the highway by the public or any person entitled to use the same, or so as to become a nuisance or injurious to any adjacent owner or occupier."

C The defendants contend that, having erected the guard round the trees, at times and in circumstances when it cannot be contended that they were not reasonably safe and so placed for the protection of the public, no further duty is imposed upon the defendants, because of the order issued by the chief constable, which plunged the city into darkness—that is really the substantial point in the case. The defendants could not contend, and of course their senior counsel has not contended, D that when authority is given by statute to place a tree or a guard in a public highway there is not equally an obligation upon the public authority to whom the powers are granted to exercise those powers with reasonable care, having regard to the reasonable protection which the public is entitled to expect. No question arises with regard to this general principle of law, which is applicable to the exercise of any public authority of permissive powers which may be granted by E statute. But it is contended that when, as in this case, it cannot be suggested that there was a nuisance or want of reasonable care on the part of the defendants in the normal conditions and in the circumstances which existed before the order of April 3 was issued by the chief constable, a greater duty is not imposed upon them, nor has a duty been created which makes it necessary for them to take further precaution during the currency of this order. I am unable to accept that F view of the law. In my judgment, the obligation upon the defendants continues throughout the time that they are maintaining these trees and guards in the public highway. There is no duty upon them to keep them absolutely safe; but there is a duty upon them to use the statutory authorisation which has been given them with reasonable care; and they are not entitled to allow these guards to continue in such a way as to make them dangerous to the public who are using G the highway. Whether or not they have taken reasonable precaution for the protection of the public after the new condition of things arose is, of course, a matter for the jury. Whether or not the defendants had the time, having regard to the seventeen days which had elapsed between the date of the order and the date of the accident, to make the changes or to take the precautions which would be necessary is again a matter for the jury. I am not prepared to say that I should H have arrived at the same conclusion. But that is not the question before us. If there is a duty upon the defendants to take reasonable care in the circumstances which I have described, and to see that the guard was not dangerous in the circumstances of the darkness that existed on April 20, the date of the accident, it becomes a question of degree as to what amount of care ought to be exercised; and that must be a question which the jury must determine; and I am not prepared to say that I there is no evidence upon which they could come to the conclusion that the I defendants had omitted to take the proper precautions.

We have had to consider during the course of the argument *Great Central Rail. Co. v. Hewlett* (1), although, as counsel for the defendants has told us, he does not suggest that this case is an authority in his favour; and upon examination it is abundantly plain that it does not go so far as the contention which is put forward on behalf of the defendants here. There a gateway had been erected with posts by the Great Central Railway Co. in the Marylebone Road, for the purpose of protecting

the ingress and egress to and from their station. After the orders had come into force which necessitated a darkness with which we have become familiar, at any rate during part of the war, a taxi-cab driver drove into the gate and was injured; and it was contended that the defendants ought to have put some kind of guard, a light, if it would have been allowed, or else painted the gate white in outline, or have painted some portion to have indicated to the driver that there was a gate at this particular place. The House of Lords held that in that case there was no duty upon the defendant, the Great Central Railway Co., because Parliament had by statute permitted the Great Central Railway Co. to keep the gateway and post where it had been erected, and Parliament having once done that, the House of Lords held that it could not be said that there was any obligation upon the defendants to do anything else; that all that Parliament had done was to give them authority to preserve and continue a thing where it actually was; and that being so, that no action would lie for negligence against the railway company in the circumstances which I have indicated. The general principle of law to which I have adverted was nowhere in controversy. As LORD PARKER OF WADDINGTON says in his speech (post p. 1029):

"it is undoubtedly a well-settled principle of law that when statutory powers are conferred they must be exercised with reasonable care, so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned, and was likely to be occasioned by their exercise, damage for negligence may be recovered."

Now here, although that principle is not in controversy, it is said that it has no application to the present case. That is where I differ from the argument that has been put by senior counsel for the defendants. I have come to the conclusion that the duty was a continuing one; that the degree of care that was required was not exhausted by erecting the fence around the tree in such a way as to be reasonably safe for the protection of the public at the time of its erection. In my view, the public authority to whom this permissive power has been given continued under the duty so as to keep that guard that it would not be a danger to the public passing along this public highway. I am not unmindful of the argument of counsel and of the obligation that this principle may be imposing upon public authorities during times of great stress and emergency, when abnormal conditions prevail, and when there are undoubtedly exceptional orders which are frequently issued and continued in force. But I cannot think that that abnormal state of things can absolve the defendants from the duty placed upon them as a public authority to use their powers in such a way as to be reasonably safe for the public. For this reason I come to the conclusion that the view taken by the learned judge was right, that it became a question of fact for the jury as to whether reasonable care had been exercised and as to whether the guard was dangerous in the circumstances; and the jury having found the answer in the affirmative to both of them, the result must be that the verdict and judgment must stand.

I desire only to add that we have had considerable argument as to whether or not the point was open to the plaintiff that the condition of the guard was that it was some $3\frac{1}{2}$ in. out of plumb, that it was only 5 ft. $2\frac{1}{2}$ in. from the ground, with the result that the point which would, according to the construction, protrude 3 in. from the guard almost at right angles, protruded in this particular case $6\frac{1}{2}$ in. Whether that was open to the plaintiff or not in the particular case, it becomes unnecessary to say; but I am inclined to the view that in the way in which the case was conducted the plaintiff had taken his stand upon the points which were actually put to the learned judge. Certainly that was the learned judge's view in the summing-up, because he left no question as to the normal condition before the lighting order came into effect. It is unnecessary to say any more than that about it, for the reason that I have come to the conclusion that the verdict and judgment must stand.

PICKFORD, L.J.—I agree. The tree and the guard were erected under the statutory powers of s. 43 of the Public Health Acts Amendment Act, 1890; and, therefore, the putting of them there was right; but they had to be put there, and they had to be kept there, in my opinion, in such a way as not to be a danger to the public, or at any rate, to put it more correctly, the defendants had to take reasonable care that they should not be a danger to the public. They were not a danger to the public in ordinary times when the lighting was ordinary; and I do not think any case was made that they were. I see no reason for thinking that they were. The minute point with regard to their being out of cant of three inches, the result of which was that anybody walking along the street would come into collision with this guard three inches sooner than he otherwise would have done, and the particular discussion as to the height, in my opinion, have very little, if any, importance.

I start with this, that the guard as put there was safe under ordinary conditions. The conditions changed; and the point is whether, having put the guard there safe under ordinary conditions, there was no further obligation upon the defendants at all, and that in any change of conditions they were at liberty to allow it to remain exactly as it was and to take no care to prevent it being dangerous under the altered conditions. That is the principal proposition put before us, and, in my opinion, it is too broad. I think that under circumstances like these, if the conditions alter, there is an obligation on the persons who put the guard there to see that it is not a danger under the altered conditions. The lighting order came into existence suddenly; it was an order indeterminate in length. There is nothing to show that the defendants had reason to think that it would last a short time or a long time. A very short time, seventeen days, had elapsed from this sudden order to the time when the accident happened. All these things ought to be considered, because they were put to the jury by the learned judge. It may be that the conclusion that I should have come to would have been that no want of reasonable care was made out. But that was a question for the jury, and we are not asked to set the verdict aside on the ground of its being against the weight of evidence. If the jury, considering all those things—considering the time, the opportunity that there was to take some precaution, and considering that no precautions were taken at all, and considering that some precautions might have avoided this accident—came to the conclusion that there was a want of reasonable care, then I do not think we can say that there was no evidence upon which they could act. There being the obligation which I have endeavoured to express, it is stated that the decision would cast a very great burden upon public authorities. It may be so. We cannot help that, if it is the law. It is said that it would involve this, that they must take precautions to light or to guard or to paint or do something to every lamp post and every tramway post, every kerb stone and everything else in their district. I venture to think that it does not impose any such obligation. It imposes an obligation to do what is reasonable; and it is not reasonable to suppose that they would have to take precautions against every possible sort of accident. It does not impose any such obligation as that upon them. It simply imposes an obligation to take reasonable care that, under these conditions, the altered conditions, what they have put in the roadway shall not be a nuisance and a danger. All these things would be for the jury to consider, in the case of any complaint against the defendants for not having taken precautions in any particular instance. In this particular instance, I think, there was evidence upon which the jury could act, although it was not great; and as to the real point whether there was this obligation or not, I think this appeal should be dismissed.

SCRUTTON, L.J.—I agree.

Appeal dismissed.

Solicitors: Rollit, Sons & Compston, for W. E. Hart, Town Clerk of Sheffield; H. G. Campion & Co., for Clegg & Sons, Sheffield.

[Reported by EDWARD J. M. CHAPLIN, Barrister-at-Law.]

HILL v. SETTLE

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Warrington, L.J., and A. T. Lawrence, J.), January 18, 1917]

[Reported [1917] 1 Ch. 319; 86 L.J.Ch. 243; 116 L.T. 263; 33 T.L.R. 168; 61 Sol. Jo. 217; [1917] H.B.R. 23]

Bankruptcy—Property available for distribution—After-acquired property—“Intervention” by trustee—Notice in general terms requiring payment to trustee of all sums becoming due to bankrupt—Vesting of property in trustee—Power of trustee to withdraw notice—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 47 (1).

A notice, dated Oct. 26, 1915, and served on the defendant by the official receiver as trustee in the bankruptcy of J. R. H., was in the following terms: “Re J. R. H.—I beg to give you notice that I require payment to be made by you to me of all moneys which may now and hereafter be and become due from you to the bankrupt, on the ground that he has not obtained his discharge in the proceedings.” On July 31, 1916, the official receiver wrote to the defendant a letter in which he said: “As there are disputes between [the bankrupt and the defendant] as to the facts, and I have no knowledge of what the true facts or position is, I am advised that my proper course is to withdraw the notice I gave to [the defendant] on Oct. 26, 1915, and I withdraw such notice accordingly.”

Held: (i) although the notice of Oct. 26, 1915, was in general terms and did not specify with particularity the debts which might become due from the defendant to the bankrupt it unmistakably manifested what was the trustee's intention, and, therefore, it was a good notice and constituted a valid “intervention” by the trustee within s. 47 (1) of the Bankruptcy Act, 1914 (2 HALSBURY'S STATUTES (2nd Edn.) 321), which was effective to vest in the trustee the after-acquired property in question; (ii) the notice of Oct. 26, 1915, having absolutely and indefeasibly vested the property in the trustee, the trustee, by the letter of July 31, 1916, could not withdraw that notice and re-vest the property in the bankrupt.

Notes. Referred to: *Re Pascoe, Ex parte Trustee in Bankruptcy and Northumberland County Council*, [1944] 1 All E.R. 281.

As to after-acquired property of bankrupt and intervention by trustee, see 2 HALSBURY'S LAWS (3rd Edn.) 429-431, and for cases see 5 DIGEST (Repl.) 794, 795.

Cases referred to:

- (1) *Cohen v. Mitchell* (1890), 25 Q.B.D. 262; 59 L.J.Q.B. 409; 63 L.T. 206; 38 W.R. 551; 6 T.L.R. 326; 7 Morr. 207; C.A.; 5 Digest (Repl.) 787, 6675.
- (2) *Herbert v. Sayer* (1844), 5 Q.B. 965; 2 Dow. & L. 49; Dav. & Mer. 723; 13 L.J.Q.B. 209; 8 Jur. 812; 114 E.R. 1512, Ex.Ch.; 5 Digest (Repl.) 796, 6736.
- (3) *Affleck v. Hammond*, [1912] 3 K.B. 162; 81 L.J.K.B. 565; 106 L.T. 8; 19 Mans. 111, C.A.; 5 Digest (Repl.) 784, 6659.

Also referred to in argument:

Jameson & Co. v. Brick and Stone Co., Ltd. (1878), 4 Q.B.D. 208; 48 L.J.Q.B. 249; 39 L.T. 594; 27 W.R. 672; 5 Digest (Repl.) 1070, 8623.

Buchan v. Hill, [1888] W.N. 233; 5 Digest (Repl.) 1068, 8608.

Re Carter, Ex parte Carter (1876), 2 Ch.D. 806; 45 L.J. Bcy. 145; 35 L.T. 388, C.A.; 5 Digest (Repl.) 794, 6723.

Re Clarke, Ex parte Beardmore, [1894] 2 Q.B. 393; 63 L.J.Q.B. 806; 70 L.T. 751; 10 T.L.R. 459; 38 Sol. Jo. 492; 1 Mans. 207; 9 R. 498, C.A.; 5 Digest (Repl.) 793, 6718.

Re New Land Development Association and Gray, [1892] 2 Ch. 138; sub nom. *Re New Land Development Association, Ltd. and Fagence's Contract*, 61 L.J.Ch. 495; 66 L.T. 694; 40 W.R. 551; 36 Sol. Jo. 446, C.A.; 5 Digest (Repl.) 788, 6678.

Appeal by the defendant from an order of EVE, J., on an application for an order that an action brought by John Hill, a bankrupt, against Victor Alfred Settle should be stayed until the official receiver had been added as a party, or, alternatively, that John Hill should give security for costs.

Clayton, K.C., and *T. E. Haydon* for the defendant.

Maugham, K.C., and *T. K. Crossfield* for the plaintiff, the bankrupt.

LORD COZENS-HARDY, M.R.—This appeal raises a curious and important point. The bankrupt, Hill, was adjudicated bankrupt on Dec. 19, 1908. He has never obtained his discharge, and the official receiver is the trustee in his bankruptcy. According to the statement of claim, in 1913 the bankrupt entered into partnership with the defendant to carry on the profession of physicians and surgeons for a period of five years. In the same year there was a further agreement, by which the defendant agreed to carry on the business alone and to give the bankrupt half the profits. On Oct. 26, 1915, the official receiver, as trustee in bankruptcy, served the following notice in writing upon the defendant:

"*Re John Robert Hill.*—As official receiver and trustee of the estate of John Robert Hill, described as of 456, Attercliffe Road, Sheffield, surgeon, I beg to give you notice that I require payment to be made by you to me of all moneys which may now and hereafter be and become due from you to the bankrupt, on the ground that he has not obtained his discharge in the proceedings."

That notice was given to the defendant, who himself informed the bankrupt of this intervention, as appears by a letter of Oct. 31, 1915. On Mar. 13, 1916, the writ in this action was issued. The statement of claim was delivered in May, and on July 7 the defendant made an application to stay the proceedings until the trustee in bankruptcy was made a party to the action, because, in his view, the trustee would be entitled to any money which might become due from the defendant to the bankrupt. On July 31, 1916, the official receiver wrote this letter:

"Referring to the action commenced by the bankrupt against Dr. Settle and the order made staying proceedings in the action until I was made a party, as there are disputes between the parties as to the facts, and I have no knowledge of what the true facts or position is, I am advised that my proper course is to withdraw the notice I gave Dr. Settle on Oct. 26, 1915, and I withdraw such notice accordingly."

In fact, no order for a stay had been made. The matter came before EVE, J., on the adjournment into court of the summons which had been before the master.

The learned judge dealt with two points. He first of all dealt with the notice of Oct. 26, 1915, which I will call the intervention of that date, and he said that, in his view, that intervention was complete, and that as long as it was in force it prevented the plaintiff from maintaining his action. The learned judge said in his judgment:

"The first question to be determined is: Did the trustee intervene in such a way as to bring about these results? In my opinion, he did. The position of the trustee as to these moneys, which represented after acquired property of the bankrupt, was that he might either claim them as assets vested in him as trustee, or he might, if he thought fit, allow the bankrupt to receive and use them for his own purposes, just as if he were free from the disadvantages of being an undischarged bankrupt. A trustee who adopts the latter course runs the risk of being called upon to justify his conduct by his *cestuis que*

trust, the creditors of the bankrupt, and this no doubt is an important factor in determining his course of conduct. When he has once made it clear that it is his intention to intervene and to assert his paramount title to the property, the bankrupt is disqualified from giving a valid receipt for and from maintaining an action to recover such property. So long as the trustee's intention is unmistakably manifested it is, in my opinion, immaterial how it is manifested, and in this case I hold that the notice of October, 1915, constituted an effectual intervention by the trustee and disqualified the bankrupt from instituting this action or giving a valid receipt for the moneys claimed in the writ."

I think that that part of the judgment is perfectly right. I cannot assent to the point strenuously argued by counsel for the bankrupt that there is something in this notice so vague and uncertain as to prevent it from being an intervention, which I must afterwards endeavour more carefully to explain. I think that it is a perfectly good notice. There was some money alleged to be due from the defendant to the bankrupt. The statement of claim showed that what the bankrupt was claiming was this: "There is a sum of money due from you, the defendant, to me arising out of partnership transactions and the subsequent agreement which terminated the partnership." I cannot see that there is any reason to hold that the notice is bad because it does not specify more particularly the nature of the debts which may become due. I think that it is a perfectly good notice, and that it would be technical and beyond all reason to say that it is not a good notice because you cannot tell the nature of the debts which are sought to be charged. The generality of the claim for "all moneys which may now and hereafter be and become due" cannot be complained of. It is not a claim for all future assets; it is not general in that sense, but it is simply saying, "I intervene in respect of moneys becoming due from you, Settle, to the bankrupt." I think, therefore, that the commencement of the proceedings by the official receiver was right.

Then the official receiver purported to withdraw the intervention by the letter of July 31, 1916, which I have referred to. It is remarkable that this action was commenced at a time when the notice of intervention was in force and had not been withdrawn. My present view is that upon that ground alone the action must fail as long as the intervention is in force. As the learned judge in the court below said:

"I hold that the notice of October, 1915, constituted an effectual intervention by the trustee and disqualified the bankrupt from instituting this action or giving a valid receipt for the moneys claimed in the writ."

The learned judge, however, based his decision on a second point. He said that the trustee had a right to withdraw that notice and that the effect of withdrawal was to undo the intervention which had taken place.

It is necessary to consider somewhat carefully what is the law upon matters of this kind. Under s. 44 of the Bankruptcy Act, 1883 [corresponding to s. 38 of the Bankruptcy Act, 1914] all the property belonging to or vested in the bankrupt, or acquired by him or devolving upon him before his discharge is vested in the trustee. After-acquired property, according to the language of the statute, is vested in him. By a long series of authorities, which it is quite impossible, I think, for any court to review, it was held that that vesting could not be interpreted in the strict and full sense of the term. As long as the trustee did not intervene, the bankrupt himself had power to enter into transactions with people for dealing with his after-acquired property. That is dealt with in so many cases that I do not think it is necessary for me to refer to any more than *Cohen v. Mitchell* (1), where the earlier authorities are carefully considered.

The legislature has passed two Acts of Parliament, neither of which, I agree, expressly deals with the present case, because one was passed in 1913 and the other in 1914, while this bankruptcy was in 1908. The legislature has plainly recognised the validity and effect of that which is to be found in what is, no

A doubt, judge-made law as expressed in a series of decisions extending over some 200 years. In s. 47 (1) of the Act of 1914 the legislature says:

B "All transactions by a bankrupt with any person dealing with him *bonâ fide* and for value, in respect of property, whether real or personal, acquired by the bankrupt after the adjudication, shall, if completed before any intervention by the trustee, be valid against the trustee, and any estate or interest in such property which by virtue of this Act is vested in the trustee shall determine and pass in such manner and to such extent as may be required for giving effect to any such transaction."

C Taking the language of the section first, that, in my view, clearly indicates "intervention" as a point of time. It says nothing about intervention continued from time to time. There is a period of time, namely, before any intervention by the trustee, during which the bankrupt's transactions, if *bonâ fide* and for value, and if completed before intervention, are valid against the trustee, and the trustee cannot impeach them—that is to say, if they are in good faith, for value and completed, then the trustee cannot interfere with or impeach them. Then, as there was some difficulty in seeing what would follow those transactions, the Act of Parliament goes on to provide that:

D "any estate or interest in such property which by virtue of this Act is vested in the trustee shall determine and pass in such manner and to such extent as may be required for giving effect to any such transaction."

E That enables the court or a judge to have a firm foundation for the theory established by numerous decisions, and says that that is the way in which effect is to be given to the title for value acquired by transactions completed. In my view, the section is an assertion of what was the common law, and does not introduce any novelty except in the last few lines, which imply a mode in which the title of persons with whom transactions are had is made unimpeachable.

F Apart from that section, what was the position? In *Cohen v. Mitchell* (1), a case of the very highest authority, decided in 1890, LORD ESHER said (25 Q.B.D. at pp. 266, 267):

G "Of course all the property which belongs to the bankrupt at the time of the bankruptcy becomes at once the property of the trustee. But does all the property acquired by the bankrupt after his bankruptcy belong to the trustee absolutely, so that the bankrupt is divested of all interest and property in it, or does it remain the property of the bankrupt, so, that, at any rate he can deal with it until the trustee interferes? In the case of property coming under the bankruptcy, if the bankrupt were to endeavour to maintain an action, in which the defendant was not estopped from denying the bankrupt's property in the subject-matter of the action, it would be a good plea that the property is not his, but is vested in the trustee; but with regard to after-acquired property, it has been held that such a plea would be bad unless it went on to show that the trustee had intervened before the transaction in respect of which the action is brought. That seems to be conclusive to show that the bankrupt has a property, whether absolute or not is immaterial, in such things till the trustee interferes."

I Then he says that the authorities do not conflict with the view which he has expressed, and he gives judgment to that effect. FRY, L.J.'s, judgment, which seems to me to be extremely important, after quoting the judgment of TYNDALL, C.J., in *Herbert v. Sayer* (2) in the Court of Exchequer Chamber, said (*ibid.* at p. 269):

"Now, I adopt that view, with the single exception that I think the language 'disaffirm his act' should be interpreted to mean 'intervene.' because I do not think that the trustee who does intervene has any power retrospectively to disaffirm what has otherwise been validly done by the bankrupt; but from

the moment of his intervention the property vests in him absolutely, and can no longer be recovered by or dealt with by the bankrupt."

Assuming, as, in my view, I have stated is the fact, that in the present case there was a good intervention from the date of the notice, thereafter property could not be recovered by or dealt with by the bankrupt. "That seems to me to be an authority which shows that even if the view is that the property was vested in the bankrupt until intervention, that will not help the bankrupt here. I think that the truer and safer view is that which is expressed by several of the judges—that the bankrupt was something in the nature of an agent who had power to deal in these transactions for value with his after-acquired property before intervention, but that was a right which ceased absolutely on intervention. From that moment the trustee's title was complete, and the property could no longer be "dealt with by the bankrupt" in the language of *Fry, L.J.* If that be so, the property was at the date of the notice by the official receiver of Oct. 26, 1915, was vested in the trustee absolutely, and the bankrupt had no power whatever henceforward to deal with it. To talk of a continuous interference, or ready and constant interference, is to talk of something which I do not understand. Interference merely refers to a *punctum temporis*—to something which happens before or something which happens after that particular period.

What authority is there for suggesting withdrawal, if withdrawal can be effectual? If the property was at the date of the intervention absolutely and indefeasibly vested in the trustee without any power of the bankrupt to dispose of it by any transactions, what possible authority can there be for saying that there can be a withdrawal having the effect of re-vesting the property in someone else? There is not a vestige of authority in favour of that view. *Affleck v. Hammond* (3) ([1912] 3 K.B. at p. 173), in which *Kennedy, L.J.*'s, dictum is to be found, seems entirely distinguishable. There was nothing in the judgments of *Vaughan Williams* and *Buckley, L.JJ.*, to support it, and *Kennedy, L.J.*'s, dictum—for, on the face of it, it is mere dictum—does not amount to much. That was a case in which there was an assignment of a sum due for commission in respect of after-acquired property. But it was personal earnings, and probably not more than was required for maintenance. It was property which would not vest in or pass to the trustee except so far as it was not required for maintenance. There the trustee simply said that he had no title to the property, and that his notice was given wrongly. To give an instance: Suppose the bankrupt is John Smith and the trustee sees a notice that John Smith has come into a legacy of £1,000. The trustee gives notice with regard to that, and it turns out that it is not John Smith the bankrupt, but another John Smith. It would be a case in which the trustee's title never did attach to the property. In such circumstances I feel no doubt that the trustee would be perfectly entitled to say: "My intervention was due to a mistake. I never had any title to this property, and, therefore, as my intervention was wrong, I simply tell you to disregard it and I will withdraw it because it was made under a mistake."

In the present case, with great respect to the learned judge in the court below, I do not think that his judgment on this part of the case can stand. He says:

"This attitude gives rise to two further questions—the one, whether a trustee who has once intervened in relation to after-acquired property can determine his intervention, and the other whether—assuming he can determine it at all—he can determine it as from a date antecedent to his notice of determination. I think he can do both. Inasmuch as it rested with him to determine in the first instance whether he should or should not intervene, and to choose the moment for intervention if he decided on intervention, I cannot myself see any reason why he should not have the same discretion in determining whether or no the intervention ought to be persisted in or whether it ought ever to have been made. Facts coming to his knowledge subsequent to the intervention

A may satisfy him that his intervention was from the first a mistake, or he may be able to make such terms with the bankrupt as to future earnings as may make a continuance of the intervention less in the interests of his cestuis que trust than its determination. I think in either case he has a power to put an end to the intervention, and when it comes to a question of date from which the intervention is to be treated as determined, I think the discretionary power vested in him in this respect must at least be as wide as the discretion he possesses in fixing upon the date to intervene."

B With great respect to the learned judge, I think that he overlooked the effect of the absolute and indefeasible vesting of this property in the trustee after his intervention. The learned judge does not really face the difficulty that withdrawal of a notice cannot operate as a re-vesting of the property in the bankrupt. For C these reasons I think that the decision of the learned judge was wrong, and that, therefore, the appeal must be allowed with costs. The order of the court below will accordingly be discharged and all proceedings will be stayed until the trustee in bankruptcy be added as a co-plaintiff. There will be a liberty to apply if that is not done within a reasonable time.

D **WARRINGTON, L.J.**—I agree. The main question, and I think the only substantial question, is whether the effect of the withdrawal, on July 31, 1916, of the notice of Oct. 26, 1915, is to re-vest in the bankrupt the right of action which he seeks to enforce in the present proceedings. We are dealing here simply with an item of property which consists of a chose in action. The law, stated E shortly, would appear to be this. Under the provisions of the Bankruptcy Acts property acquired by the bankrupt, including rights of action under contracts subsequent to the date of the order of adjudication—i.e., after the commencement of the bankruptcy—is vested in the trustee. So far the provisions of the Acts of Parliament appear to be clear. But, by a long series of decisions, it is now settled that, although the property is vested in the trustee, to use the words of the F Court of Appeal in *Cohen v. Mitchell* (1) (25 Q.B.D. at p. 267):

"Until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him *bonâ fide* and for value, in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee."

G With regard to choses in action, that requires a little amplification, because among dealings with such a class of property is included the right of action to recover money represented by what lawyers call a "chose in action." In other words, until the trustee has intervened the right of action remains vested in the bankrupt. But, from the moment that the trustee intervenes—using the words of Fry, L.J., in *Cohen v. Mitchell* (1) (*ibid.* at p. 269)—"the property vests in him"—the trustee H —"absolutely, and can no longer be recovered by or dealt with by the bankrupt." Therefore, in the case of a chose in action, which is the only kind of property we are dealing with, I think that there can be no question that the effect of the intervention by the trustee is to vest in the trustee in bankruptcy the right of action which previously was vested in the bankrupt himself. If so, then at the date when this action was commenced, and at the date when Eve, J., made his I order refusing the defendant's application, the right of action was vested in the trustee in bankruptcy and he was a necessary party to the action.

But it is said that, although the intervention of the trustee may have the effect which I have just mentioned, yet the trustee may destroy that right and restore the previously existing right of the bankrupt by withdrawing the intervention. I do not know quite, to begin with, what is meant by "withdrawing the intervention." The intervention is there; it has taken place and it has a certain legal operation. What the bankrupt is really contending for is that it is open to the trustee to bring about another legal position and to destroy that which is already

operating, namely, by re-vesting the property in the bankrupt. In my opinion, that cannot be done. If we are to hold that the intervention was capable of being revoked, we should be unduly adding another element to the judge-made law which has already modified the express words of the Bankruptcy statutes. That, it seems to me, we are not at liberty to do. I say that with all respect to Eve, J.—using, I think, the words which the Master of the Rolls has already used—that he has forgotten that the exercise of what he calls the discretionary power of the trustee has had the legal effect to which I have already referred. It is not as if the trustee had a discretionary power which he might exercise one way at one time, and one way at another time. The exercise itself of the discretionary power has a certain legal effect, and it seems to me that it is not competent for the trustee to destroy that effect by something which he does afterwards.

There is only one other point. It was contended on behalf of the bankrupt that the notice of Oct. 26, 1915, was not an intervention on the part of the trustee within the meaning of the rule that I have referred to because it was in general terms, that is to say, a notice by the trustee requiring payment of moneys due or which had become due from the debtor to the bankrupt. In my judgment, with all respect to the argument, there is nothing in that point. The property in question is a debt due from the person to whom the notice was addressed to the bankrupt, and the notice is quite sufficient to make it improper thereafter for the debtor to pay any part of that debt to the bankrupt or to anyone except the trustee in bankruptcy. It seems to me that that is quite sufficient, and it matters not a bit whether there may hereafter be moneys becoming due under other contracts to which that notice would not apply, or could not apply. I do not think it matters in the least. It was a notice with regard to an existing debt, and, so far as that is concerned, it constitutes an intervention by the trustee. On the whole I think that the order of Eve, J., was wrong, and that this appeal should be allowed.

A. T. LAWRENCE, J.—I entirely concur in what has been said by the Master of the Rolls and WARRINGTON, L.J. It seems to me that this property, which was after-acquired property, vested in the trustee in bankruptcy absolutely when he gave his notice of intervention. And once it had vested in him absolutely I do not think it is possible to say that anything has taken it out of him. It was argued that the notice was a bad one by reason of its being in general terms. But I think that the argument which counsel sought to make, that it is necessary to have a specific and particular notice in order to affect the property, cannot be right. The reason is that it is a notice which has to be given by a trustee whose information may be extremely vague, and it would, I think, have the worst possible effect if we said that he must deliver a legal instrument actually touching the property itself in its terms. In my judgment, it is sufficient if he clearly conveys the fact that he requires delivery of the property to him. In the present case he required the payment “of all moneys which may now and hereafter be and become due from you to the bankrupt.” That shows that he was dealing with something, or affecting to deal with something which had become due under some contractual relationship, such as a contract of tenancy or a partnership—a contract of some such nature as to cause moneys to become due in the future. The trustee claims all those moneys, and thereby it seems to me that he shows that he is claiming title to the rights of the bankrupt in this partnership.

EVE, J., says in the earlier part of his judgment :

“When he [the trustee] has once made it clear that it is his intention to intervene and to assert his paramount title to the property, the bankrupt is disqualified from giving a valid receipt for and from maintaining an action to recover such property.”

I entirely agree with that. But then the learned judge goes on to say that the trustees may determine his intervention. I think that there the learned judge ignored the argument which counsel for the defendant addressed—namely, that

A this is a matter which deals with the vesting of property. Once you look at it from that point of view, it seems to me impossible to say that a mere notice of withdrawal will re-vest the property. It is quite true that the property was vested in the trustee in a qualified sense before the notice of intervention. But it was only in a qualified sense, and the proposition stated in *Cohen v. Mitchell* (1) is exactly that which has been reproduced in s. 47 of the Bankruptcy Act, 1914. It is evident

B that the section is, in effect, a statutory declaration of the validity of the proposition in *Cohen v. Mitchell* (1). I do not think that the argument that this notice could be treated as a re-assignment is sound. It is not in any form a conveyance, and there are no words of assignment in it. To withdraw a notice cannot be said to have the effect of re-assigning property. It is true that when the trustee has acquired after-acquired property by his intervention, he can sell it and dispose of it in the

C ordinary way that anyone else could, but that does not entitle us to say that the giving of a notice of withdrawal is a form of assignment. Therefore, I entirely agree with what has been said—that the learned judge in the court below did not deal with this case effectually in the latter part of his judgment.

Appeal allowed.

D Solicitors: *Redpath, Marshall & Holdsworth*, for *R. F. Payne*, Sheffield; *Aldous & Co.*, for *Richardson & Mitchell*, Sheffield.

[Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]

F HAYWARD v. DRURY LANE THEATRE, LTD. AND ANOTHER

[COURT OF APPEAL (Viscount Reading, C.J., Scrutton, L.J., and Neville, J.), July 30, 1917]

[Reported [1917] 2 K.B. 899; 87 L.J.K.B. 18; 117 L.T. 523;
33 T.L.R. 557; 61 Sol. Jo. 665]

G *Negligence—Duty of occupier of premises to visitor—Volunteer with interest in common with occupier.*

Where a person voluntarily and gratuitously places himself under the control of another to act in the capacity of a servant, both persons having a common interest in the transaction, he is not a mere volunteer, but has the same

H rights as an invitee (see note infra).

The plaintiff, a professional dancer, gratuitously attended rehearsals for a revue in the hope that she would thereby obtain an engagement to take part in the revue when produced. She was not under contract with the defendants, the producers of the revue, but they allowed her to join in the rehearsals so that they could, without expense to themselves, ascertain whether she was fit to be engaged. During a rehearsal the plaintiff was injured by the negligence of

I a servant of the defendants.

Held: though a volunteer, she was a volunteer with an interest in common with the defendants, and was entitled to recover damages from them in respect of the negligence of their servant.

Notes. The doctrine and defence of common employment was abolished by s. 1 (1) of the Law Reform (Personal Injuries) Act, 1948: 25 HALSBURY'S STATUTES (2nd Edn.) 364. The duty which an occupier of premises owes to his visitors is

now the common duty of care defined by s. 2 (2) of the Occupier's Liability Act, 1957: 37 HALSBURY'S STATUTES (2nd Edn.) 832. The "visitors" to whom the duty is owed are those persons who at common law would be treated as invitees or licensees (see s. 1 (2) of the Act), but not volunteers. It is on this point that the present case is included in these reports.

Referred to: *Kimber v. Gas Light and Coke Co.* (1918), 87 L.J.K.B. 651; *Hardy v. Central London Rail. Co.*, [1920] All E.R. Rep. 205; *Heasmer v. Pickfords, Ltd.* (1920), 36 T.L.R. 818; *Sutcliffe v. Clients Investment Co.*, [1924] 2 K.B. 746; *Silverman v. Imperial London Hotels, Ltd.*, [1927] All E.R. Rep. 712; *Coleshill v. Manchester Corpn.*, [1928] 1 K.B. 776; *Little v. North Riding of Yorkshire County Council* [1934] All E.R. Rep. 222; *Purkis v. Walthamstow Borough Council*, [1934] All E.R. Rep. 64; *Weigall v. Westminster Hospital*, [1936] 1 All E.R. 232; *Bromiley v. Collins*, [1936] 2 All E.R. 1061; *Holdman v. Hamlyn*, [1943] 2 All E.R. 137; *Hawkins v. Coulsdon and Purley U.D.C.*, [1954] 1 All E.R. 97; *Dyer v. Ilfracombe U.D.C.*, [1956] 1 All E.R. 581.

As to the duty towards a volunteer and who are visitors, see 28 HALSBURY'S LAWS (3rd Edn.) 7 (f), 47, and for cases see 36 DIGEST (Repl.) 48.

Cases referred to:

- (1) *Indermaur v. Dames* (1866), L.R. 1 C.P. 274; Har. & Ruth. 243; 35 L.J.C.P. 184; 14 L.T. 484; 12 Jur. N.S. 432; 14 W.R. 586; affirmed (1867), L.R. 2 C.P. 311; 36 L.J.C.P. 181; 16 L.T. 293; 31 J.P. 390; 15 W.R. 434, Ex.Ch. 36 Digest (Repl.) 46, 246.
- (2) *Degg v. Midland Rail. Co.* (1857), 1 H. & N. 773; 26 L.J.Ex. 171; 28 L.T.O.S. 357; 3 Jur. N.S. 395; 5 W.R. 364; 156 E.R. 1413; 36 Digest (Repl.) 8, 16.
- (3) *Wiggett v. Fox* (1856), 11 Exch. 832; 25 L.J.Ex. 188; 26 L.T.O.S. 309; 2 Jur. N.S. 955; 4 W.R. 254; 156 E.R. 1069; 34 Digest 31, 86.
- (4) *Potter v. Faulkner* (1861), 1 B. & S. 800; 31 L.J.Q.B. 30; 5 L.T. 455; 26 J.P. 116; 8 Jur. N.S. 259; 10 W.R. 93; 121 E.R. 911, Ex.Ch.; 36 Digest (Repl.) 81, 432.
- (5) *Holmes v. North Eastern Rail. Co.* (1869), L.R. 4 Exch. 254; 38 L.J.Ex. 161; 20 L.T. 616; 17 W.R. 800; affirmed (1871), L.R. 6 Exch. 123; 40 L.J.Ex. 121; 24 L.T. 69, Ex.Ch.; 36 Digest (Repl.) 49, 257.
- (6) *Wright v. London and North Western Rail. Co.* (1876), 1 Q.B.D. 252; 45 L.J.Q.B. 570; 33 L.T. 830; 40 J.P. 628, C.A.; 36 Digest (Repl.) 48, 254.
- (7) *Swainson v. North Eastern Rail. Co.* (1878), 3 Ex.D. 341; 47 L.J.Q.B. 372; 38 L.T. 201; 42 J.P. 357; 26 W.R. 413, C.A.; 34 Digest 214, 1769.
- (8) *Johnson v. Lindsay & Co.*, [1891] A.C. 371; 61 L.J.Q.B. 90; 65 L.T. 97; 55 J.P. 644; 40 W.R. 405; 7 T.L.R. 715, H.L.; 34 Digest 215, 1773.
- (9) *Gautret v. Egerton* (1867), L.R. 2 C.P. 371; 36 L.J.C.P. 191; 15 W.R. 638; sub nom. *Gantret v. Egerton*, 16 L.T. 17; 36 Digest (Repl.) 47, 247.
- (10) *Mersey Docks and Harbour Board Trustees v. Gibbs* (1866), L.R. 1 H.L. 93; 11 H.L. Cas. 686; 35 L.J.Ex. 225; 14 L.T. 677; 30 J.P. 467; 12 Jur. N.S. 571; 14 W.R. 872; 2 Mar. L.C. 353; 11 E.R. 1500, H.L.; 36 Digest (Repl.) 25, 111.
- (11) *Parnaby v. Lancaster Canal Co.* (1839), 11 Ad. & El. 223; 1 Ry. & Can. Cas. 696; 3 Per. & Dav. 162; 9 L.J.Ex. 338; 113 E.R. 400, Ex.Ch.
- (12) *Latham v. R. Johnson & Nephew, Ltd.*, [1913] 1 K.B. 398; 82 L.J.K.B. 258; 108 L.T. 4; 77 J.P. 137; 29 T.L.R. 124; 57 Sol. Jo. 127, C.A.; 36 Digest (Repl.) 49, 262.
- (13) *Lowery v. Walker*, [1910] 1 K.B. 173; 79 L.J.K.B. 297; 101 L.T. 873; 26 T.L.R. 108; 54 Sol. Jo. 99, C.A.; reversed, [1911] A.C. 10; 80 L.J.K.B. 138; 103 L.T. 674; 27 T.L.R. 83; 55 Sol. Jo. 62, H.L.; 36 Digest (Repl.) 55, 301.

Appeal by the defendants from an order made by SHEARMAN, J., in an action tried by him with a common jury in which the plaintiff, Hilda Hayward, a

A professional dancer, claimed damages from the defendants, Drury Lane Theatre, Ltd., and Moss Empires, Ltd., for personal injuries occasioned by the negligence of the defendants' servants.

Rigby Swift, K.C., and Harold Brandon for the defendants.

Rawlinson, K.C., and Harry Dobb for the plaintiff.

Cur. adv. vult.

B July 30, 1917. The following judgments were read.

VISCOUNT READING, C.J.—The plaintiff sued the defendants for damages for personal injuries sustained in consequence of the negligence of the defendants' servants, and obtained a verdict and judgment for £367 against Moss Empires, Ltd. At the trial before SHEARMAN, J., and a common jury the jury found that (i) the plaintiff was not in the employment of Moss Empires, Ltd.; (ii) Moss Empires did not use reasonable care to prevent unexpected danger on the stage of which they knew or ought to have known; and (iii) the injury was caused by the negligence of a person in their employment. All further questions of fact were left to the judge, who held that the plaintiff was on the stage at the request of the defendants, and for the purpose of assisting them as a person they professed themselves willing to engage when the time came. The defendants appeal on the ground that in law the plaintiff must be treated as a person in common employment with the servants of the defendants through whose negligence she was injured, and, therefore, that this action is not maintainable, and that the verdict and judgment for the plaintiff should be set aside and judgment entered for the defendants, Moss Empires, Ltd. It is admitted that the plaintiff was injured by the negligence of a servant of the defendants, and no question arises with regard to the amount of the damages. The only question on this appeal is as to the right of the plaintiff to recover damages upon the undisputed facts.

Moss Empires, Ltd., were in possession of Drury Lane Theatre and were intending on June 12, 1916, to produce a revue called "Razzle Dazzle." For this purpose rehearsals had been proceeding for some weeks, which were attended by the plaintiff, a professional dancer. She was not under contract with the defendants either to attend rehearsals or to perform in the proposed production. She was requested by the defendants to attend the rehearsals without payment, and she attended, the object on their part being to ascertain and test her fitness and capacity for engagement in the revue, and on her part to obtain a contract to perform in the revue when produced. While attending rehearsals on June 9, she was ordered by Wilson, the producer of the revue, who was in the defendants' employment, to stand on a staircase which was part of the scenery. She took her position accordingly, and the staircase, being insecurely fixed owing to the negligent orders of Wilson, collapsed and injured her.

If the plaintiff had been a stranger whom the defendants, for the purposes of their business, had invited to enter upon the premises, it cannot be doubted that they would have been liable for the failure to use reasonable care to prevent damage to the plaintiff from unusual danger which the defendants by their servants knew or ought to have known of: *Indermaur v. Dames* (1). But it is contended that the plaintiff is not in the position of a stranger, and is to be regarded as in common employment with the servant of the defendants, whose negligence caused the injury, and therefore the plaintiff cannot recover. That, in fact, the plaintiff was not in common employment with Wilson is beyond question, as there was no contract of service, but it is argued that she is to be regarded as in the same position as if she had been in common employment, first because she had submitted herself to the orders of Wilson on behalf of the defendants, and, secondly, because she was a volunteer. Upon the first point, the true inference from the facts is that she had not contracted to obey the orders of the defendants' servants, but that if she did not obey them she would imperil her prospects of obtaining an engagement. She was under no legal obligation to obey orders.

The second point raises a question of greater difficulty. The defendants' case rested, in the main, upon the authority of *Degg v. Midland Rail. Co.* (2). There the injured man was voluntarily assisting the railway company's servants in turning a truck when other servants of the railway company negligently ran a steam engine so as to cause his death. His administratrix brought the action. It was held that the action was not maintainable. BRAMWELL, B., said, in delivering the judgment of the court (1 H. & N. at p. 779):

"The cases show that if the deceased had been a servant of the defendants, and injured under such circumstances as occurred here, no action would be maintainable; and it might be enough for us to say that those cases govern this, for it seems impossible to suppose that the deceased, by volunteering his services, can have any greater rights or impose any greater duty on the defendants than would have existed had he been a hired servant. But we were pressed by an expression to be found in those cases to the effect that 'a servant undertakes as between him and the master to run all ordinary risks of the service, including the negligence of a fellow-servant': *Wiggett v. Fox* (3) and it was said there was no such undertaking here. But in truth there is as much in the one case as in the other; the consideration may not be as obvious, but it is competent for a man to agree, and as reasonable to hold that he does agree, that, if allowed to assist in the work, though not paid, he will take care of himself from the negligence of his fellow-workmen as it would be if he were paid for his services."

This decision was approved four years later by the Exchequer Chamber in *Potter v. Faulkner* (4). There ERLE, C.J., said (1 B. & S. at p. 806):

"This is the case of one who volunteers to associate himself with the defendants' servant in the performance of his work, and that without the consent or even the knowledge of the master. Such an one cannot stand in a better position than those with whom he associates himself in respect of their master's liability; he can impose no greater obligation upon the master than that to which he was subject in respect of a servant in his actual employ."

In both of these cases the injured person had of his own initiative volunteered to assist the defendants' servants, and in law was on the defendants' premises as a mere licensee.

In *Holmes v. North Eastern Rail. Co.* (5) it was held that, where a plaintiff was not a mere licensee, but was engaged with the consent and invitation of the defendants in a transaction of common interest to both parties, the defendants were liable if he was injured owing to their premises not being in a reasonably secure condition, upon the authority of *Indermaur v. Dames* (1). In *Holmes' Case* (5) the plaintiff was the consignee of a coal waggon, and, with the permission of the stationmaster, went to the waggon and took coal from it. In so doing he stepped on the flagged path, which gave way, and he was injured, and it was held that he was entitled to recover. The court took the view that he was not a mere volunteer: see particularly CHANNELL, B., who said (L.R. 4 Exch. at p. 258):

"In one sense the plaintiff was a licensee, but he was not a mere licensee, and the word 'mere' has a very qualifying operation. We must infer from the silence of the stationmaster that he acquiesced in the plaintiff going on to the siding for the purpose of getting coal from his waggon in the way in which he did get it."

This case was affirmed in the Exchequer Chamber by COCKBURN, C.J., and six other judges.

In *Wright v. London and North Western Rail. Co.* (6) the principle in *Holmes v. North Eastern Rail. Co.* (5) was approved. The plaintiff was at the station to receive a heifer which was in a horsebox of the defendants. In order to save delay he helped the defendants' servants to shunt the horse-box, and, whilst so doing,

A was injured by the negligence of the defendants' servants. The stationmaster knew that the plaintiff was assisting in the shunting and assented. The court had to consider whether the case came within *Degg v. Midland Rail. Co.* (2) or *Holmes v. North Eastern Rail. Co.* (5), and decided, in the words of LORD COLERIDGE, C.J. (1 Q.B.D. at p. 255):

B "that the plaintiff was not acting merely as a volunteer, in which case he would have been bound to take all risks upon himself which he met with in the employment; nor was it the case of master and servant, in which case the defendants would not have been liable for the negligence of a fellow servant. But the defendants being bound by contract to deliver the heifer to the plaintiff, they, by their representative, the stationmaster, allowed the plaintiff to take part in the delivery, and they were therefore bound to see that he did not get injured by the negligence of their servants."

C JAMES, L.J., said it would be a shocking state of the law if a person in the position in which the plaintiff was could not recover, and he agreed with LORD COLERIDGE, C.J. CLEASBY, B., who was a party to *Holmes v. North Eastern Rail. Co.* (5) said (ibid. at p. 257): "He has not agreed to be the fellow servant of the defendants' servants."

D In the two earlier cases there was not, as in the present case, an invitation of the defendants, and there was neither knowledge nor assent of the defendants or of any person in the position to receive it or give it on behalf of the defendants, and the bearing of these facts upon the law must be considered. It is to be observed that in neither of them did the principle of *Indermaur v. Dames* (1) come under consideration. The judgment in *Degg's Case* (2) and *Potter's Case* (4) is based upon the principle that a volunteer cannot be in a better position to recover damages occasioned by the negligence of the defendants' servants whom he was assisting on his own invitation than a servant of the defendants.

E On behalf of the defendants reliance was placed upon the observations made by BRETT, L.J., in *Swainson v. North Eastern Rail. Co.* (7) (L.R. 3 Ex.D. at p. 349):

F "In order to give rise to the exemption there must be a common employment and a common master; it is not necessary that there should be a common service for a definite time or at fixed wages; for the exemption exists in the case of volunteers and of other persons where plainly there has been no contract for payment; a volunteer puts himself under the control of another person, and in respect of that other person he is for the time being in the position of a servant"

G and upon *Johnson v. Lindsay & Co.* (8), where LORD HERSCHELL, having quoted these observations, said ([1891] A.C. at p. 377):

H "A person who is not under any paid contract of service may nevertheless have put himself under the control of an employer to act in the capacity of a servant, so as to be regarded as such. This, as has been pointed out, is the position of a volunteer. But it is obvious that, if the exemption results, as it does according to the authorities I have cited, from the injured person having undertaken as between himself and the person he sues, to bear the risks of his fellow-servant's negligence, it can never be applicable when there is no relation between the parties from which such an undertaking can be implied. . . . I do not see how such an obligation can arise otherwise than from some contractual relation. The obligation and the exemption appear to me to be correlative and to be implied from the relation of master and servant created between the parties."

I LORD WATSON also held (ibid. at p. 382) that the immunity of the master in such a case rested upon an implied undertaking by the servant to bear the risks of a fellow-servant's negligence. In the present case the plaintiff has not, in my view of the facts, either expressly or impliedly, undertaken as between herself and

the defendants to bear the risk of the negligence of the defendants' servants. Since no contractual relation existed between the parties I cannot see how or from what relation such an undertaking can be implied. Therefore the plaintiff was not in common employment with Wilson.

It was argued for the defendants that, even if there was no such implied undertaking, the above quoted observations of LORD HERSCHELL showed that the plaintiff, being a volunteer, could not recover. I cannot find that these observations cast any doubt upon the decisions in *Holmes' Case* (5) and *Wright's Case* (6). Neither LORD HERSCHELL nor BRETT, L.J., was considering the distinction between the case of a mere volunteer and one who voluntarily assisted the defendants' servants in the circumstances proved in *Holmes' Case* (5) and *Wright's Case* (6). I think the law is now well established that a mere volunteer cannot be in a better position to recover damages from the master for injury caused by the negligence of the master's servants than the servants who are under contract of service with the master. *Holmes' Case* (5) and *Wright's Case* (6) show that there is a distinction to be made when the injured person voluntarily assists the master's servants in a service in which he has a common interest with the master, and by the invitation or with the acquiescence of the master or servant acting within the scope of his employment. He is not a mere volunteer, and can recover if he is injured by the negligence of the master's servants. The present case falls within the principle of the decisions in the last-mentioned cases, and shows that the action by the plaintiff against Moss Empires, Ltd., is maintainable. Nothing that I have said is, in my opinion, in conflict with the true principle of the decisions in the *Degg's Case* (2) and *Potter's Case* (4). I should have been sorry had I constrained by precedents to hold that the plaintiff could not recover against the defendants. In my judgment, this appeal should be dismissed with costs.

SCRUTTON, L.J., stated the facts, said that the plaintiff was in the theatre by the licence or invitation of the company, she had an interest in the matter in that she hoped her performance at rehearsal would get her a permanent engagement, they had an interest in the matter in that they were able to test her abilities as cheaply as possible, both parties contemplated a possible contractual relation in the future, but were under no present contractual relation; referred to the doctrine of common employment, and continued: It is not surprising that the question arose what was the position of a volunteer. In 1857 *Degg v. Midland Rail. Co.* (2) was decided by the Court of Exchequer. In that case a carman of Pickford's, seeing some servants of the railway company trying to move a turntable, of his own accord ran to help them, and was injured by an engine of the company. This case was considered in the Exchequer Chamber in 1861 in *Potter v. Faulkner* (4), in which case a carman waiting to receive goods for A. from a warehouse belonging to B. was asked by a carman of B.'s to help him stow some goods to be carried to C. He did so, and while helping was injured by the negligence of other servants of B. In neither case, it will be noticed, did the master know or approve of the assistance rendered by the plaintiff, and in *Degg's Case* (2) the assistance was rendered without the request of the master's servants. In *Degg's Case* (2) BRAMWELL, B., held that the defendant, by volunteering his services, could not get any greater rights or impose any greater duty than could have existed [under the doctrine of common employment] had he been a hired servant. He also held that there was a similar undertaking to bear risks implied in the case of such a volunteer. The greater part of his judgment is devoted to the view that there is no liability in tort to the trespasser or wrongdoer by a master for the negligence of his servants, though the master himself might be liable for negligence if he knew the trespasser was there and carelessly injured him. The Exchequer Chamber in *Potter v. Faulkner* (4) affirmed the principle of *Degg's Case* (2), which ERLE, C.J., put in this way (1 B. & S. at p. 806):

"This is the case of one who volunteers to associate himself with the defendants'

A servants in the performance of his work, and that without the consent or even the knowledge of the master. Such a one cannot stand in a better position than those with whom he associates himself in respect of their master's liability."

B These cases seem explicable on the ground that the volunteer is, as regards the master, a trespasser, and cannot claim a higher protection than that the master himself shall not wilfully or carelessly injure him. He cannot make the master liable for negligent acts of his servants, as their duties to the master do not include taking care of trespassers. The difficulty of implying the undertaking spoken of by BRAMWELL, B., is that there is no contract or legal relation between the master and volunteer in which the undertaking can be implied. POLLOCK ON TORTS (8th Edn.) p. 104, treats these cases as an application of the principle of volenti non fit injuria.

C Some years afterwards two more cases showed the difficulties involved in some of the language used in the former cases. In 1868 in *Holmes v. North Eastern Rail. Co.* (5) a consignee going with permission to the stationmaster to get coal from his wagon in the defendants' premises, work which the defendants should do by contract, was injured by a trap in the shape of a defective flagstone. He was held to be a licensee, but not a mere licensee, a licensee with a common interest with the licensor, and as such entitled to be warned of traps. Nothing was said about the doctrine of common employment. In *Wright v. London and North Western Rail. Co.* (6) a consignee helped the railway porters, with the assent of the stationmaster, to discharge his heifer, and was injured by a train negligently allowed to come out of the siding. It was argued, on the one hand, that he was a volunteer who within *Degg's Case* (2) had undertaken the risk, on the other that he was a licensee with an interest, within *Holmes' Case* (5). It was held the plaintiff was neither a volunteer nor a servant, but an invitee, with regard to whom the company must by their servants use reasonable care.

E There are, however, two opinions of weight which must be considered. Both arose in cases where it was endeavoured to extend the doctrine of common employment to cases where the servants were engaged in the same work though under different masters. In *Swainson v. North Eastern Rail. Co.* (7), BRETT, L.J., says (47 L.J.Q.B. at p. 376):

G "In all the cases there is a common employment, and work done in common by servants under a common master. The cases show that both these conditions, or something equivalent to both, is necessary to raise the exception to the general rule of liability. We cannot say that the common service required is necessarily a common service arising out of a binding contract to serve for a definite time, or on which the complainant is to receive wages; for these are cases of volunteers, and other cases in which there is certainly no contract and no payment in virtue of one. But when the volunteer cases are looked at it will be found that they are all cases of volunteering to serve, in which the complainant put himself voluntarily under the control and order of the defendant as his master; therefore, though not a paid servant, by his voluntary act he puts the defendant in possession of his services, and makes him unsuable so long as he chooses to remain under such orders and control, and so becomes a servant of the defendant."

I It will be noticed that the learned judge is meeting the argument that a contract of service is not necessary, because of the volunteer cases, by saying that the volunteer has offered to serve the master. I do not see how this can make any contract of service with a master who does not know of this voluntary offer, still less with a master who knows of the offer and refuses to make a contract. COTTON, L.J., says (*ibid.* at p. 377):

"If the injured man is a volunteer, and is acting as a servant when injured, it is well established that he cannot recover against the head of the establishment,

but then he puts himself in the same position as if he were actually a servant, and there is the same applied contract because he has put himself in the same relation. That is the principle laid down in *Degg's Case* (2)."

Here, again, the learned judge speaks of the relation as a contract implied from a relation; and I cannot see how you can imply a contract with a person who is ignorant of the voluntary service. Both these passages, though entitled to the greatest respect, were obiter dicta not necessary for the decision. The same question of common employment was raised in *Johnson v. Lindsay & Co.* (8). LORD HERSCHELL explains the position of volunteers thus ([1891] A.C. at p. 377):

"These authorities are sufficient to establish the proposition that unless the person sought to be rendered liable for the negligence of his servant can show that the person so seeking to make him liable was himself in his service the defence of common employment is not open to him. Such service need not, of course, be permanent or for any definite term. The general servant of A. may for a time or on a particular occasion be the servant of B., and a person who is not under any paid contract of service may, nevertheless, have put himself under the control of an employer to act in the capacity of servant so as to be regarded as such. This, as has been pointed out, is the position of a volunteer."

This again is obiter dictum, and indeed the learned Lord goes on:

"The exemption can never be applicable when there is no relation between the parties from which such an undertaking can be implied. I do not see how such an obligation can arise otherwise than from some contractual relation."

As I have said, I cannot see how a contractual relation can be implied between a volunteer and a master ignorant of his volunteering. It appears to me that while *Degg's Case* (2) and *Potter's Case* (4) are rightly decided, they are right for the reasons given by BRAMWELL, B., that a trespassing volunteer cannot complain against the employer, ignorant of his presence, of the negligence of that employer's servants, on the ground of tort. That is justified by the reason given by ERLE, C.J., that to do so would be to allow him to put himself without the consent of the employer on a better position than the servants whom the employer consented to employ on the work into which the volunteer trespassed. I think it is not correct to base them on any contractual relation. In the case before us the employer knew of the volunteer's presence and action and of set policy declined to make a contract with her. I do not see after this how he can avail himself of a protection which, as LORD HERSCHELL says, can only be implied from a contractual relation. But he has invited the volunteer to be present, and licensed her remaining to endeavour to obtain a contract. This appears to me to impose on him a liability for tort. I understand that liability to be this. A bare or mere licensee, one who has no common interest with the owner of the premises, but is there by the owner's permission, takes the premises as he finds them, with all their dangers and traps, a trap being a danger which a person who does not know the premises could not avoid by reasonable care and skill. The owner is under no liability as to existing traps unless he has intentionally set them for the licensee, but must not create new traps without taking precautions to protect licensees against them: see the judgment of WILLES, J., in *Gautret v. Egerton* (9). A licensee who is on premises on the business of the owners, or with a common interest with them, is not a bare or mere licensee, but a licensee with an interest, and has the same rights as an invitee: see *Holmes v. North Eastern Rail. Co.* (5); *Wright v. London and North Western Rail. Co.* (6). In stating the rights of an invitee one must separate those cases where the person using the premises does it for payment. The owners in such a case are bound to see that the premises are reasonably safe, and if they are not safe and the owners could know of the dangerous condition and negligently did not know of it they are liable for damages caused: *Mersey Docks and Harbour Board Trustees v. Gibb* (10) (L.R. 1 H.L. at p. 104); *Parnaby v. Lancaster Canal*

A Co. (11). This latter case is treated by HAMILTON, L.J., in his very instructive judgment in *Latham v. R. Johnson & Nephew, Ltd.* (12) ([1913] 1 K.B. at p. 412) as a case applying to invitees generally. It seems to me to be a case of an invitee for payment. The rights of an invitee who does not pay for his presence are stated in *Indermaur v. Dames* (1), and are that the owner of premises must use reasonable care to protect him, either by warning or precaution, against traps, whether existing or new dangers which the licensee, if ignorant of the premises, could not avoid by reasonable care and prudence. Against dangers which are not traps in this sense the owner is under no liability—that is, he does not warrant the premises safe, or as safe as reasonable care could make them. The difference between the bare licensee and the invitee licensee with an interest is that, as to existing traps, the owner incurs liability to the latter and not to the former. The liability towards a trespasser is fully discussed by the Court of Appeal in *Lowery v. Walker* (13).

B If this statement of the law is correct, the volunteer in *Degg's Case* (2) and *Potter's Case* (4) was a trespasser, and the owner had no liability for any negligence of his servants without the need of implying a contractual relation, which I cannot think existed. The plaintiff in the present case was either a licensee with an interest or an invitee, as SHEARMAN, J., found, and was as such entitled to be protected against traps. A trap in my view is none the less a trap that it begins by an act of negligence, and continues so by an act of negligence, if its continuing condition is a danger which the licensee cannot avoid by reasonable care. The jury in this case have found there was danger unexpected to the plaintiff on the stage, which the defendants by their servants ought to have known of and prevented, and there was evidence on which they could come to this finding. If there had been a contractual relation between plaintiff and defendants, the plaintiff could, on the authorities, have impliedly taken the risk of negligence of fellow servants in creating such a danger, in the absence of personal negligence of the defendants, or negligent failure on their part to appoint competent servants. There being no contractual relation on the admitted facts, this implication cannot be made, and the plaintiff has the ordinary protection of an invitee and can, in my opinion, recover. On these grounds, in my opinion, the appeal fails and should be dismissed with costs.

E NEVILLE, J.—The doctrine of common employment appears to me to be a purely arbitrary and artificial rule founded upon neither principle nor (prior to 1837 according to LORD WATSON, see *Johnson v. Lindsay* (8)) authority. A mere exerescence upon the common law devised apparently for the purpose of exempting a particular class from an otherwise universal liability. The best to be said for it probably is that it was considered at the time of its innovation to be in furtherance of public policy, inasmuch as the application of the law as it stood to the case of the masters might operate to the discouragement of the employment of labour. The rule, however, is to-day established beyond question and cannot be disregarded by the court.

H It remains to consider whether the doctrine is applicable where the services rendered by the injured person are voluntary. There are dicta of eminent judges, for whose opinion I entertain the most profound respect, in the affirmative. I gather from the cases cited that this extension of the doctrine is sought to be established by *Degg v. Midland Rail. Co.* (2) and *Potter v. Faulkner* (4). With these cases I will deal later. The extent of the rule is plainly stated by LORD HERSHELL in *Johnson v. Lindsay & Co.* (8) ([1891] A.C. at pp. 377, 378, 380), and it is there stated to extend to volunteers, though that extension was not necessary for the decision. It is said (*ibid.* at p. 378) to rest upon some contractual relation, so that in the case of volunteers we are at once faced by the amorphous conception of a contractual relation arising in the absence of a contract. To say that parties bear a contractual relation to one another where no contract exists

between them is, to my mind, to state a legal paradox. The idea that the doctrine of common employment extends to the case of volunteers appears, as I have said, to depend mainly upon *Degg v. Midland Rail. Co.* (2) and *Potter v. Faulkner* (4). In neither of these cases was there any consideration for the acts done by the injured person, and both appear to have been accepted as instances of the application of the doctrine of common employment. Indeed, the language of the judgments in those cases lends itself to such a construction. But even if the phrase "contractual relation" is extended beyond its extreme limit so as to cover the case of a voluntary relation which would have been contractual had there been any consideration to support it, it will not fit the facts in either of those cases. In neither case was there any relation at all between the master and the injured person beyond that which arose from the gratuitous interference of the latter with the master's business. There was no invitation to do the acts by the master or any person having his authority. Applying the law, therefore, as laid down in *Johnson v. Lindsay & Co.* (8), there being no contractual relation between the master and the injured person, either real or supposititious, in either of these cases, they must be both excluded from the operation of the doctrine of common employment. They do not stand the test of the definition of the rule, and yet are relied upon for the extension of the rule to volunteers. A somewhat remarkable result.

The truth is, in my opinion, that in both *Degg v. Midland Rail. Co.* (2) and *Potter v. Faulkner* (4) the true ground for the decisions, or, at all events, a ground upon which both cases can be supported, is not the application to them of the doctrine of common employment at all. In both cases the injured person when the accident happened was interfering voluntarily and officiously with the affairs of another, and it seems to me consistent both with law and good sense (which in the main are identical) to hold that in such circumstances the injured person can have no legal claim against the master of the servant whose negligence occasioned the accident. It seems to me that in such a case the master could answer the claim by saying conclusively: "You meddled in what was no business of yours. You interfered with my property without any invitation from me. In so doing you acted illegally, and that can give you no claim against me." As at present advised, having regard to the decisions to which our attention has been called, the doctrine of common employment extends to cases where there is in fact no contractual relation between the master of the negligent servant and the injured person. The dicta of other judges afford valuable assistance to a judge in the determination of the case before him, but, in my opinion, he is not bound, and, therefore, certainly not entitled to follow, the dictum of another judge, however eminent, unless it accords with his own judgment, which I think, in the absence of binding authority, he is bound to exercise. I do not think, however, that the question I have dealt with necessarily arises in the present case.

Holmes v. North Eastern Rail. Co. (5) and *Wright v. London and North Western Rail. Co.* (6) differentiate from cases coming within the rule of cases where the master and the injured person have what has been called a common interest in the transaction in the course of which the accident happens. I do not think, speaking with deference, that "common interest" is a phrase happily chosen to represent what appears to me to have been the ground of decision in these cases. In the first, the accident happened while the plaintiff was seeking delivery of his own coal; in the second, of his own heifer. In both cases the plaintiff was pursuing his own business and seeking to advance his own interest exclusively. Any benefit that the defendants might derive from his action was purely incidental. That appears to me in each case to be the true ground of the decision, subject to what I have said above with regard to the effect of absence of consideration. The question in each case appears to me to be: Was the injured person acting for himself and for his own interests, or was his action intended for the benefit of the master? Applying this test to the facts of the present case, it appears to me that the plaintiff was acting on her own account and in furtherance of her own interests alone. She

A desired to obtain an engagement, and attending the rehearsals, as desired by the defendants, appeared to her the best means of obtaining one. If she had gone to the office of the manager of the theatre to apply for an engagement, and, in obedience to his desire, she had accompanied him to the stage to exhibit her dancing, wishing to induce him to employ her, and had then been injured by a servant of the defendants, could it be successfully contended that she was engaged upon any business but her own in any sense of the word, however extended in their employment? I am unable to draw any sound distinction between that case and the case proved by the plaintiff here. The jury have found that she was not in the employment of the defendants, and I think they were amply justified by the evidence in so finding. If it be an inference of law, I come to the same conclusion. In my opinion, the appeal should be dismissed.

C Appeal dismissed.

Solicitors: William Hurd & Son; J. F. Spencer Cridland.

[Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.]

THOM (OTHERWISE SIMPSON) v. SINCLAIR

E [HOUSE OF LORDS (Viscount Haldane, Lord Kinneir, Lord Shaw and Lord Parmoor), October 30, 31, 1916, March 8, 1917]

[Reported [1917] A.C. 127; 86 L.J.P.C. 102; 116 L.T. 609;
33 T.L.R. 247; 61 Sol. Jo. 350; 10 B.W.C.C. 220]

F *Workmen's Compensation*—"Arising out of employment"—*Accident with no causal relation to work on which injured workman employed*—*Workman required to work in particular building*—*Collapse of roof through adjacent wall, not belonging to employer, falling on it*—*Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1 (1).*

G If the conditions of his employment oblige a workman to work in a particular building or position which exposes him at the time and on the occasion of the accident to the injury for which compensation is claimed, then, although the accident is not consequent on and has no causal relation to the work on which the workman is employed, the accident arises, not only during the course of the employment, but also "out of the employment" within s. 1 (1) of the Workmen's Compensation Act, 1906, as incident, not to the character of the work, but to the dangers and risks of the particular building or position in which by the condition of his employment he is obliged to work.

H So held by VISCOUNT HALDANE, LORD KINNEIR, LORD SHAW and LORD PARMOOR.

I Per VISCOUNT HALDANE: Under s. 1 (1) the court is directed to look at what has happened proximately and not to search for causes or conditions lying behind, as would be the case if negligence on the part of the employer had to be established. The governing purpose of the statute makes it irrelevant to look beyond the immediate cause of the accident for explanations or for remoter causes, as it would be in a case arising on a policy of marine insurance, provided that the circumstances bring the immediate cause within the definition.

Per LORD SHAW: The expression "arising out of the employment" is not confined to the mere nature of the employment. The expression applies to the employment as such—to its nature, its conditions, its obligations, and its incidents. If by reason of any of these the workman is brought within the

zone of special danger and so injured or killed, the broad words of the statute—"arising out of the employment"—apply.

The appellant was employed to pack herrings in a shed belonging to the respondent, a fish-curer. While she was at work an adjoining brick wall in course of erection, which did not belong to the respondent, fell on the shed, brought down the roof, and injured the appellant.

On a claim for compensation under the Act of 1906,

Held: the House could not go beyond the fact that the roof fell; it was enough that by the terms of her employment the appellant had to work in the particular shed and was in consequence injured by an accident which happened to the roof; and, therefore, the accident arose out of her employment although it had been ultimately caused by the fall of a wall belonging to someone other than her employer.

Decision of Second Division of Court of Session, 1916 S.C. 85, reversed.

Notes. The Workmen's Compensation Act, 1906, was repealed by the Workmen's Compensation Act, 1925, itself repealed by the National Insurance (Industrial Injuries) Act, 1946, which prescribes a system of insurance against injuries caused by industrial accidents, but s. 1 (1) of the Act of 1946 provides that the insurance shall be "against personal injury caused . . . by accident arising out of and in the course of" employment, thus adopting the language of s. 1 (1) of the Act of 1906. See also s. 7 (1) of the Act of 1946.

Followed: *Fearnley v. Bates and Northcliffe* (1917), 86 L.J.K.B. 1000. Applied: *Marsh v. Pope and Pearson* (1917), 86 L.J.K.B. 1849; *Wales v. Lambton and Hetton Collieries* (1917), 86 L.J.K.B. 1346. Considered: *Wright and Greig v. M'Kendry* (1918), 12 B.W.C.C. 410; *Lee v. Breckman* (1928), 138 L.T. 610. Applied: *Lawrence v. George Matthews (1924) Ltd.*, [1929] 1 A.C. 1. Considered: *Holden v. Premier Waterproof and Rubber Co., Ltd.* (1930), 144 L.T. 519. Applied: *Brooker v. Thomas Boothwick & Sons (Australasia), Ltd. and Connected Appeals*, [1933] A.C. 669. Considered: *Dover Navigation Co. v. Craig*, [1939] 4 All E.R. 558; *Powell v. Great Western Rail. Co.*, [1940] 1 All E.R. 87. Referred to: *Dennis v. White*, [1917] A.C. 479; *Whittal v. Staveley Iron and Coal Co.* (1917), 86 L.J.K.B. 985; *Allcock v. Rogers* (1918), 118 L.T. 386; *Davidson v. M'Robb or Officer*, [1918] A.C. 304; *Bell v. Armstrong, Whitworth & Co.* (1918), 88 L.J.K.B. 844; *Smidmore v. London and Thames Haven Oil Wharves* (1921), 14 B.W.C.C. 114; *St. Helens Colliery Co. v. Hewitson*, [1923] All E.R.Rep. 249; *Upton v. Great Central Rail. Co.*, [1923] All E.R.Rep. 286; *Simpson v. London, Midland and Scottish Rail. Co.*, [1931] A.C. 351; *Hutchings v. Devon County Council* (1931), 24 B.W.C.C. 320; *Codling v. Ridley* (1933), 26 B.W.C.C. 3; *Lander v. British United Shoe Machinery Co.* (1933), 102 L.J.K.B. 768; *Blanning v. Bailey, Ltd.*, [1942] 2 All E.R. 562; *Smith v. Davey, Parman & Co. (Colchester), Ltd.*, [1943] 1 All E.R. 286; *Cadzow Coal Co. v. Price, Cadzow Coal Co. v. Murphy*, [1944] 1 All E.R. 54; *Re Drake*, [1945] 1 All E.R. 576; *Slavin v. Carmichael & Co.*, [1945] 1 All E.R. 292.

As to accidents within the Workmen's Compensation Acts, see 34 HALSBURY'S LAWS (2nd Edn.) 816 et seq.; as to industrial accidents, see *ibid.* (3rd Edn.) 802 et seq.; and for cases see 34 DIGEST 266 et seq. For National Insurance (Industrial Injuries) Act, 1946, see 16 HALSBURY'S STATUTES (2nd Edn.) 797.

Cases referred to:

- (1) *Craske v. Wigan*, [1909] 2 K.B. 635; 78 L.J.K.B. 994; 101 L.T. 6; 25 T.L.R. 632; 53 Sol. Jo. 560; 2 B.W.C.C. 35, C.A.; 34 Digest 316, 2597.
- (2) *Trim Joint District School Board of Management v. Kelly*, [1914] A.C. 667; 83 L.J.P.C. 220; 111 L.T. 305; 30 T.L.R. 452; 58 Sol. Jo. 493; 7 B.W.C.C. 274, H.L.; 34 Digest 270, 2300.
- (3) *Warner v. Couchman*, [1912] A.C. 35; 81 L.J.K.B. 45; 105 L.T. 676; 28 T.L.R. 58; 56 Sol. Jo. 70; 5 B.W.C.C. 177, H.L.; 34 Digest 318, 2604.

- A** (4) *Plumb v. Cobden Flour Mills Co., Ltd.*, [1914] A.C. 62; 83 L.J.K.B. 197; 109 L.T. 759; 30 T.L.R. 174; 58 Sol. Jo. 184; 7 B.W.C.C. 1, H.L.; 34 Digest 288, 2415.
- (5) *Guthrie v. Kinghorn*, 1913 S.C. 1155; 50 Sc.L.R. 863; 1913 2 S.L.T. 153; 6 B.W.C.C. 887; 34 Digest 337, *t.*
- B** (6) *Fitzgerald v. W. G. Clarke & Son*, [1908] 2 K.B. 796; 77 L.J.K.B. 1018; 99 L.T. 101; 1 B.W.C.C. 197, C.A.; 34 Digest 276, 2332.
- (7) *Mitchinson v. Day Bros.*, [1913] 1 K.B. 603; 82 L.J.K.B. 421; 108 L.T. 193; 29 T.L.R. 267; 57 Sol. Jo. 300; 6 B.W.C.C. 190, C.A.; 34 Digest 270, 2299.
- (8) *Martin v. J. Lovibond & Sons, Ltd.*, [1914] 2 K.B. 227; 83 L.J.K.B. 806; 110 L.T. 455; 7 B.W.C.C. 243, C.A.; 34 Digest 322, 2635.
- C** (9) *Wicks v. Dowell & Co., Ltd.*, [1905] 2 K.B. 225; sub nom. *Wilkes v. Dowell & Co.*, 74 L.J.K.B. 572; 92 L.T. 677; 53 W.R. 515; 21 T.L.R. 487; 49 Sol. Jo. 480; 7 W.C.C. 14, C.A.; 34 Digest 266, 2265.
- (10) *Millar v. Refuge Assurance Co., Ltd.*, 1912 S.C. 37; 49 Sc.L.R. 67; 5 B.W.C.C. 522; 34 Digest 319, *r.*
- (11) *Adamson v. Anderson & Co. (1905), Ltd.*, 1913 S.C. 1038; 50 S.L.R. 855; 6 B.W.C.C. 874; 34 Digest 321, *f.*
- D** (12) *Hughes v. Bett*, 1915 S.C. 150; 52 Sc.L.R. 93; 1914 2 S.L.T. 337; sub nom. *Bett v. Hughes*, 8 B.W.C.C. 362; 34 Digest 322, *o.*
- (13) *Nicol v. Young's Paraffin Light and Mineral Oil Co., Ltd.*, 1915 S.C. 439; 52 Sc.L.R. 354; 1915 1 S.L.T. 159; 8 B.W.C.C. 395; 34 Digest 278, *e.*
- (14) *White v. W. & T. Avery, Ltd.*, 1916 S.C. 209; 53 Sc.L.R. 122; 1915 2 S.L.T. 374; 9 B.W.C.C. 663; 34 Digest 322, *p.*
- E** (15) *M'Neice v. Singer Sewing Machine Co., Ltd.*, 1911 S.C. 12; 48 Sc.L.R. 15; 1910 2 S.L.T. 210; 4 B.W.C.C. 351; 34 Digest 321, *m.*
- (16) *Barnes v. Nunnery Colliery Co., Ltd.*, [1912] A.C. 44; 81 L.J.K.B. 213; 105 L.T. 961; 28 T.L.R. 135; 56 Sol. Jo. 159; 5 B.W.C.C. 195, H.L.; 34 Digest 299, 2489.
- F** (17) *Karemaker v. Corsican (Owners)* (1911), 4 B.W.C.C. 295, C.A.; 34 Digest 319, 2609.
- (18) *Morgan v. Zenaida (Owners)* (1909), 25 T.L.R. 446; 2 B.W.C.C. 19, C.A.; 34 Digest 268, 2279.
- (19) *Davies v. Gillespie* (1911), 105 L.T. 494; 28 T.L.R. 6; 56 Sol. Jo. 11; 5 B.W.C.C. 64, C.A.; 34 Digest 268, 2280.
- G** (20) *Andrew v. Failsworth Industrial Society*, [1904] 2 K.B. 32; 73 L.J.K.B. 510; 90 L.T. 611; 68 J.P. 409; 52 W.R. 451; 20 T.L.R. 429; 48 Sol. Jo. 415; 6 W.C.C. 11, C.A.; 34 Digest 318, 2605.
- (21) *Pierce v. Provident Clothing and Supply Co., Ltd.*, [1911] 1 K.B. 997; 80 L.J.K.B. 831; 104 L.T. 473; 4 B.W.C.C. 242; sub nom. *Pearce v. Provident Clothing and Supply Co., Ltd.*, 27 T.L.R. 299; 55 Sol. Jo. 363, C.A.; 34 Digest 322, 2629.
- H** (22) *Coyle (or Brown) v. John Watson, Ltd.*, [1915] A.C. 1; 83 L.J.P.C. 307; 111 L.T. 347; 30 T.L.R. 501; 58 Sol. Jo. 533; 7 B.W.C.C. 259, H.L.; 34 Digest 268, 2284.

Appeal by the workman from an order of the Second Division of the Court of Session setting aside an award in her favour by the Sheriff-substitute of Aberdeen.

The facts and cases cited sufficiently appear from the judgment of VISCOUNT HALDANE.

Douglas Knocker and Duffes (the latter of the Scottish Bar) for the appellant.

Moncrieff, K.C., and *T. M. Cooper* (both of the Scottish Bar) for the respondent.

The House took time for consideration.

Mar. 8, 1917. The following opinions were read.

VISCOUNT HALDANE.—In this case LORD KINNEAR requests me to say that he concurs in the opinion I am about to read. The question is whether the

appellant, who was employed in packing herrings by the respondent, a fish-curer in Aberdeen, is entitled to recover compensation from him under the Workmen's Compensation Act, 1906, for injury caused by accident. What happened was that a brick wall, about 20 ft. high, in course of erection on ground belonging to someone else, but contiguous to the curing-shed of the respondent in which the appellant was employed, fell, by reason of its instability, on the shed. The consequence was that the roof of the shed and part of its wall tumbled in, and the appellant and other workers were buried under fallen material composed mainly of corrugated iron and rafters which belonged to the roof of the shed, and of bricks from the wall on the adjoining property. The sheriff-substitute of Aberdeen decided that the accident to the appellant arose "out of and in the course of the employment" within the meaning of the statute, and awarded compensation for her injuries. But he stated a Case so as to raise a question of law for the opinion of the court. The Second Division, differing from his view of the law, reversed his decision, and hence this appeal.

It will, I think, be convenient in considering the question of law raised, which is one of construction of the words of the Act, to examine it in the first instance apart from authority, and then to see whether the decided cases, looked at in the light so obtained, admit of freedom in interpretation. This is the more expedient because the decided cases, as was established in the course of the able and elaborate arguments which were addressed to your Lordships from both sides of the bar, are not altogether in harmony. I turn to the words in the statute on which the question depends. It will be observed that the legislature has imposed a double condition for the liability of the employer for injury from accident, a condition that the injury must arise not only in the course of the employment but out of it. It is easy in a case like the present to determine the satisfaction of one of these conditions. The appellant was actually employed when the accident occurred, and she was obviously injured by an accident in the course of the employment. But did the accident arise out of the employment? As to the meaning of these words, two contentions have been put forward. According to one of them the language used is satisfied if injury has been inflicted on the workman by any accident, such as something falling on him, which would not have happened to him if his employment had not caused him to be in the place at which the accident occurred at the time of its occurrence, the place and time having thus been conditions of the result brought into existence by the employment. Once establish this and it is said that no further causal connection need be sought. I think that this interpretation is too vague. It would cover the case of a farm labourer struck by lightning while walking across a field on the farm on which he was employed. Yet he might just as readily have been struck while walking elsewhere off the farm. A further condition seems to be required, the condition that the injury should have arisen, not merely by reason of presence in a particular spot at a particular time, but because of some special circumstance attending the employment of the workmen there. His duty may have occasioned his being near a tree which attracted the lightning, or being under a roof which for some reason fell in. According to the other contention a still fuller and more definite causal relation than this is essential. Unless, it is argued, the accident was due to something the man was doing in the course of his employment or was exposed to as a peculiar danger by the nature of his employment, the conditions required by the statute are not fulfilled. This view of its requirements was adopted in the judgments of the Second Division in the present case, who thought that it derived countenance from expressions used by LORD COZENS-HARDY, M.R., in *Craske v. Wigan* (1), to which I will refer later on. The foundation of the argument is that the mere fact of a man being, by reason of the locality of his employment, in the place where an accident happens to him does not distinguish his case from that of mankind generally if the accident is one, such as a stroke by lightning, which might have happened to him as readily in some other spot as in the one where he was employed. In order that the accident may be truly said to have arisen out of the employment it is argued that

A the character of the employment must be shown to have actively contributed to its occurrence.

There are, no doubt, many kinds of accident which do not in any sense arise out of the employment. There may be no reason why such accidents should happen to a man in one situation rather than to a man in another, and it may, therefore, be impossible to pronounce truly that they are so connected with the employment as to have arisen out of it. But where a man is ordered to work under a particular roof and that roof falls in on him, it is not clear that the accident belongs to that category. If the particular accident would not have happened to him had he not been employed to work under the particular roof, there seems to be nothing in the language of the Act which precludes an occurrence from being held within it which satisfies the test proposed by the first of the alternative constructions modified to the extent I have suggested. The falling of the particular roof could only happen in one place, and the presence there of the person injured was due to the employment. The question really turns on the character of the causation through the employment which is required by the words "arising out of it." Now, it is to be observed that it is the employment which is pointed to as to be the distinctive cause, and not any particular kind of physical occurrence. The condition is that the employment is to give rise to the circumstance of injury by accident. If, therefore, the statute, when read as a whole, excludes the necessity of looking for remoter causes, such as some failure in duty on the part of the employer as a condition of his liability, and treats him rather as in a position analogous to that of a mere insurer, the question becomes a simple one. Has the accident arisen because the claimant was employed in the particular spot on which the roof fell? If so, the accident has arisen out of the employment, and there is no necessity to go back in the search for causes to anything more remote than the immediate event, the mere fall of the roof, and there need be no other connection between what happened and the nature of the work in which the injured person was engaged. The expression "cause" is almost invariably used in a way which lacks precision. In strict logic the cause cannot be pronounced to be less than the sum of the entire conditions. But in ordinary speech and practice we select some one or more out of what is an infinite number of conditions to be treated as the cause. From the practical standpoint of the man in the street the cause of the setting the house on fire was the striking of a match, while from that of the man of science it was the presence of all the conditions which enabled potential to be converted into kinetic energy. On the other hand, for the court which tries a question of arson the cause is the intention of the accused and any deed done which has accomplished this intention.

What, then, is the special point of view which the Workmen's Compensation Act, 1906, directs us to take in the practical selection of the circumstances which are to determine whether an event has arisen out of the employment which has amounted to injury by accident within the meaning of the Act? I think that the court is directed to look at what has happened proximately, and not to search for causes or conditions lying behind, as would be the case if negligence on the part of the employer had to be established. For the reasons which I assigned in this House in *Trim Joint District School Board of Management v. Kelly* (2), reasons which I abstain from repeating, I am of opinion that the governing purpose of the statute makes it as irrelevant to look beyond the immediate cause of the accident for explanations or for remoter causes, as it would be in a case arising on a policy of marine insurance, provided that the circumstances bring the immediate cause within the definition. Where the question is one of the construction of an obligation to insure against accident the law looks to the proxima causa of the accident as decisive and does not look behind it.

If, therefore, the language in question were to be construed upon principle and apart from authorities I should be prepared to hold that it was satisfied where, as here, it has been established as a fact that it was as arising out of her employment that the appellant was under the roof by the falling in of which she was injured.

Behind the fact that the roof fell we cannot go. The limiting words in the Act do not refer to any act of negligence on the part of the employer as to be looked for, but simply to a restriction of the class of accident against which he is to provide insurance. The appellant was injured because she happened at the moment of the accident to be working in the shed where she was employed to work, and I think that, unless authority constrains us to hold the contrary, the Act ought to be construed as signifying that an accident such as this comes within the class against which she is insured. Whether the remoter cause of the roof falling was the collapse of a neighbouring wall, or the falling down of some high adjacent building, or a stroke of lightning, seems to me immaterial in the light of this construction. It is enough that by the terms of her employment the appellant had to work in this particular shed, and was in consequence injured by an accident which happened to the roof of the shed. The accident is one arising out of the employment not the less if ultimately caused by the fall of someone else's wall than if it had been caused by inherent weakness of the employer's roof.

I turn now to the authorities to see what bearing they have on the construction of the statute. The first observation I must make is that decided cases afford less guidance than usual on such a question. The reason is that the appellate tribunals have consistently shown a proper reluctance to look beyond findings of fact by the arbitrator. This has been particularly so in the course of the decisions on the Act in your Lordships' House. *Warner v. Couchman* (3), the frost-bite case, is an excellent illustration of this, and in consequence nothing that was said there is authority on which the appellant here can rely. After examining what has been decided in this House I have come to the conclusion that we are free on the present occasion, so far as decisions in this House are concerned, to construe the statute in the sense I have indicated. I wish particularly to say that, in my view, there is nothing in *Plumb v. Cobden Flour Mills Co., Ltd.* (4) which really touches the point here. But in the Court of Session and in the Court of Appeal in England opinions have occasionally been indicated which apparently militate against this construction, and, if there had been anything like a uniform course of decisions to that effect, I should naturally have hesitated before disturbing them. However, on examining the authorities I find that they are far from harmonious. I deal with some of the more important.

Guthrie v. Kinghorn (5) was a case in which a carter in charge of a horse and lorry within his employer's yard was struck by a sheet of corrugated iron blown from the roof of an adjoining building. The Second Division of the Court of Session held that the case was not within the Act because what had happened was not an ordinary risk of the employment. I doubt whether this was right. But the decision, which proceeded on the narrower interpretation of the statute, was followed by the Second Division in the present case. It was thought to have proceeded on a principle believed to have been laid down in *Craske v. Wigan* (1) ([1909] 2 K.B. at p. 638), where the accident was caused by a cockchafer which flew in at an open window and so frightened a lady's maid, who was doing needlework for herself, that she threw back her hand and injured her eye. It was held that the mere fact that she was in her employer's house was not enough, for it did not really contribute to a risk which was common to humanity. That may well have been the correct interpretation of the facts. What the Master of the Rolls said as to its being necessary to say more than that "the accident would not have happened if I had not been engaged in that employment, or if I had not been in that particular place," is quite true when referred to the facts with which he was dealing. When he adds that the claimant must say that "the accident arose because of something I was doing in the course of my employment, or because I was exposed by the nature of my employment to some particular danger," that is also quite true as a criticism of the kind of claim that was before him. But I am not sure that the exposition of the Act by BUCKLEY, J., is not unduly abstract, and in consequence apt to mislead in some of its language. He said that the words "out of" point to the origin and cause of the accident, and the words "in the

course of" to the time, place, and circumstances under which the accident takes place. In saying this he adopted what he had previously said to the same effect in *Fitzgerald v. W. G. Clarke & Son* (6). I doubt whether the time, place, and circumstances can properly be so sharply distinguished from other conditions which are described as belonging to the origin and cause as these words suggest. *Mitchinson v. Day Bros.* (7) is, I think, a more doubtful case. There a carter in charge of a horse and van was murderously assaulted, and it was held that the risk of being attacked by a man who was drunk did not arise reasonably out of the employment. In any view the facts differ from those in the present case, but I am not sure that the interpretation of the Act was not too narrow. In *Martin v. J. Lovibond & Sons, Ltd.* (8) a brewer's drayman was driving the dray in the course of his employment left his dray to get a glass of beer, and in returning was knocked down by a motor car. His dependants were held entitled to claim. The Court of Appeal held that what had happened arose out of and in the course of his employment. The case shows how far the courts have sometimes gone in the direction of the wider interpretation of which I have spoken. *Wicks v. Dowell & Co., Ltd.* (9) was the case of a workman employed in unloading coal from a ship who had to stand by the open hatchway through which the coal was being brought up from the hold. He was seized with an epileptic fit while so engaged, and fell into the hold and was injured. COLLINS, M.R., and the Court of Appeal held that the *causa proxima* of the accident was his necessary nearness to the open hatchway, and, following the principle of the marine insurance cases to which I have already referred, held that in interpreting the Act this, the *causa proxima*, and not the idiopathic condition of the person injured, was to be looked to.

I think that the main current of authority in the Court of Appeal in this country does not militate against the view taken by COLLINS, M.R., and in the Court of Session it seems to me that the weight of authority is in its favour and against what has been argued for by the respondent here. In *Millar v. Refuge Assurance Co., Ltd.* (10) a collector for the company had fallen down a stair which he had to use while seeking to collect a premium. Lord President DUNEDIN and LORD KINNEAR agreed in holding the company liable. The latter said that a risk was specially connected with a man's employment if it was due to the particular place where his employment required him to be at the time. *Adamson v. Anderson & Co. (1905), Ltd.* (11) is a decision of the First Division recognising this construction, and so, I think, are the decisions in *Hughes v. Bett* (12) and *Nicol v. Young's Paraffin Light and Mineral Oil Co., Ltd.* (13). *White v. W. & T. Avery, Ltd.* (14) proceeds on the same principle, and so, as it appears to me, does the earlier case of *McNeice v. Singer Sewing Machine Co., Ltd.* (15). It is not necessary to proceed further in the examination of the authorities. For those to which I have referred show that there is no such uniform exposition of this very recent statute as precludes this House from feeling itself free, if it should be so disposed, to give effect to the construction which I am suggesting. For this construction decided cases disclose, indeed, a great deal of support. In the result, I move your Lordships that the judgment appealed from be reversed and that of the sheriff-substitute restored, and that the appellant should have such costs in this House and in the courts below as are consistent with her appearance here in formâ pauperis.

LORD SHAW.—The question which arises in this case is somewhat narrow, but I have had little hesitation in agreeing with your Lordships upon it. There have been many cases dealing with the consideration of those words in the Workmen's Compensation Act, namely, "arising out of the employment." The criticism is, of course, correct that those words must be taken to signify something more in the sense of limitation than "in the course of" the employment, and that both of those expressions of condition must be satisfied before the Act can apply. The decided cases are numerous and the dicta therein cannot always be reconciled; but a further consideration of the language of the statute itself—to which language one

must go as the absolute test of liability—has confirmed my view that the decision pronounced by the learned sheriff-substitute was correct.

On Jan. 26, 1915, the appellant, who was then a fish-worker in the employ of the respondent, a fish-curer, was engaged in packing herrings into boxes. The work had to be performed in a brick shed, 7 ft. high, roofed with corrugated iron and lit by obscure windows in the roof. The appellant was, accordingly, obliged, as part of the conditions of her service, to be within the shed when engaged in her work and to be there at the time when the accident occurred. The accident itself was caused by reason of the collapse of a brick wall 20 ft. high. This was being erected on an adjacent building and it fell upon the roof of the shed where the appellant was working, bringing down the roof and part of the working shed, so that the appellant and other workers were buried under the wreckage. Three of them were killed, and six others, of whom the appellant was one, were injured. The learned sheriff-substitute found that the conditions of the appellant's employment "obliged her to work where she was and exposed her to the risk of said accident." As a statement of fact, this of course cannot be denied; but the respondent's argument before this House is that no liability is imposed under the statute, because such a situation is not covered by the words "arising out of the employment" where these words are properly construed.

The main argument relied on—the argument being successful in the Second Division of the Court of Session—was that the words of the Act "arising out of the employment" should be construed to mean "arising out of the nature of the employment." And a further construction is maintained to be correct, namely, that the words not only mean "the nature of the employment" in general, but the nature of the injured servant's employment. For myself I cannot so narrow the statutory words, either in the general or in the particular sense. The test applied by the learned Master of the Rolls (LORD COZENS-HARDY) in *Craske v. Wigan* (1) ([1909] 2 K.B. at p. 638) and referred to by the learned judges as an inviolable rule, is that

"it is not enough for the applicant to say 'the accident would not have happened if I had not been engaged in that employment, or if I had not been in that particular place.' He must go further and must say 'the accident arose because of something I was doing in the course of my employment or because I was exposed by the nature of my employment to some peculiar danger.'"

This dictum has been given effect to in its full extent by the learned judges in the court below. The Lord Justice-Clerk observes:

"it seems to me that the accident must have arisen because of the nature of the employment in which the injured person was working at the time."

LORD DUNDAS puts the point with much clearness in application to the present case when he says:

"it seems to me impossible to say that it was because the poor woman was a fish-curer that the accident befell her."

And the other learned lords decide upon the same ground.

With much respect to the learned judges, I am unable to agree in such a limitation upon the words of the Act of Parliament. When a miner is engaged to hew coal, and in the course of his work brings down upon himself a mass of superincumbent material, it is plain that such a case would fall within the limited construction just cited. But such a case is comparatively rare. I ask myself what would result under the statute in those infinitely more numerous cases of accident to underground workers, the specific nature of whose employment was, for instance, not in actual excavation, but merely in the haulage of the coal or the lighting or watching of the pit? Accidents arise, not from anything in the nature of the particular miner's work, but possibly from causes, say subsidence, fires, or escapes of gas, taking their origin, it may be miles away, communicating along the strata

of the earth and in no way causally connected with the particular workman's job. I think, accordingly, that the statute is not satisfied by asking the question whether the nature of the employment of the injured person had any causal relation to the accident, because it is clear that in very many instances the accident arose out of the employment as such, apart from the particular nature of the service which the injured workman had to render. When, in fact, the statute uses the words "arising out of the employment," it refers, in the first place at least, not to the individual's particular service. It follows from that that there may be causes of danger arising to all employees, which causes are not confined to the individual situation, but are general and applicable to the employment as a whole. It may be that that employment is underground, with all the risks attached to underground work. It may be in the air or on the sea, with a special exposure to the dangers relative to such elements; or it may be on the surface of the earth, in surroundings which are those of peril. In all such cases it is quite possible to figure injuries by accident in the course of and arising out of the employment which are totally disconnected with the nature of the employment upon which the workman was generally or for the moment engaged, but which, without any doubt, sprang from the employment in the sense that it was on account of the obligations or conditions thereof, or on that account alone, that he incurred the danger. In short, my view of the statute is that the expression "arising out of the employment" is not confined to the mere "nature of the employment." The expression, in my opinion, applies to the employment as such—to its nature, its conditions, its obligations, and its incidents. If by reason of any of these the workman is brought within the zone of special danger and so injured or killed, it appears to me that the broad words of the statute—"arising out of the employment"—apply. If the peril which he encountered was not an added peril produced by the workman himself, as in *Plumb v. Cobden Flour Mills Co., Ltd.* (4) and *Barnes v. Nunnery Colliery Co., Ltd.* (16) in this House, then a case for compensation under the statute appears to arise.

It is said in the present case that the injury by accident arose, not because of the nature of the employment, which was packing herrings, and if decisions and dicta, such as those above cited, to the effect that the statutory words "the employment" can only be satisfied by "the nature of the employment," this is conclusive. But upon the other hand it is quite plain that it was part of the conditions of the appellant's labour and part of the obligations which she undertook as a servant of the respondent that she should at the time of the accident occupy this particular place of work which turned out to be a place of special danger. Her service there and not anywhere else brought her into the position of being subjected to this peril. It was not a peril which might fall upon the public at large, such as the severity of the weather, as in *Warner v. Couchman* (3) and *Karemaker v. Corsican (Owners)* (17), but it was a peril attached to the particular location in which by the obligation of service the appellant was placed. In my humble opinion, this latter case falls within the Act, upon a sound construction of its terms.

I am glad to be fortified in this view by a large body of decided cases. In *Morgan v. Zenaida (Owners)* (18), where a seaman painting the outside of his ship in Mexican waters, and, receiving from his position at work the force both of the direct and reflected rays of the sun, underwent sunstroke, he was held entitled to recover under the Act. In *Davies v. Gillespie* (19), also a case of sunstroke, liability attached because the workman was placed by the conditions of his work within a zone of special danger, namely, for some hours on a blackened steel deck under the blazing sun of Haiti. In *Millar v. Refuge Assurance Co., Ltd.* (10) an assurance company's collector, engaged in collecting premiums, was injured on a stair to which he had by the obligations of his service to go; in *M'Neice v. Singer Sewing Machine Co., Ltd.* (15) an accident overtook a salesman who was cycling in the course of his duty in a public street. In both of these cases liability was held to attach to the employer, and for the same reason, viz., that it was part of

the obligations of the service that the workman was placed within the zone of special danger. I venture to give my particular adhesion to the opinion delivered by my noble and learned friend LORD KINNEAR in the former of these cases. In *Andrew v. Failsworth Industrial Society* (20), a lightning case, the position in which the man was doing the work and the place he had necessarily to occupy were a position and a place of special danger, and so the Act was held to apply. In *Pierce v. Provident Clothing and Supply Co., Ltd.* (21), a street accident to a collector on a bicycle, the Scottish case of *M'Neice v. Singer Sewing Machine Co., Ltd.* (15), just referred to, was followed. In *Coyle (or Brown) v. John Watson, Ltd.* (22) this House, reversing the Second Division of the Court of Session, held that a workman, having been by the conditions of his service placed in a position of danger from extreme chill, causing pneumonia and death, there was liability under the Act. In *Martin v. J. Lovibond & Sons, Ltd.* (8) the same decision was given as in the analogous street cases of *M'Neice v. Singer Sewing Machine Co., Ltd.* (15) and *Pierce v. Provident Clothing and Supply Co., Ltd.* (21). The cases above cited, nine in number, are in truth all what might be termed "location" cases, and although there is much variety of expression by the learned judges, I think that they form a body of authority in support of the construction of the statute which your Lordships are now sanctioning. In each and all it was because of the nature, conditions, obligations, or incidents of the employment that the workman was brought within the zone of special danger, that injury by accident was pronounced to have arisen out of the employment. In conclusion, I desire to say that the case of *Guthrie v. Kinghorn* (5) is inconsistent with these decisions and with the present judgment and cannot be supported.

LORD PARMOOR [after stating the facts]: The question of law to be determined is whether upon the facts it was competent for the sheriff-substitute to find that the injuries sustained by the appellant were caused by accident arising out of her employment within the meaning of the Workmen's Compensation Act, 1906. The Second Division of the Court of Session have answered this question in the negative, and it is against this decision that the appeal is brought before your Lordships.

Apart from authority it appears to me to be reasonably clear, and in accordance with the ordinary natural meaning of the language of the statute to hold, that, if the conditions of his employment oblige a workman to work in a particular building or position which exposes him at the time and on the occasion of the accident to the injury for which compensation is claimed, then, although the accident is not consequent on and has no causal relation to the work on which the workman is employed, the accident arises out of his employment, as incident, not to the character of the work, but to the dangers and risks of the particular building or position in which by the condition of his employment he is obliged to work. The Workmen's Compensation Act connotes no distinction between such dangers and risks, and dangers and risks incident to the plant required in the employment, or to the particular machine at which the workman may be engaged at the time of the accident. In either case the workman is subject to an accident which arises out of his employment. Counsel for the respondent suggested a distinction between inherent defects in a building and wreckage caused by the outside carelessness of some third party. This consideration appears to me to have no weight under the insurance principle of the Workmen's Compensation Act, in which compensation is not dependent in any way on the conduct or negligence of the employer. It was further argued that all mankind were subject to the risk of a falling wall in the proximity of new buildings, and that this consideration negatived the suggestion that the accident arose out of the employment, although the sheriff-substitute had found that the appellant was obliged, under the conditions of her employment, to work in this particular shed, which was wrecked by the fall of an adjoining wall. I am unable to assent to this argument. The fact that the risk may be common to all mankind does not disentitle a workman to compensation,

if in the particular case it arises out of the employment. Any stranger walking along a road in a mine may be exposed to the risk of an accidental fall of coal, but this does not affect the claim of a miner who in the course of his duty, or to obtain access to his work, is injured by such fall. It is, no doubt, not sufficient merely to allege that the accident could not have happened if the appellant had not been in the particular shed, but this is not the case made on behalf of the respondent, and would be inconsistent with the findings of fact by the sheriff-substitute.

A large number of cases were cited to your Lordships during the argument, but it is not necessary to refer to them after the exhaustive review of them by LORD HALDANE, and I propose only to refer to the cases on which the Lord Justice-Clerk relies in support of his judgment. In *Craske v. Wigan* (1) it was held that it was not enough for the applicant to say: "The accident would not have happened if I had not been engaged in that employment or if I had not been in that particular place." I do not think that the present appeal necessitates any departure from this principle. The Master of the Rolls then adds that the applicant must go further and say: "The accident arose because of something I was doing in the course of my employment, or because I was exposed by the nature of my employment to some peculiar danger." The words "nature of the employment" do not occur in this part of the statute, but it is unnecessary to raise any matter of mere verbal criticism. In my opinion, if the conditions of the workman's employment oblige him to work in a particular building and thereby expose him to the risk of the accident which has happened, this may be described as a peculiar danger to which from the nature of the employment the workman is exposed. I think, however, that it is preferable to adopt the actual words of the statute in testing their applicability to the facts of a particular case. In *Plumb v. Cobden Flour Mills Co., Ltd.* (4), decided in this House, LORD DUNEDIN says ([1914] A.C. at p. 68):

"A risk is not incidental to the employment when either it is not due to the nature of the employment, or when it is an added peril due to the conduct of the servant himself. . . . Illustrations of the first proposition will be found in all the cases where the risk has been found to be a risk common to all mankind and not accentuated by the incidents of the employment."

A risk may be accentuated by the incidents of the employment when the conditions of employment oblige the work to be carried on in a particular building which exposes the workman to the risk of the accident which in fact has occurred. An example of the application of this principle is found in *Andrew v. Failsworth Industrial Society* (20), which is approved in the opinion of LORD DUNEDIN. COLLINS, M.R., says ([1904] 2 K.B. at pp. 34, 35):

"Though [the accident] may not be connected with, or have any relation to the work a man is doing, yet, if, in point of fact, the position in which the man was doing the work, and the place he must necessarily occupy while doing the work, are a position and place of danger which caused the accident, it may fairly be said that it arose out of the employment, not because of the work, but because of the position":

see *Martin v. J. Lovibond & Sons, Ltd.* (8). The only other case decided in this House to which the Lord Justice-Clerk refers is *Trim Joint District School Board of Management v. Kelly* (2), but this is not a case which can be quoted to support the contention of the respondent. In my opinion, the appeal should be allowed, with costs.

Solicitors: *John Cuthbert*, London, for *T. M. Pole*, Edinburgh; *R. S. Taylor, Son & Humbert*, London, for *Macpherson & Mackay*, S.S.C., Edinburgh.

[Reported by W. E. REID, Esq., Barrister-at-Law.]

**GREENOCK CORPORATION v. CALEDONIAN RAIL. CO.
SAME v. GLASGOW AND SOUTH-WESTERN RAIL. CO.**

[HOUSE OF LORDS (Lord Finlay, L.C., Lord Dunedin, Lord Shaw, Lord Parker of Waddington and Lord Wrenbury), April 30, May 1, 3, 4, 7, 8, 10, July 23, 1917]

[Reported [1917] A.C. 556; 86 L.J.P.C. 185; 117 L.T. 483;
81 J.P. 269; 33 T.L.R. 531; 62 Sol. Jo. 8; 15 L.G.R. 749]

Water—Diversion of stream—Liability for overflow—Duty to provide substituted channel sufficient to meet all demands.

It is the duty of anyone who interferes with the course of a stream to see that the works which he substitutes for the channel provided by nature are adequate to carry off the water brought down even by extraordinary rainfall, and so to secure all persons lower down the stream from all danger. The responsibility to provide a substituted channel is not limited to providing a channel sufficient to meet all demands which may reasonably be anticipated or even all demands (in excess of the ordinary) short of an act of God. There must be provided a substituted channel which will be equally efficient happen what will. Where a stream has been dammed or diverted damage from a wholly unprecedented flood results, not from the act of God, but from the act of man in that he failed to provide a channel sufficient to meet the contingency of the act of God. But for the act of man there would have been no damage from the act of God.

Notes. Referred to: *A.-G. v. Cory*, *Kennard v. Cory*, [1921] 1 A.C. 521; *City of Montreal v. Watt and Scott*, [1922] 2 A.C. 555; *Sedleigh-Denfield v. O'Callagan*, [1940] 3 All E.R. 349; *Slater v. Worthington's Cash Stores (1930), Ltd.*, [1941] 1 All E.R. 245.

As to liability for flooding, see 33 HALSBURY'S LAWS (2nd Edn.) 630; and for cases see 44 DIGEST 24, 58.

Cases referred to:

- (1) *Kerr v. Earl of Orkney* (1857), 20 Dunl. (Ct. of Sess.) 298.
- (2) *Tennent v. Earl of Glasgow* (1864), 2 Macph. (Ct. of Sess.) (H.L.) 22; 36 Sc. Jur. 400; 44 Digest 61, h.
- (3) *Samuel v. Edinburgh and Glasgow Rail. Co.* (1850), 13 Dunl. (Ct. of Sess.) 312; 23 Sc. Jur. 125; 38 Digest (Repl.) 345, *590.
- (4) *Nichols v. Marsland* (1875), L.R. 10 Exch. 255; 44 L.J.Ex. 134; 33 L.T. 265; 23 W.R. 693; affirmed (1876), 2 Ex.D. 1; 46 L.J.Q.B. 174; 35 L.T. 725; 41 J.P. 500; 25 W.R. 173, C.A.; 36 Digest (Repl.) 297, 421.
- (5) *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 282, 334.
- (6) *Fletcher v. Smith* (1877), 2 App. Cas. 781; sub nom. *Smith v. Musgrave*, 47 L.J.Q.B. 4; sub nom. *Musgrave v. Smith*, 37 L.T. 367; 42 J.P. 260; 26 W.R. 88, H.L.; 44 Digest 22, 135.
- (7) *Potter v. Hamilton and Strathaven Rail. Co.* (1864), 3 Macph. (Ct. of Sess.) 83.

Also referred to in argument:

- Blyth v. Birmingham Waterworks Co.* (1856), 11 Exch. 781; 25 L.J.Ex. 212; 26 L.T.O.S. 261; 20 J.P. 247; 2 Jur.N.S. 333; 4 W.R. 294; 156 E.R. 1047; 36 Digest (Repl.) 5, i.
- Wilson v. Newberry* (1871), L.R. 7 Q.B. 31; 41 L.J.Q.B. 31; 25 L.T. 695; 36 J.P. 215; 20 W.R. 111; 2 Digest (Repl.) 90, 547.
- Green v. Chelsea Waterworks Co.* (1894), 70 L.T. 547; 10 T.L.R. 259, C.A.; 38 Digest (Repl.) 13, 52.
- Countess of Rothes v. Kircaldy Waterworks Comrs.* (1882), 7 App. Cas. 694, H.L.; 44 Digest 63, 450.

A Appeals from the orders of the First Division of the Court of Session affirming by a majority decisions of the Lord Ordinary (LORD DEWAR).

The facts appear in the opinion of the LORD CHANCELLOR.

Constable, K.C., and *Charles H. Brown* (both of the Scottish Bar) for the appellants.

Clyde, K.C. (Lord Advocate and Dean of Faculty), *W. Watson, K.C.*, and *Douglas Jamieson* (all of the Scottish Bar) for the respondents, the Caledonian Railway Co.

H. P. Macmillan, K.C., and *Douglas Jamieson* (both of the Scottish Bar) for the respondents, the Glasgow and South-Western Railway Co.

The House took time for consideration.

C July 23, 1917. The following opinions were read.

LORD FINLAY, L.C.—The two actions which form the subject of these appeals were brought by the Caledonian Railway Co. and by the Glasgow and South-Western Railway Co. respectively against the corporation of Greenock, to recover damages for injury to the property of the railway companies by flooding said to have been occasioned by works carried out by the corporation. The Lord Ordinary (LORD DEWAR) decided in favour of the pursuers in both cases. The case was argued on appeal before the First Division of the Inner House, and it was directed that minutes of debate should be prepared in order that the opinion of all the judges might be obtained. That opinion by a majority in each case—seven to six in the case of the Caledonian Railway Co. and ten to three in the case of the Glasgow and South-Western Railway Co.,—was in favour of the Lord Ordinary's views, and the Inner House, in conformity with the opinion of the majority of consulted judges, affirmed the decision of the Lord Ordinary. From that decision the corporation have appealed to your Lordships' House. The result of the appeal, in my opinion, depends mainly upon questions of fact.

The case for the respondents was that the damage to the railway companies' property in Greenock was caused by a large volume of water which found its way down Inverkip Road (and its continuation, Inverkip Street) on Aug. 5, 1912, owing to the works constructed by the corporation in and about the channel of the West Burn obstructing its flow. Inverkip Road (by which name for convenience I shall refer to Inverkip Road proper and its continuation, Inverkip Street) runs in a direction east by north through the town of Greenock, crossing on bridges first the Glasgow and South-Western Railway, and, a little further down, the Caledonian Railway. The road comes down from the hills lying to the south-west of the town, and there is a considerable fall even after the road has entered the burgh, with a substantially continuous gradient, the level at the West Greenock station of the Caledonian Railway Co. being 20 ft. lower than at the Lady Alice Park alongside which the road passes soon after entering the burgh. The West Burn runs alongside the road above the Lady Alice Park, and brings down the drainage from an area of some 600 or 800 acres, and is liable to come down in flood in wet weather. The Lord Ordinary describes the West Burn in its natural state and as altered by the works of the corporation in the following passage of his judgment: The West Burn comes from hilly ground lying to the south-west of Greenock and enters the town at the park called the "Lady Alice Park," about 800 yards south-west of the railway station. Until a few years ago it flowed through this park for a distance of about 400 yards in a little valley. The channel of the stream was considerably below the surrounding ground which drained into it, and in particular was below the level of Inverkip Road, which lay on its north bank. In the year 1908 this little valley was presented to the town of Greenock, and the defenders, with a view to effecting a city improvement, and forming a playground for children, altered the natural channel of the West Burn and the contour of the ground. They constructed a culvert and enclosed the West Burn in it, and raised the level by depositing material on the top of the culvert. In this way a pleasure ground

has been formed, but the valley has been obliterated and the burn buried. The surface of the park now slopes down to Inverkip Road, which has become the lowest level, and is the only channel for surface water formerly drained into the West Burn and for any overflow which may come from the burn before it reaches the mouth of the culvert. In addition to altering the levels in this way the defenders constructed certain works at the mouth of the culvert, which had the effect of seriously obstructing the free flow of water. These works consisted of a concrete paddling pond placed near the mouth of the culvert and constructed in such a manner that the concrete bottom of the pond is 1 ft. 7 in. higher than the original bed of the burn. At the bottom end there is a concrete curb or weir, and in the mouth of the culvert there is an iron grating to prevent children falling into the culvert. In the mouth of the culvert there are also a couple of large iron pipes which discharge surplus water from two of the corporation's reservoirs. At the top end of the paddling pond there is a concrete dam placed across the stream, with a footpath on the top, to give access from Inverkip Road to Brachelston Street, and an opening underneath—8 ft. wide by 4 ft. 5 in. high—for the passage of the burn. The footway on the top of the dam and the cope wall of the paddling pond are both above the level of Inverkip Road. It is admitted that these works obstruct about half the flow of water which would otherwise go down the culvert. That is not of importance except in times of high flood. But the rainfall in Greenock is heavy, and the West Burn is frequently in high flood. It drains an area variously estimated at from 600 to 800 acres of hill ground, and running transversely across this area there are two canals or "cuts" which connect some of the corporation reservoirs, and one of these cuts discharges surplus water into the West Burn. Like all hill burns it rises rapidly in heavy rain, but before the defenders altered the levels and constructed their works it had never caused any damage. Since the alterations were made, however, it has twice overflowed on to Inverkip Road at the mouth of the culvert and damaged property in the town—once in December, 1909, and again on the present occasion.

Before the works carried out by the corporation, the West Burn had a deep and capacious channel down which all water passed freely at a level much lower than that of Inverkip Road. The works of the corporation filled up the channel altogether, in order to form the Lady Alice Park, and substituted for the channel a culvert below the surface of the park, which was raised to a height above Inverkip Road. The result was that if the culvert proved insufficient to carry off flood water, it would overflow into Inverkip Road, which would be thus converted into the bed of a stream, down which the water would rush in the direction of the two railways. Lady Alice Park is about 400 yards long, and at its lower end the water emerges from the culvert constructed by the corporation into the open and deep channel of the West Burn, and runs down it for a distance of about 200 ft. past Leslie's Garage, which is on the left bank of the channel. The water is then conducted into a culvert crossing under the Glasgow and South-Western Railway and the Inverkip Road, whence it passes mainly by culverts to the sea.

On the forenoon of Aug. 5, 1912, very heavy rain came on in the Greenock district, which resulted in the damage forming the subject of these actions. Everything turns on the sequence of events, which appears to me to have been as follows: 10.45 the rain began; 10.50 the rain became very heavy; 11.15 an overflow of water coming down the West Burn took place from the paddling pond into the Inverkip Road; 11.20 the water pouring down Inverkip Road reached Leslie's Garage; 11.40 the flood swept Leslie's Garage buildings, with their contents, motors, &c., into the channel of the West Burn, and at 11.45 it swept away the wall of the Glasgow and South-Western Railway; 12.10 the retaining wall of the Caledonian Railway Co. at the West Station fell owing to the pressure of the water which had accumulated behind it. The Lord Ordinary found that the damage was done by the water which was diverted into the Inverkip Road by the works of the corporation at Lady Alice Park. He found that the overflow from the paddling pond began at 11.15, and that this overflow, coming down the Inverkip Road, caused

A the fall of the Glasgow and South-Western Railway wall at 11.45 and the fall of the Caledonian Railway Co.'s at 12.10. The Lord President, in an elaborate judgment, dissented from the conclusion of the Lord Ordinary in point of fact, and held that the fall of the railway walls occurred before the overflow from the paddling pond. If so, the inference is, of course, irresistible that the fall of these walls was not caused by that overflow: *ante hoc ergo non propter hoc*. The Lord President found that the retaining wall of the Caledonian Railway Co. gave way about ten minutes past twelve o'clock, and that the overflow of the burn and paddling pond occurred at about a quarter-past twelve. He referred especially to the evidence of Inglis, a witness for the pursuers, and said that the Lord Ordinary failed to observe that Inglis really meant a quarter-past twelve when he said that a quarter-past eleven was the time when he observed the burn overflowing from the paddling pond. This witness stated in his evidence that he saw the overflow at 11.15 from the higher ground in a market garden situate at the corner formed by the junction of Bow Road and Inverkip Road, just opposite the paddling pond. When the rain came on he took shelter in a greenhouse for a time, and went up to the higher ground in the market garden after the rain had been falling for about half an hour. As the rain began at 10.45 or thereabouts this points to about 11.15 as the time when Inglis went up to the higher ground in the garden, and 11.15 is the time he specifies in his evidence. The passage to which the Lord President refers as showing that Inglis meant 12.15 when he said 11.15 appears to me clearly to relate to a subsequent occasion altogether when he left the market garden "at the back of twelve," crossed the Bow Road, and went up through the cemetery and then down through its main gate. Taking Inglis' evidence as a whole, I have no hesitation in accepting the Lord Ordinary's understanding of his evidence as correct. Inglis' evidence so understood is consistent with the effect of other evidence in the case as a whole, and is particularly corroborated by the witnesses Smillie and Sheridan. When the pond overflowed the flood rushed down Inverkip Road and reached Leslie's Garage, pouring into the yard through the upper gateway. The men who were there described the exertions which they made to stem the flood, exertions which would probably fill up some fifteen or twenty minutes of time and bring us up to 11.40 or thereabouts—the probable time of the fall of the garage. This time is arrived at by the fact that the Glasgow and South-Western signalman, Robert Handley, fixes 11.50 as the time when he saw the flood and débris pouring along the line of the Glasgow and South-Western Railway, which they had reached through the breach in the railway wall. Reckoning back from 11.50, the hour fixed by the signalman, it appears to be probable that the Lord Ordinary was right in saying that the overflow from the pond converting the Inverkip Road into a torrent took place at about 11.15. The evidence, taken as a whole, seems to point to this conclusion, and the opinion of the judge who heard and saw the witnesses is, of course, entitled to great weight on a point of this kind.

H The evidence appears to leave no doubt that the flood coming down the road from the overflow of the pond was the cause of the damage to the Glasgow and South-Western Railway Co. The great volume of water which found its way into the yard of the garage at and after 11.20 cannot well have come from any other source. At about 11.40 it swept the garage buildings and their contents, including two motors, into the bed of the stream, and the flood impelled this mass of solid material against the railway wall, which collapsed. As regards the damage done to the wall of the Caledonian Railway Co., which is situate further down the Inverkip Road, it was strongly contended for the corporation that after the collapse of the garage buildings at 11.40 the flood proceeding from the overflow at the paddling pond would rush through the garage yard into the bed of the stream, and when the wall fell, down the line of the Glasgow and South-Western Railway, so that any contribution from the West Burn to the fall of the Caledonian Railway wall would from that time have been impossible. I do not think that this is correct in point of fact. Though the gate at the upper end of the garage yard was open, the fence remained between the yard and the road, and the lower gate was

closed. This would be quite enough to ensure that a great part of the flood would continue in its course down the Inverkip Road and would not be diverted into the garage yard. The West Greenock station of the Caledonian Railway Co. is situate in the angle formed by the junction of Roxburgh Street with Inverkip Road, and at the junction there is an open space spoken of in the evidence as the Railway Square. Very soon after the rainfall began water began to gather in this square, pouring into it from the adjacent streets, and began to accumulate behind a retaining wall of the railway company forming part of the station buildings. This wall ultimately collapsed, owing to the pressure of the water upon it, and the action is brought by the Caledonian Railway Co. on the allegation that its fall was caused or materially contributed to by the flood from the West Burn, which, after the overflow from the paddling pond, found its way down Inverkip Road into the square, and thence upon the railway premises. It was contended by the corporation that the damage to this wall was done entirely by water from other sources and that their works were in no way responsible for what happened.

I agree with the Lord Ordinary in thinking that in point of fact the flood coming down Inverkip Road caused by the diversion into this road of the water which, but for the corporation's works, would have found its way to the sea by the open channel, substantially contributed to the disaster. As soon as it is established that the overflow from the paddling pond preceded the fall of the retaining wall by nearly an hour, it is almost impossible to suppose that the great volume of water which from this source would find its way into the square both before and after the fall of the garage would not contribute substantially to what followed. It would require a very clear case upon the evidence to justify a reversal of the finding of fact by the Lord Ordinary, before whom the case was tried, and, in my opinion, the effect of the evidence as a whole is to show that the Lord Ordinary was right. [His LORDSHIP reviewed the evidence given by certain of the witnesses and continued:] All this evidence goes to show that the greatest volume of water which came down to the Caledonian Railway Square was from the Inverkip Road, and that it started coming down from that direction with suddenness at some time between eleven and twelve. It appears to me that the reasonable inference is that this flood coming down the Inverkip Road proceeded from the overflow of the burn from the paddling pond caused by the corporation's works there. When once it is established that this very considerable volume of water came down the Inverkip Road, beginning at 11.15, it appears to me only reasonable to conclude that it substantially contributed to the pressure of the water upon the retaining wall of the Caledonian Railway Co. and its consequent collapse, and it appears to me to have been the main, if not the only, cause of the fall of the garage and the consequent destruction of the wall of the Glasgow and South-Western Railway.

It remains to consider the questions of law raised on behalf of the appellants. The question of the liability incurred by any person who interferes with a natural watercourse was considered in the Court of Session in *Kerr v. Earl of Orkney* (1). In that case a dam had been constructed on a stream for the purpose of collecting water, and Lord Justice Clerk HOPE makes the following observations as to the extent of the liability for damage occasioned by the escape of such water (20 Dunl. (Ct. of Sess.) at p. 302):

"Although we did not require any answer from the respondent upon the general point of Lord Orkney's liability for the consequences of his dam bursting from a violent fall of rain, yet I think it right to state the general principle on which the view of the court is founded. That principle is—that if a person chooses upon a stream to make a great operation for collecting and damming up the water, for whatever purpose, he is bound, as the necessary condition of such an operation, to accomplish his object in such a way as to protect all persons lower down the stream from all danger. He must secure them against danger. It is not sufficient that he took all the pains which were thought at the time necessary and sufficient. They were exposed to no danger

A before the operation. He creates the danger, and he must secure them against danger, so as to make them as safe, notwithstanding his dam, as they were before. It is no defence in such a case to allege the dam would have stood against all ordinary rains—it gave way in an extraordinary and unprecedented fall of rain which could not be expected. The dam must be made perfect against all extraordinary falls of rain—else the protection is not afforded against the operation which the party must accomplish. An extraordinary fall of rain is a matter which, in our climate, cannot be called a *damnum fatale*—supposing the doctrine so denoted by that term to be applicable, generally speaking, to a dam for collecting water. And the experience of the last fifteen years has shown that the increased drainage of the country brings down in heavy rains the whole water in a very short space of time, and therefore in floods of a weight and power and force of water quite unknown in former times. But against such a state of things the party forming such dams must completely provide so as to secure safety to those lower down the stream. When an operation is made which involves great risk to the safety of life and property, the condition on which alone that can be allowed which causes such risk is complete protection. A dam that gives way in a night's rain is not such as the maker was bound to erect. The fact that it gives way is a proof that his obligation was not fulfilled, and that the protection was not afforded which he was bound to provide. What shall be considered a *damnum fatale* in such a case I need not inquire, but of this I am very clear, that a great fall of rain and consequent accumulation and weight of water is not a *damnum fatale* which exempts the proprietor from liability for the failure of his operation, for it is against such accumulation and weight of water that he is bound to provide."

In my opinion, the Lord Justice Clerk in that passage correctly stated the law of Scotland, and it received approval in your Lordships' House when the *Earl of Orkney's Case* (1) came under consideration in *Tennent v. Earl of Glasgow* (2). In that case the defender had substituted a wall for a hedge as a defence for his property. A stream burst its banks at a point above the wall, and the water descending was damned up by the wall, which after a time gave way and considerable damage was done by the accumulated water to the lands of an inferior inheritor. In giving judgment LORD WESTBURY says (2 Macph. (Ct. of Sess.) (H.L.) at p. 26 :

"This case differs very much from those which have been cited and relied on at the Bar. If anything be done by an individual which interferes with natural occurrences, such as, for example, in *Lord Orkney's Case* (1), throwing a dam across the course of a stream, it is undoubtedly the duty of that person so to construct the work as to provide in an efficient manner, not only against usual occurrences and ordinary state of things, but also to provide against things which are unusual and extraordinary. And therefore the decision of the court in the *Earl of Orkney's Case* (1), where a dam gave way, was properly referable to that circumstance."

LORD CHELMSFORD says (*ibid.* at p. 28) :

"This case is not at all like the case of *Lord Orkney* (1)—that is the case with respect to the dam—because there, as I have already intimated, the stream before the erection of the dam flowed harmlessly to the pursuer's mill. Lord Orkney erected a dam, by which he obstructed and headed up the course of the water. He was bound, therefore, under those circumstances—interfering with the stream and with another person's rights over the stream—to provide against every contingency. And although it was an extraordinary flood in that case which occasioned the bursting of the dam, it was one which he ought to have provided against. He ought to have made the dam capable of resisting any force which might be directed against it."

These authorities justify the view of the law propounded by PROFESSOR RANKINE in his work on the LAW OF LAND OWNERSHIP IN SCOTLAND (4th Edn.), p. 376 :

"The sound view seems to be that even in the case of an unprecedented disaster the person who constructs an opus manufactum on the course of a stream or diverts its flow will be liable in damages provided the injured proprietor can show (i) that the opus has not been fortified by prescription and (ii) that but for it the phenomena would have passed him scathless."

This passage, in my opinion, expresses the true view of the law applicable to this case.

The appellants contend that they are not responsible, as the injury to the wall was in the nature of *damnum fatale*. What amounts to *damnum fatale*? Its definition is given by LORD WESTBURY in *Tennent v. Earl of Glasgow* (2) (2 Macph. (Ct. of Sess.) (H.L.) at pp. 26, 27) :

"Under these circumstances, my Lords, what has occurred is one of those things which do not involve any legal liability—what are denominated in the law of Scotland *damnum fatale* occurrences—circumstances which no human foresight can provide against, and of which human prudence is not bound to recognise the possibility, and which when they do occur, therefore, are calamities which do not involve the obligation of paying for the consequences that may result from them."

LORD COCKBURN expressed the same idea in a picturesque phrase used by him in *Samuel v. Edinburgh and Glasgow Rail. Co.* (3), when he said (13 Dunl. (Ct. of Sess.) at p. 314) :

"I think he is bound to provide against the ordinary operations of nature, but not against her miracles."

In my opinion, the appellants have entirely failed to establish any defence on this ground. It is true that the flood was of extraordinary violence, but floods of extraordinary violence must be anticipated as likely to take place from time to time. It is the duty of anyone who interferes with the course of a stream to see that the works which he substitutes for the channel provided by nature are adequate to carry off the water brought down even by extraordinary rainfall, and if damage results from the deficiency of the substitute which he has provided for the natural channel, he will be liable. Such damage is not in the nature of *damnum fatale*, but is the direct result of the obstruction of a natural water course by the defenders' works followed by heavy rain.

Reliance was placed by the appellants upon *Nichols v. Marsland* (4). In that case it was decided that if the escape of water from a reservoir was due to the act of God, the person maintaining the reservoir was not liable. As MELLISH, L.J., put it (2 Ex.D. at p. 5) :

"If, indeed, the damages were occasioned by the act of the party without more—as where a man accumulated water on his own land, but owing to the peculiar nature or condition of the soil the water escapes and does damage to his neighbour, the case of *Rylands v. Fletcher* (5) establishes that he must be held liable."

The lord justice then goes on to decide that if the bursting of the reservoir was due to the act of God the liability to pay damages does not arise. *Nichols v. Marsland* (4) had been tried by a jury, and the finding of the jury is thus stated by MELLISH, L.J., (ibid. at pp. 5, 6) :

"The remaining question is, did the defendant make out that the escape of water was owing to the act of God? Now the jury have distinctly found not only that there was no negligence in the construction or the maintenance of the reservoirs, but that the flood was so great that it could not reasonably have been anticipated, although, if it had been anticipated, the effect might have been prevented; and this seems to us in substance a finding that the

A escape of the water was owing to the act of God. However great the flood had been, if it had not been greater than floods that had happened before and might be expected to occur again, the defendant might not have made out that she was free from fault, but we think she ought not to be held liable because she did not prevent the effect of an extraordinary act of nature which she could not anticipate."

B Two observations arise upon this case of *Nichols v. Marsland* (4). The first is that the case is dealt with in the argument and judgments with reference merely to the accumulation of water in a reservoir. There is no reference to the fact that the course of a natural stream had been interfered with. The operations which had in fact been carried out are described as follows (L.R. 10 Exch. at p. 256):

C "A natural stream called Bagbrook, which rose in higher lands, ran through the defendant's grounds, and after leaving them flowed under the four county bridges in question. After entering the defendant's grounds the stream was diverted and dammed up by an artificial embankment into a pool of three acres in area, called 'the upper pool,' from which it escapes over a weir in the embankment, and was again similarly dammed up by an artificial embankment into the 'middle pool,' which was between one and two acres in area. Escap-
D ing over a weir in the embankment, it was again dammed up into the 'lower pool,' which was between eight and nine acres in area, and from which the stream escaped into its natural and original course."

This decision, having reference merely to the storage of water as in *Rylands v. Fletcher* (5), does not affect the question of liability for interference with the course
E of a natural stream as laid down in the authorities cited above. Secondly, the jury had found that the damage was occasioned by the act of God, and there is this note (2 Ex.D. at p. 6):

"The question whether the rule should be made absolute for a new trial, on
F the ground that the verdict was against the evidence, was reserved for future discussion if the plaintiff should desire it."

It does not appear that this question was ever again brought up for discussion in the Exchequer Chamber.

In the case now under appeal the Lord Ordinary found, and, in my opinion,
G rightly found, that the flood could not be regarded as in the nature of damnum fatale, and that the appellants in constructing the culvert ought to have foreseen the possibility of such an occurrence and to have provided against it. In my opinion, both the appeals fail upon all points, and should be dismissed with costs.

H **LORD DUNEDIN.**—I concur. The Lord Chancellor has gone so fully into the evidence, and I am so entirely in accordance with the view he has taken of the events of the morning of Aug. 5, 1912, that I cannot think of inflicting on your Lordships what would only be a repetition of what he has said. I agree with the Lord Ordinary and disagree with the Lord President as to the time at which the overflow at the pond took place. As to the appellants being in fact responsible for the alteration of the bed of the stream, which made what happened possible, there is no dispute. The only question that remains is whether the responsibility in fact entails a responsibility in law.

I I think I am making an accurate statement when I say that *Kerr v. Earl of Orkney* (1) has been since its date considered by Scottish lawyers to have been well decided, and it will from henceforth enjoy the approval of the noble Lord on the Woolsack, and I believe of the other noble Lords who have taken part in this appeal. Leading counsel for the appellants, in his address, which was equally admirable for its force and its moderation, felt that he was pressed by that case and argued that, though the decision itself was right, the dicta in it must be regarded as modified by what had since been decided, and notably by *Nichols v. Marsland* (4) and *Fletcher v. Smith* (6). *Nichols v. Marsland* (4) was, as his

Lordship has pointed out, decided upon the footing of the verdict of the jury, which, as construed by the court, amounted to a direct finding that the occurrence in question was an act of God, which is the exact equivalent to the expression used in the Scottish cases, *damnum fatale*. Lord Justice Clerk HOPE, in *Kerr v. Earl of Orkney* (1), expressly saved the case of *damnum fatale*, adding that whatever might be a *damnum fatale*, an extraordinary fall of rain in the climate of Scotland could not be so considered. But, further, what I think makes it clear that the doctrine of act of God or *damnum fatale*, which was what was given effect to in *Nichols v. Marsland* (4), did not in any way weaken the authority of *Kerr v. Earl of Orkney* (1) is the way in which that case was considered and treated in a subsequent case in your Lordships' House—namely, *Tennent v. Earl of Glasgow* (2). In that case the Earl of Glasgow had built a wall along a road where a hedge had been. There was a burn which ran parallel to the road at a distance of about a quarter of a mile. The burn eventually entered beneath the road by a conduit, and an opening had been made in the wall to allow of the burn entering the conduit. There was an extraordinary fall of rain, and the burn burst its banks at a place where there was a bend, invaded the road at a place far above the entrance of the conduit, and formed an accumulation behind the wall, through which it eventually burst and caused the damage complained of. LORD WESTBURY, L.C., said as follows :

"If anything be done by an individual which interferes with natural occurrences, such as, for example, in *Lord Orkney's Case* (1), throwing a dam across the course of a stream, it is undoubtedly the duty of that individual so to construct the work as to provide in an effectual manner not only against usual occurrences and ordinary states, but also to provide against things which are unusual and extraordinary; and therefore the decision of the court in the *Earl of Orkney's Case* (1) was properly referable to that circumstance. . . . But there was nothing which the noble defender was bound to guard against in the building of a wall along the public road. . . . The wall was not erected for the purpose of interfering with anything like that which has been called at the Bar the course of nature. . . . Under the circumstances what has occurred is one of those things which do not involve any legal liability—which are denominated in the law of Scotland *damnum fatale* occurrences—circumstances which no human foresight can provide against, and of which human prudence is not bound to recognise the possibility, and which when they do occur, therefore, are calamities that do not involve the obligation of paying for the consequences that may result from them."

In an earlier part of his judgment he had said :

"It might have been a very material thing in this case if the injury, or the wrong I should rather call it, sustained by the appellant could have been shown to be caused by a state of circumstances directly occasioned by the building of the wall by the noble defender over the conduit and along the parish road, because it is clear that the natural course of the stream was down the parish road and that the conduit provided a means of carrying the water beneath the parish road."

It is clear that a case decided by the Inner House of the Court of Session, and afterwards approved by your Lordships' House in another Scottish case, cannot as authority be overruled or modified by a decision of the English Exchequer Chamber. But the truth is that, once it is recognised that *Nichols v. Marsland* (4) proceeded on the verdict of the jury, there is no inconsistency between that case and *Kerr v. Earl of Orkney* (1).

As regards *Fletcher v. Smith* (6) there was again a finding of the jury that precludes any effect of it as a decision against *Kerr v. Earl of Orkney* (1) for the jury found that the substituted watercourse was not as efficient as the old. The appellants, however, pinned their faith to the preference expressed by LORD

A PENZANCE (though he expressly declined to give a positive opinion on the matter) for the second as opposed to the third of the questions he put. These questions were :

B "Secondly, were the defendants bound, as they were making a new and artificial watercourse, to construct it in such a manner that it would be capable of carrying off the water that might flow into it from all such floods and rainfalls as might reasonably be anticipated to happen in that locality? Or, thirdly, were they bound to make provision for any such quantities of water as might possibly be discharged into it from any mere rainfall however unusual and however contrary to present experience?"

C The second proposition, as contrasted with the first, is really of no assistance to the appellants unless it is possible to extract from the phrases used a definition of what is and what is not, a *damnum fatale*. The appellants argue that, applying LORD PENZANCE's test, if they can show that this rainfall was much in excess of what had been previously observed in Greenock, that is enough. I do not think that you can rightly confine your view to Greenock alone. No one can say that such rainfall was unprecedented in Scotland; and I think the appellants were bound to consider that some day Greenock might be subjected to the same rainfall as other places in Scotland had been subjected to. With deference to LORD PENZANCE, I think that there is no clear-cut choice in law between his two propositions; but that it always comes to a question of fact whether such and such an occurrence was a *damnum fatale*: and I hold a clear opinion that this flood was not. I agree with the Lord Chancellor that the law is accurately stated by PROFESSOR RANKINE in his book. I may perhaps add that the expression "fortified by prescription" does not, I think, mean that the work is protected by the actual prescription statutes, but that by analogy (as such analogy has been applied in the case of servitudes) the existence of a state of things for the period of the long prescription may serve to prevent any person alleging that another state of things was the true state of nature. The appeal, in my judgment, should be dismissed.

F LORD SHAW.—I concur. In the view taken by that very careful and sagacious judge, LORD DEWAR (Lord Ordinary), there is no refinement of fact about the case. He says :

G "I think it is out of the question for them (the corporation) to argue that they were entitled to bury the burn, which from time immemorial had carried flood waters safely to the sea, and to alter the levels so that the public highway, leading on a descending gradient into the town, became the only means by which these flood waters could escape."

As to whether this was the actual state of the facts, I express my opinion in the affirmative. I agree with the analysis of, and conclusions upon, the evidence made by the learned Lord Ordinary and by my noble and learned friend on the Woolsack.

H This being as stated, the law of the case appears to be in no way doubtful. I have never known the law of Scotland, as stated in the judgment of the Lord Justice Clerk HOPE in the *Earl of Orkney's Case* (1), to be questioned. On the contrary, it has been, since its date, accepted as sound. And I think it right to add, being in this fortified by the opinion of the noble and learned Lord Chancellor, that I know of no decided authority for the proposition that there is a difference on this topic between the law of England and that of Scotland. A person making an operation for collecting and damming up the water of a stream must so work as to make proprietors or occupants on a lower level as secure against injury as they would have been had nature not been interfered with. And this is so, although the water accumulated suddenly, and the fall was extraordinary or even unprecedented in quantity. These are the general propositions of the law. While, if any help as to Scottish climatic conditions might be sought, one would get that also from the observation made by Lord Justice Clerk HOPE—and, by the way, plainly applicable in the present case—who said :

"An extraordinary fall of rain . . . in our climate, cannot be called a *damnum fatale*—supposing the doctrine so denoted by that term to be applicable, generally speaking, to a dam for collecting water."

No doubt whatsoever is thrown upon these doctrines by *Nichols v. Marsland* (4). A perusal of the judgments and procedure therein shows that it was held by a jury's finding that the disaster did as a matter of fact occur by a *damnum fatale*. I cannot, I confess, view the case as wholly satisfactory; but its conclusion was reached undoubtedly and solely by the road of settled fact—an affirmation of *damnum fatale*. Such an affirmation has not been made in the present case, and, in my opinion, on its merits as well as on the guide to a proper view thereof as expressed in the outstanding authority of *Kerr v. Earl of Orkney* (1), which I have cited, such an affirmation could not be made. These occurrences arose from a heavy, it may be an extraordinary and it may be an unprecedented, spate. That spate would have harmlessly passed away but for the appellants' operations. These operations, however, converted them into sources of harm and damage, and the appellants are thus answerable therefor. In the words of LORD CHELMSFORD in *Tennent v. Earl of Glasgow* (2) (2 Macph. (Ct. of Sess.) (H.L.) at p. 28)—a case which in substance entirely approved of the principle of *Kerr v. Earl of Orkney* (1):

"He was bound, therefore, under those circumstances—interfering with the stream and with another person's right over the stream—to provide against every contingency. And although it was an extraordinary flood in that case which occasioned the bursting of the dam, it was one which he ought to have provided against."

It is accordingly quite unnecessary to go into the doctrine of *damnum fatale* in general. I am not entirely satisfied that that expression, or the equivalent expression "the act of God," will ever be capable of complete, exact, and unassailable definition. The nearest approach which the law has made to that point is in the judgment of LORD WESTBURY, L.C., in *Tennent v. Earl of Glasgow* (2). Further, I may be allowed to express the doubt whether expressions such as those used by LORD COCKBURN in *Samuel v. Edinburgh and Glasgow Rail. Co.* (3) (13 Dunl. (Ct. of Sess.) at p. 314) as to nature's "miracles" do anything to clarify, or, indeed, whether they do not confuse, the issue. And I am quite clear that when in *Potter v. Hamilton and Strathaven Rail. Co.* (7) LORD ARDMILLAN supplemented his citation from LORD WESTBURY's judgment in *Tennent's Case* (2) by the observation (3 Macph. (Ct. of Sess.) at p. 86):

"A person who makes a new work is bound to protect those on a lower level from extraordinary as well as ordinary accumulations of water, provided they be not such as to amount to an unprecedented event, so improbable and unnatural as could not have been reasonably anticipated,"

such a gloss is not warranted by law. Its effect might be to whittle away and undermine an affirmation of the law which, without it, would be, as it was meant to be and is, broad and firm.

LORD PARKER OF WADDINGTON.—I agree. With regard to the facts I cannot find any valid reason for dissenting from the findings of the Lord Ordinary, and *Kerr v. Earl of Orkney* (1), approved by this House in *Tennent v. Earl of Glasgow* (2), is undoubtedly the governing authority. I do not understand that the Lord Justice Clerk in the former case intended to decide that the Scottish doctrine of *damnum fatale* could never have any application in cases such as that with which he was dealing, but merely that the facts before him disclosed no such *damnum*. If this be so, *Kerr v. Earl of Orkney* (1) is not in conflict with the English authorities. *Rylands v. Fletcher* (5) saved the question whether the act of God might not have afforded a defence, and this question was answered in the affirmative in *Nichols v. Marsland* (4) in which the act of God had been established by the finding of the jury, though I have some doubt whether such finding was

A correct. With regard to *Fletcher v. Smith* (6) it decides nothing, but I think the House was inclined to accept the view of the law which had been taken in *Nichols v. Marsland* (4), though it is true that LORD PENZANCE's alternatives were not very clearly stated.

B LORD WRENBURY referred to the facts and continued: Numerous cases have been cited, beginning in England with *Rylands v. Fletcher* (5) and in Scotland with *Samuel v. Edinburgh and Glasgow Rail. Co.* (3) and *Kerr v. Earl of Orkney* (1). But in none of these was the question one as to liability for the consequences resulting from works in alveo fluminis whereby the natural alveus was filled up and the flow of water under the force of gravity thrown into a new channel at a new and higher level. The effect of the corporation's works was that, except in
 C so far as their culvert sufficed to take and took water coming from the westward, the Inverkip Road was substituted for the V of the valley, and became the channel by which all that water had to be drained away. In such a case the corporation is responsible, I conceive, for resultant damage howsoever arising. The responsibility to provide a substituted channel is not limited to providing a channel sufficient to meet all demands which might reasonably be anticipated, or even all demands (in excess of the ordinary) short of the act of God. The corporation must
 D provide a substituted channel which will be equally efficient happen what will. Assuming an act of God, such as a flood, wholly unprecedented, the damage in such a case results not from the act of God, but from the act of man in that he failed to provide (as there was before) a channel sufficient to meet the contingency of the act of God. But for the act of man there would have been no damage from the act of God. The case is not that of a man who has brought a wild beast upon
 E his land and has effectually chained him and the chain has been broken by an act of God. That was *Nichols v. Marsland* (4). It is a case in which the act of God—if there was one here—brought the wild beast, and but for the act of man there was a safe exit for the wild beast, and he would have gone away and there would have been no injury done. The act of man consisted in closing the exit,
 F which, had it remained, would have rendered the advent of the wild beast harmless. To construct a reservoir upon a man's own land is a lawful act. To close or divert the natural line of flow of a stream so as to render it less efficient is not. It has never been held that in such a case there is not liability.

Upon the facts in the Glasgow and South-Western case I do not add anything. I am satisfied that, whether their wall fell before or after the overflow of the pond,
 G the damage resulted from the fact that the corporation had made the Inverkip Road a sort of substituted alveus fluminis, and that the wreckage of the garage, the consequent blocking of the Glasgow and South-Western culvert, and the resultant fall of the wall, are due to that state of things. Upon the Caledonian case I have felt much more difficulty. When the Glasgow and South-Western wall fell at 11.40 or 11.45 there was opened to the flood a new channel of ample capacity and
 H at a much lower level—viz., the Glasgow and South-Western tunnel down to the Princes Pier. There was, I think, upon the evidence, very considerable means of access from the Inverkip Road to that new channel. The respondents have an arduous task to maintain that the fall of the Caledonian wall some half-hour later, at 12.10, was due to water coming from the westward down the Inverkip Road and not flood water of which there was plenty reaching the Station Square from
 I other directions. But as your Lordships are satisfied that the evidence is sufficient to support the Caledonian case, I do not take it upon myself to differ from your Lordships' conclusion.

Solicitors: *John Kennedy*, W.S., London, for *Cumming & Duff*, W.S., Edinburgh; *Grahams & Co.*, London, for *D. L. Forgan*, Glasgow, and *Hope, Todd & Kirk*, W.S., Edinburgh; *Sherwood & Co.*, London, for *Maclay, Murray & Spens*, Glasgow, and *John C. Brodie & Sons*, W.S., Edinburgh.

[Reported by W. E. REID, ESQ., Barrister-at-Law.]

Re MOXON

[CHANCERY DIVISION (Sargant, J.), July 26, 27, October 13, 1916]

[Reported [1916] 2 Ch. 595; 86 L.J.Ch. 32; 115 L.T. 673;
61 Sol. Jo. 42]

Trustee—New trustees—Appointment of Public Trustee as sole trustee—Provision in trust instrument that number of trustees not to be reduced below three—Trustee Act, 1893 (56 & 57 Vict., c. 53), ss. 10, 25—Public Trustee Act, 1906 (6 Edw. 7, c. 65), s. 5.

Persons having the statutory power to appoint new trustees may appoint the Public Trustee as sole trustee despite an express provision in the trust instrument that upon the appointment of new trustees the number is not to be reduced below three.

Notes. The Trustee Act, 1893 is repealed, ss. 10 and 25 being replaced by the Trustee Act, 1925, ss. 36 and 41 (see 26 HALSBURY'S STATUTES (2nd Edn.) 107. As to the appointment of the Public Trustee, see 33 HALSBURY'S LAWS (2nd Edn.) 337, 338; and for cases see 43 DIGEST 1033, 1034. For the Public Trustee Act, 1906, see 26 HALSBURY'S STATUTES (2nd Edn.) 28.

Case referred to:

(1) *Re Leslie's Hassop Estates*, [1911] 1 Ch. 611; 80 L.J.Ch. 486; 27 T.L.R. 352; 55 Sol. Jo. 384; sub nom. *Re Hassop Settled Estates, Re Leslie's Will*, 104 L.T. 563; 43 Digest 1034, 4743.

Also referred to in argument:

Re Cunningham and Bradley and Wilson, [1877] W.N. 258; 12 L.J.N.C. 214; 43 Digest 679, 1099.

West of England and South Wales District Bank v. Murch (1883), 23 Ch.D. 138; 31 W.R. 467; sub nom. *West of England Bank v. Murch, Re Booker & Co.*, 52 L.J.Ch. 784; 48 L.T. 417; 43 Digest 682, 1121.

Originating Summons to determine whether certain trustees had power under a will to appoint the Public Trustee a sole trustee in their place or in the alternative if they had not the power, that the court should appoint the Public Trustee sole trustee thereof.

The testator, who died many years before the Public Trustee Act, 1906, by his will gave his residuary estate to his wife and certain other persons whom he appointed executors thereof. The trusts of the will are immaterial, but it contained an express power for his wife during her widowhood and in case of her remarriage for her and the surviving or continuing trustees or trustee, or for the last retiring trustees or trustee to appoint new trustees thereof, and the testator provided that upon such appointment the number of trustees might be augmented or reduced so that the number should not be raised above four or reduced below three. The widow died in 1915, and the two surviving trustees were anxious to retire and appoint the Public Trustee in their place. The Public Trustee was willing to act if he could be validly appointed a sole trustee and the beneficiaries desired that he should be appointed. The question turned on the meaning of s. 5 (1) of the Public Trustees Act, 1906, taken in conjunction with ss. 10 and 25 of Trustee Act, 1893, and what was the effect thereof, and the summons stood over to allow the Public Trustee to be added as a party to argue the question.

By s. 10 of the Trustee Act, 1893 [see now s. 36 of Trustee Act, 1925]:

“(1) Where a trustee, either original or substituted, and whether appointed by a court or otherwise, . . . desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, . . . then the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust . . . may, by writing, appoint another person or other

- A persons to be a trustee or trustees in the place of the trustee . . . desiring to be discharged. (2) On the appointment of a new trustee for the whole or any part of trust property: (a) The number of trustees may be increased, and . . . (c) it shall not be obligatory to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than two trustees were originally appointed; but, except
- B where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust. . . (3) Every new trustee so appointed as well before as after all the trust property becomes by law, or by assurance or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a
- C trustee by the instrument, if any, creating the trust. (4) The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator, and those relative to a continuing trustee, including a refusing or retiring trustee, if willing to act in the execution of the provisions of this section. (5) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any,
- D creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained. (6) This section applies to trusts created either before or after the commencement of this Act."

By s. 25 of the Trustee Act, 1893 [see now s. 41 of the Trustee Act, 1925] :

- E "(1) The High Court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult, or impracticable so to do without the assistance of the court, make an order for the appointment of a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee. In particular, and without prejudice to the generality of the foregoing provision,
- F the court may make an order for the appointment of a new trustee in substitution for a trustee who is convicted of felony or is a bankrupt. (2) An order under this section, and any consequential vesting order or conveyance, shall not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated. (3) Nothing in this section shall give power to appoint an executor or administrator."

- G By s. 5 of the Public Trustee Act, 1906 :

- H "(1) The Public Trustee may by that name or any other sufficient description be appointed to be trustee of any will or settlement or other instrument creating a trust or to perform any trust or duty belonging to a class which he is authorised by the rules made under this Act to accept and may be so appointed whether the will or settlement or instrument creating the trust or duty was made or came into operation before or after the passing of this Act and either as an original or as a new trustee or as an additional trustee in the same cases and in the same manner and by the same persons or court as if he were a private trustee with this addition that though the trustees originally
- I appointed were two or more the public trustee may be appointed sole trustee. (2) Where the public trustee has been appointed a trustee of any trust a co-trustee may retire from the trust under and in accordance with s. 11 of the Trustee Act, 1893, notwithstanding that there are not more than two trustees and without such consents as are required by that section. (3) The Public Trustee shall not be so appointed either as a new or additional trustee where the will, settlement, or other instrument creating the trust or duty contains a direction to the contrary unless the court otherwise order."

The originating summons was taken out both under Ord. 55, r. 3, of the Rules of the Supreme Court, 1883, and under ss. 25, 35, and 38 of the Trustee Act, 1893. A

Mark L. Romer, K.C., and B. A. Hall for the applicants.

Sheldon for the Public Trustee.

Cur. adv. vult.

SARGANT, J.—This summons raises the important question whether persons having the statutory power of appointing new trustees of a will can appoint the Public Trustee as the sole trustee of the will notwithstanding that the will contains a provision that upon any appointment of new trustees the number is not to be reduced below three. In *Re Leslie's Hassop Estates* (1) EVE, J., has expressed a clear opinion in favour of such an appointment. But the actual decision in that case was merely that the court could make such an appointment, and the relevant statutory provisions are not precisely the same in the case of an appointment by the court as in the case of individual appointors. Here the persons proposing to make the appointment are the retiring trustees themselves, and, inasmuch as both they and the beneficiaries under the settlement are desirous that the appointment should be made, there has been some difficulty in securing an effective argument against the proposed appointment. But by arrangement the Public Trustee has been served with the summons, and counsel on his behalf has assisted me by pointing out very effectively such objections as there are to the appointment. Though I have not been convinced by his arguments, yet, out of respect to them and because of the general importance of the question, I have thought it well to put the reasons for my judgment into writing. B C D

Counsel's objections were two in number. The first was that on its true construction s. 5 of the Public Trustee Act merely brings the Public Trustee within the scope of the statutory power contained in s. 10 of the Trustee Act and enables his appointment under that section; that accordingly any such appointment of the Public Trustee is subject to all the restrictions of s. 10, including those in sub-s. (2) (c) and sub-s. (5), and that in the present case these last restrictions clearly prohibit the appointment now proposed. I am, however, of opinion that the first link in this chain of reasoning is defective. It seems to me that s. 5 of the Public Trustee Act, 1906, is not merely by way of addition to the statutory power, but is a positive and independent enactment enabling the appointment of the Public Trustee on every occasion on which a private trustee could be appointed. For instance, after as well as before s. 5 of the Trustee Act, 1893, or its legislative predecessors such as s. 31 of the Conveyancing Act, 1881, s. 5 of the Conveyancing Act, 1882, and s. 6 of the Conveyancing Act, 1892, there are cases in which the power of appointing new trustees rests entirely on the provisions of the will or settlement in question and is wholly independent of any statutory power, and the language of s. 5 of the Public Trustee Act, 1906, obviously allows the appointment of the Public Trustee in these cases as well as in the cases governed by the general legislation. It is true that the occasion of appointment, the manner of appointment, and the persons appointing are to be the same in the case of the Public Trustee as in the case of any other trustee. But this was in the main necessary to prevent conflict of overlapping, and in any case the use of referential words of this kind is sufficiently explicable by reasons of convenience, and is not of itself enough to convert into a mere modification or extension of the statutory power that which is on the face of it a power separate from and independent of the statute. Indeed, though it may not be necessary to go so far in this particular case, I am inclined to adopt the broad general view suggested by counsel for the applicants that (subject, of course, to the restrictions imposed by sub-ss. (3) and (4)) sub-s. (1) enables the Public Trustee to be appointed in all cases of appointment as the sole trustee, and sub-s. (2) enables the Public Trustee to be left in all cases of retirement as the sole trustee. On this view of the effect of s. 5 of the Public Trustee Act, 1906, it is unnecessary for me to consider whether the terms of sub-s. (1) of E F G H I

A that section are in themselves sufficient to override in this respect the provisions of sub-s. (5) of s. 10 of the Trustee Act, 1893. But in saying this I must not be understood as in any way dissenting from the view expressed by EVE, J., that they are sufficient.

B Counsel's second objection was the more obvious one that the provision in the settlement that the number of trustees is not to be reduced below three is a direction to the contrary within the meaning of sub-s. (3) of s. 5. It is, however, to be observed that the direction to the contrary which is dealt with by the subsection is primarily, at all events, a direction entirely prohibiting the appointment of the Public Trustee, and has no special reference at all to his appointment as a sole trustee. The language is very different from that of sub-s. (5) of s. 10 of the Trustee Act. Here it is admitted that, apart from the question of number, there is nothing whatever to prevent the appointment of the Public Trustee as one of the trustees of the will. And even if the provision in the will is to be deemed a direction that the Public Trustee, like any other trustee, is to be one of not less than three (which I very much doubt, having regard to the entirely new constitution and position of the statutory corporation constituted by the Public Trustee Act), I am of opinion that this direction is surmounted by the concluding words of sub-s. (1) of s. 5 of the Act, and is not a direction to the contrary within the true meaning of sub-s. (5) of the section. Accordingly I propose to declare that on the true construction of the will, and in the events which have happened, the applicants have power to appoint the Public Trustee sole trustee of the will in their place. The costs of adding the Public Trustee and of the adjournment into court as between solicitor and client are to be paid by the Public Trustee, and the rest of the costs of the summons as between solicitor and client are to be paid out of the trust estate.

E Solicitors: *Theodore Goddard & Co.*; *L. J. Fulton*, Legal Adviser to the Public Trustee.

[Reported by L. MORGAN MAY, Esq., Barrister-at-Law.]

F

TREBECK v. CROUDACE

G [COURT OF APPEAL (Swinfen Eady, Bankes and Warrington, L.JJ.), July 26, 27, November 6, 1917]

[Reported [1918] 1 K.B. 158; 87 L.J.K.B. 272; 118 L.T. 141; 82 J.P. 69; 34 T.L.R. 57; 62 Sol. Jo. 85; 16 L.G.R. 82]

Malicious Prosecution—Evidence—Need to prove malice and absence of reasonable and probable cause.

H Two ingredients essential to support an action for malicious prosecution are (i) malice and (ii) an absence of reasonable and probable cause. The jury must find that the defendant acted maliciously.

Notes. Considered: *Barnard v. Gorman*, [1941] 3 All E.R. 45. Referred to: *Isaacs v. Keech*, [1925] 2 K.B. 354.

I As to the essentials to be proved in an action for malicious prosecution, see 25 HALSBURY'S LAWS (3rd Edn.) 353 et seq.; and for cases see 33 DIGEST 478 et seq.

Case referred to:

(1) *Bradshaw v. Waterlow & Sons, Ltd.*, [1915] 3 K.B. 527; 85 L.J.K.B. 318; 118 L.T. 1101; 31 T.L.R. 556, C.A.; 33 Digest 506, 493.

Also referred to in argument:

Hicks v. Faulkner (1881), 8 Q.B.D. 167; 51 L.J.Q.B. 268; 46 L.T. 127; 46 J.P. 420; 30 W.R. 545, D.C.; affirmed (1882), 46 L.T. 180; 46 J.P. 421, C.A.; 33 Digest 467, 18.

Broad v. Ham (1839), 5 Bing.N.C. 722; 8 Scott, 40; 8 L.J.C.P. 357; 132 E.R. 1278; 33 Digest 495, 362. A

Brown v. Hawkes, [1891] 2 Q.B. 718; 61 L.J.Q.B. 151; 65 L.T. 108; 55 J.P. 823; 7 T.L.R. 607, C.A.; 33 Digest 504, 454.

Griffin v. Coleman (1859), 4 H. & N. 265; 28 L.J.Ex. 134; 157 E.R. 840; sub nom. *Coleman v. Griffin*, 32 L.T.O.S. 333; sub nom. *Colman v. Griffin*, 23 J.P. 327; 14 Digest (Repl.) 194, 1592. B

Hogg v. Ward (1858), 3 H. & N. 417; 27 L.J.Ex. 443; 31 L.T.O.S. 184; 22 J.P. 626; 4 Jur.N.S. 885; 6 W.R. 595; 157 E.R. 533; 14 Digest (Repl.) 197, 1630.

Mitchell v. Jenkins (1833), 5 B. & Ad. 588; 2 Nev. & M.K.B. 301; 3 L.J.K.B. 35; 110 E.R. 908; 33 Digest 486, 235.

Chamberlain v. King (1871), L.R. 6 C.P. 474; sub nom. *King v. Chamberlain*, 40 L.J.C.P. 273; 24 L.T. 736; 35 J.P. 743; 19 W.R. 931; 42 Digest 952, 253. C

Appeal by defendant and cross-appeal by plaintiff from orders made by BAILHACHE, J., in an action tried by him with a common jury.

The plaintiff was a taxicab driver and the defendant was a sergeant of the Metropolitan Police. On Aug. 5, 1916, between 8 and 8.15 p.m., the plaintiff, who had just taken out a taxicab at Shepherd's Bush, was engaged by a Lieutenant Tait to drive him and his wife to Uxbridge, the fare being agreed beforehand at 17s. 6d. The engine was not pulling well, and three times on the way to Uxbridge the plaintiff had to stop and descend from the cab and make some adjustment. In consequence they arrived at Uxbridge later than had been anticipated. Lieutenant Tait, who had to rejoin his regiment at Denham, was afraid that he had missed at Uxbridge the train to Denham, and he asked the plaintiff to drive on from Uxbridge to the camp at Denham, three miles further on. The plaintiff declined to go on to Denham. An altercation arose. Lieutenant Tait appealed to a policeman, and the policeman called the defendant. The sergeant considered that the plaintiff was the worse for drink, and took him to the police station. The plaintiff arrived at the station about 9.20 p.m. The divisional surgeon was sent for, and he arrived about 9.40 p.m. He applied to the plaintiff the usual tests for drunkenness, and then signed his report, which stated that the plaintiff "smells of drink, but is not drunk." The defendant signed the charge sheet, and the sergeant on duty at the station accepted the charge. Later that night the plaintiff's employer came to the police station and bailed out the plaintiff. The plaintiff subsequently appeared before the magistrates, when the charge against him was dismissed. Thereupon the plaintiff brought an action against the defendant for false imprisonment and malicious prosecution. The action came on before BAILHACHE, J., and a common jury. The learned judge left the following questions to the jury: (i) Did the defendant honestly believe at the time he arrested the plaintiff that the plaintiff was drunk?—Answer: Yes. (ii) Did the defendant honestly believe at the time he signed the charge sheet that the plaintiff was drunk?—Answer: No. (iii) Damages (if any) for false imprisonment.—Answer: Four guineas. (iv) Damages (if any) for malicious prosecution.—Answer: Twenty guineas. Upon those findings his Lordship entered judgment for the defendant on the charge of false imprisonment and for the plaintiff on the charge of malicious prosecution with the damages assessed by the jury. The defendant applied for judgment or a new trial on appeal from the verdict and judgment as to the malicious prosecution. The plaintiff cross-appealed against that part of the verdict and judgment which ordered that judgment should be entered for the defendant on the issue of false imprisonment. D
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Inskip, K.C., and *Malcolm Macnaghten* for the defendant.

Arthur Powell, K.C., and *Martin O'Connor* for the plaintiff.

Cur. adv. vult.

Nov. 6, 1917. The following judgments were read.

SWINFEN EADY, L.J.—This action was brought to recover damages for false imprisonment and malicious prosecution, and was tried before BAILHACHE, J., and

A a common jury. He left certain questions to the jury, and, having regard to their answers, he directed judgment for the defendant upon the claim for false imprisonment and for the plaintiff for £21 damages upon the claim for malicious prosecution. Each side appeals. The plaintiff contends that on the claim for false imprisonment judgment should be entered for him for £4 4s., being the amount of damages provisionally assessed by the jury. The defendant contends that upon the claim
B for malicious prosecution judgment should be entered for him as well as upon the claim for false imprisonment.

[HIS LORDSHIP stated the facts as above set forth, and continued:] The plaintiff's evidence was that he was a teetotaler from the previous February until the evening in question, when before starting he had only drunk a portion of some elder wine with which he had been supplied, as the house had no "tonic water,"
C for which he had called. With reference to the defendant's appeal against the judgment for malicious prosecution it will be observed that the form of the second question put to the jury is ambiguous. It is open to the interpretation that the jury were asked whether the defendant believed at the time when he signed the charge sheet that the plaintiff was then drunk, not whether he then believed that he was drunk when he was arrested, and the way in which the case was conducted at
D the trial gives support to the belief that this was the sense and meaning in which the jury understood it. But it is not necessary to pursue this matter further, as there is a fatal objection to the plaintiff's recovering on the ground of malicious prosecution, and that is that there is no evidence anywhere of any malice. The parties were entire strangers until, after complaint had been made to the police by a member of the public, the defendant, in the execution of what he conceived
E to be his duty, arrested and charged the plaintiff.

Two ingredients essential to support an action for malicious prosecution are malice and an absence of reasonable and probable cause. The jury must find that the defendant acted maliciously. Here, although the defendant by his counsel insisted that malice was necessary, not only was the question of the defendant's acting maliciously never left to the jury, but there was an entire absence of any
F evidence of malice to go to the jury. It was decided by the Court of Appeal in *Bradshaw v. Waterlow & Sons, Ltd.* (1) that the question whether the defendant honestly believed in the charge which he made ought not to be left to the jury unless there was some evidence of the absence of that belief. In this case there was not any such evidence. Again, the judge is to determine whether there is reasonable and probable cause or not. In this case there is no evidence whatever
G of the want of reasonable and probable cause. For these reasons I am of opinion that on the claim for malicious prosecution the judgment should be reversed and judgment entered for the defendant.

[The cross-appeal of the plaintiff on the claim for false imprisonment was based on the provisions of s. 12 of the Licensing Act, 1872, and that matter has been rendered obsolete by s. 6 (3) (a) of the Road Traffic Act, 1960, and does not call
H for report.]

BANKES, L.J.—In these cross-appeals the defendant claims to have judgment entered for him upon the issue of malicious prosecution upon the ground that there was no evidence of want of reasonable and probable cause or of malice; and the plaintiff claims to have judgment entered for him upon the issue of false imprisonment upon the ground that there was no evidence justifying or excusing his arrest.
I

The defendant's appeal raises a simple question upon which I entertain no doubt. At the trial the learned judge intimated that the question he intended to leave to the jury was: "Did the defendant honestly believe at the time he arrested the plaintiff that the plaintiff was drunk?" At the instance of the plaintiff's counsel the judge was persuaded to put a second question—namely,

"Did the defendant honestly believe at the time he signed the charge sheet that the plaintiff was drunk?"

This question, in order to be relevant, must have reference to the state of the defendant's belief at the time he signed the charge sheet as to the plaintiff's condition at the time he was arrested. The question to be quite clear should have been: "Did the defendant still honestly believe at the time he signed the charge sheet that the plaintiff was drunk at the time when he was arrested?" The jury answered the first question in the affirmative and the second in the negative. I have very little doubt that the jury misunderstood the second question, in spite of the learned judge's observations to them on the point; but, whether that is so or not, I am of opinion that there was no evidence upon which the jury could find the second question in the plaintiff's favour if the question was properly understood. The defendant throughout stoutly maintained that, at the time he arrested the plaintiff, he believed that he was drunk, and the jury accepted his statement. There is practically no dispute that the plaintiff was not drunk at the time he was charged. But, in my opinion, there is nothing in that fact which, under the circumstances, would justify a conclusion that the defendant had either changed his mind or had any reason to change his mind as to the plaintiff's condition at the time he was arrested. Under these circumstances I think that there was no evidence to support the second finding of the jury upon the assumption that they understood the question. The defendant is, therefore, entitled to succeed on his appeal and to have judgment upon the issue of malicious prosecution entered for him.

[HIS LORDSHIP then dealt with the plaintiff's appeal.]

WARRINGTON, L.J., in giving judgment, said that at the trial it was admitted that the plaintiff was not in fact drunk. At the close of the defendant's case it was submitted that there was no evidence of malice. The learned judge, however, determined to leave the case to the jury. The questions put to the jury were (i) Did the defendant honestly believe at the time he arrested the plaintiff that the plaintiff was drunk? (ii) Did the defendant honestly believe at the time he signed the charge sheet that the plaintiff was drunk? (iii) Damages, if any, for false imprisonment; and (iv) damages, if any, for malicious prosecution. The jury answered the first question in the affirmative, the second in the negative, and assessed the damages for malicious prosecution at £21. HIS LORDSHIP continued: I am of opinion, after careful consideration of the evidence, that there was no evidence on which the second finding of the jury could properly have been arrived at. They have found that the defendant honestly believed at the time of the arrest that the man was drunk. The only material circumstance that had happened since that time was the examination by the doctor, and there is no evidence to show that this had induced the defendant to change his mind. On the contrary, he swore both before the magistrates and at the trial that on each occasion he still believed in the truth of the charge. I think it was necessary to produce some evidence not only that there were reasons for a change of belief but that such change had actually taken place, and of this there was none. On this ground, therefore, I think judgment ought to have been, and ought now to be, entered for the defendant on the claim for damages for malicious prosecution.

Defendant's appeal allowed.

Solicitors: *Wontner & Sons; C. F. Appleton & Co.*

[Reported by E. A. SCRATCHLEY, ESQ., Barrister-at-Law.]

PORTHCAWL URBAN DISTRICT COUNCIL v. BROGDEN

[CHANCERY DIVISION (Sargant, J.), January 19, 23, 1917]

[Reported [1917] 1 Ch. 534; 86 L.J.Ch. 393; 116 L.T. 405;

81 J.P. 137; 61 Sol. Jo. 300; 15 L.G.R. 601]

B *Street—Private street works—Expenses—Apportionment—Objection—Exemption under agreement with local authority—Objection that premises should be excluded from apportionment—Objection that apportionment incorrect “in respect of matter of fact”—Right of frontager to raise objection in proceedings to recover expenses—Private Street Works Act, 1892 (55 & 56 Vict., c. 57), s. 7 (e), (f), s. 8 (2).*

C An objection by a frontager that he is exempt from liability for expenses provisionally apportioned of private street works by reason of an agreement with the local authority is, if not an objection that the premises ought to be excluded from the apportionment within para. (e) of s. 7 of the Private Street Works Act, 1892 [now s. 177 (1) (e) of the Highways Act, 1959], at any rate an objection that the apportionment is incorrect “in respect of a matter of fact” within para. (f) of s. 7 of the Act of 1892 [now para. (f) of s. 177 (1) of the Act of 1959]. Accordingly, by virtue of s. 8 (2) of the Act of 1892 [now s. 186 of the Highways Act, 1959], such an objection must be made in the manner provided by s. 7 of the Act of 1892 [now s. 177 (1) of the Act of 1959], and cannot be raised by the frontager in proceedings against him to recover the expenses.

E *Wallasey U.D.C. v. W. H. Walker & Co.* (1) (1906), 70 J.P. 199, applied.

Notes. The Private Street Works Act, 1892, was repealed by the Highways Act, 1959, which came into force on Jan. 1, 1960. The provisions of s. 7 of the Act of 1892 are contained in s. 177 of the Act of 1959; s. 8 (2) of the Act of 1892 is replaced by s. 186 of the Act of 1959.

F Referred to: *Stockwell v. Southgate Corpn.*, [1936] 2 All E.R. 1343; *Watford Corpn. v. London Passenger Transport Board*, [1944] 2 All E.R. 400.

As to objections by owners to an apportionment of the expenses of private street works, see 19 HALSBURY'S LAWS (3rd Edn.) 443-445; and for cases see 26 DIGEST (Repl.) 615 et seq. For the Highways Act, 1959, s. 177 and s. 186, see 39 HALSBURY'S STATUTES (2nd Edn.) 602 and 611.

G Cases referred to:

(1) *Wallasey U.D.C. v. W. H. Walker & Co.* (1906), 70 J.P. 199; 4 L.G.R. 1042; 26 Digest (Repl.) 621, 2727.

(2) *Hawkins v. Gathercole* (1855), 6 De G.M. & G. 1; 3 Eq. Rep. 348; 24 L.J.Ch. 332; 24 L.T.O.S. 281; 19 J.P. 115; 1 Jur.N.S. 481; 3 W.R. 194; 43 E.R. 1129, L.J.J.; 38 Digest (Repl.) 783, 7.

H Also referred to in argument:

Herne Bay U.D.C. v. Payne and Wood, [1907] 2 K.B. 130; 76 L.J.K.B. 685; 96 L.T. 666; 71 J.P. 282; sub nom. *Herne Bay U.D.C. v. Farley, etc.*, 23 T.L.R. 442; 5 L.G.R. 631, D.C.; 26 Digest (Repl.) 617, 2698.

Woodford U.D.C. v. Henwood (1899), 64 J.P. 148, D.C.; 26 Digest (Repl.) 616, 2689.

I *Folkestone Corpn. v. Rook* (1907), 71 J.P. 550; 6 L.G.R. 69, D.C.; 26 Digest (Repl.) 611, 2652.

Bishop Auckland U.D.C. v. Alderson, [1913] 2 K.B. 324; 76 J.P. 347; sub nom. *Alderson v. Bishop Auckland U.C.*, 82 L.J.K.B. 737; 10 L.G.R. 722; 26 Digest (Repl.) 613, 2670.

Teddington U.D.C. v. Vile (1906), 70 J.P. 381; 4 L.G.R. 782, D.C.; 26 Digest (Repl.) 621, 2726.

Originating Summons taken out by the Porthcawl Urban District Council against M. C. Brogden and L. E. Brogden for (i) a declaration that the plaintiffs were

entitled to a charge upon the Esplanade Hotel and a piece of building land, both abutting upon St. Mary's Street, Porthcawl, for a sum of £180 10s. 10d., alleged to be a final apportionment for the expense of certain improvements under the Private Street Works Act, 1892, and (ii) an account of the principal, interest, and costs due to the plaintiffs, and that the charge might be enforced by sale.

By a conveyance dated Sept. 19, 1904, made between the defendant M. C. Brogden and certain other then owners of property fronting on the sea at Porthcawl and the Porthcawl Urban District Council, it was recited that the council, being desirous of having the hereditaments thereafter conveyed dedicated to the public use and of executing certain works of improvement thereon, had applied "to the owners" to convey the same to them for that purpose, which they had agreed to do upon and subject to performance by the council of the covenants, conditions, and agreements therein contained; and in consideration of the premises and the covenants, conditions and agreements therein contained and on the part of the council to be observed and performed, there was conveyed to the council a piece of land called the Esplanade, bounded on the north by other lands of some of the parties to the conveyance. The council covenanted to lay out the land conveyed for "a public highway, esplanade, and promenade, and for that purpose to make suitable roads, footpaths and works," and expend certain sums in so doing within a certain time; and it was agreed that the Esplanade Hotel and certain other therein specified buildings "and all other lands of the said M. C. Brogden which are not at present occupied with buildings, and which abut on the esplanade, shall be free and exempt from all charges in respect of the said works or any works under the Public Health Act, 1875, or under the Private Street Works Act, 1892, or any other similar Act for the time being in force." In 1911 the council, under the powers conferred on them by s. 6 of the Private Street Works Act, 1892, passed a resolution requiring a street called St. Mary's Street, which ran north from and at right-angles to the esplanade, to be drained, levelled, paved, and completed. By a later resolution the estimates, with a provisional apportionment thereof among the premises liable to be charged therewith, were approved. The Esplanade Hotel, owned by the defendants, was at the corner of this street, and the esplanade and certain premises thereof abutted on the side of the street. The resolution providing for the apportionment was advertised and posted in accordance with the Act of 1892, and a copy embodying a notice of provisional apportionment was sent to each of the defendants by registered post. The work was carried out at the cost of £650, and in pursuance of s. 12 (1) of the Act of 1892 the surveyor made his final apportionment, and the amount therein apportioned in respect of the defendants' property was £180 10s. 10d. The defendants received notice of this, but gave no objection thereto as required by s. 7 of the Act, and sent no notice of objection to the final apportionment. The defendants contended that they had contracted themselves out of liability for the charge under the Private Street Works Act, 1892, by the conveyance of Sept. 19, 1904.

Macmorran, K.C., and D. Donaldson Robertson for the plaintiffs.

Austen-Cartmell for the defendants.

Cur. adv. vult.

Jan. 23, 1917. **SARGANT, J.**—The defence to the plaintiffs' claim is that the defendants have contracted out of their liability by the conveyance of 1904. To that defence the plaintiffs have two replies—namely, (i) that, on the true construction of the deed, notwithstanding the wide words used in the operative part of the deed, there is no contracting out in respect of the liability for charges of the description represented by the £180 10s. 10d. claimed; and (ii) that, even if the defence was good on the construction of the deed, the defendants have omitted to make that defence in time, and have allowed matters to go on for such a period without objection that their right to set it up is gone. The deed was entered into at a time when the defendants or their predecessors in title were making over to the council a large amount of frontage on the seashore upon certain terms as to

A that and the making up of the frontage given over as an esplanade, and the words of the exemption relied on by the defendants seem to me in themselves, without reference to the rest of the document and without any cutting down by the context, to be sufficient to include the charges now in question. [His LORDSHIP stated his reasons for this opinion, but held, on the construction of the whole deed, that the words of exemption were controlled by the context (see *Hawkins v. Gathercole* (2)), and that the defence on the deed failed.]

B That really disposes of the question of liability between the parties, but, as the second point has been argued, I will express my opinion upon it. By the Private Street Works Act, 1892, provision is made for the apportionment on the various owners of property fronting on a street which is about to be made up of the expense of making it up. Section 7 provides that during a certain period—namely, one month from the publication of the resolution referred to in s. 6—“any owner of any premises shown in a provisional apportionment as liable to be charged with any part of the expenses of executing the works may, by written notice served on the urban authority, object to the proposals of the urban authority” on any of several grounds. One of these grounds is “(e) That any premises ought to be excluded from or inserted in the provisional apportionment,” and another ground is “(f) That the provisional apportionment is incorrect in respect of some matter of fact to be specified in the objection,” and so on. Then, by s. 8 (2), after the time for making these objections has expired, and when the district authority comes to enforce the charge under the Act, it is provided as follows: “No objection which could be made under this Act shall be otherwise made or allowed in any court proceeding or manner whatsoever”—these words being the very widest words which could be used to prevent persons from taking an objection, before this court or any other court, which they might have properly taken against the apportionment under s. 7 of the Act.

C Counsel for the defendants contended that although the owners had been settled on the list, and although they had not objected, if they had made any objection that would not have been an objection to the apportionment, but only an objection D as to the persons who were liable in respect of the particular apportioned amount. I think that to adopt such a construction would be to read the scheme of the Act too narrowly. In my judgment, the scheme of the Act was to have an apportionment of the liability of particular named persons published or ascertained by the local authority, and that from that time forward—or, at any rate, from the time when the opportunity of objecting to that apportionment had passed by—the apportionment should be conclusive, so that all persons concerned should know what their position was. To my mind it is an essential part of that construction, not only that the apportioned amount should be ascertained, but that the persons liable for that amount should be ascertained; and, although it may possibly be that an objection as to the person liable is not an objection under head (e) of s. 7—namely, “that any premises ought to be excluded from or inserted in the provisional apportionment”—nevertheless it does seem to me that an objection as to the person liable does fall under head (f) which is “that the provisional apportionment is incorrect in respect of some matter of fact.” If the provisional apportionment finds that a particular sum is due from X, as the owner of the property, it appears to me that the finding that X is liable is a finding of fact, and if Z and not X is the owner of the property an objection founded upon that incorrect finding I is an objection that the provisional apportionment was incorrect in respect of a matter of fact.

I should have come to that conclusion on this legislation if there had been no authority in respect of it, but the point seems to have been decided by *BRAY, J.*, in *Wallasey U.D.C. v. W. H. Walker & Co.* (1). There a person had been settled as liable for an apportioned amount on the ground that he owned a wall which abutted on the road or street to be made up. As a matter of fact he did not own the wall, but he did not object until he was sued, when he raised the objection not that the apportionment was incorrect quâ amount or quâ the premises in respect

of which it was ascertained, but that it was wrong in finding that he, and not somebody else, was the owner of the property. It was held that his objection was one which he might have raised under s. 7 of the Act, and that he was precluded from raising it when the matter came into court. I cannot see any difference in substance between that case and the one before me. Here the defendants are not saying that they are not the owners, but they are saying that a special bargain was made with them under which they are not liable, as otherwise they would have been, for the amount apportioned in respect of their property. If they are right in that contention, the result, if their objection had been taken in time, ought to have been that no amount was apportionable against them as owners of the property. I cannot see how that is less a question of fact than a question whether a person was or was not the owner of the property. In my judgment, therefore, the plaintiffs are entitled to the relief claimed by their summons. Their taxed costs must be added to their charge, and there will be liberty to apply.

Declaration and order accordingly.

Solicitors: *Smith, Rundell & Dods; Lawrence Jones & Co.*

[Reported by L. MORGAN MAY, Esq., Barrister-at-Law.]

PANOUTSOS v. RAYMOND HADLEY CORPORATION OF NEW YORK

[COURT OF APPEAL (Viscount Reading, C.J., Lord Cozens-Hardy, M.R., and Scrutton, L.J.), June 13, 14, 1917]

[Reported [1917] 2 K.B. 473; 86 L.J.K.B. 1325; 117 L.T. 330;
33 T.L.R. 436; 61 Sol. Jo. 590; 22 Com. Cas. 308]

Sale of Goods—Condition—Breach—Waiver—Payment to be by confirmed bankers' credit—Unconfirmed credit opened by buyer to seller's knowledge—Shipments under contract made by seller and paid for by unconfirmed credit—Right of seller to enforce condition as to confirmed credit—Right to cancel contract for breach of condition—Need to give reasonable notice to the buyer.

By a contract made in September, 1915, for the sale of 4,000 tons of flour to be shipped from the United States to Greece not later than Nov. 7, 1915, it was provided that each shipment should be deemed a separate contract, and that payment should be by "confirmed bankers' credit." On Oct. 16, 1915, the buyer opened a bankers' credit in favour of the sellers which was not a "confirmed" credit, and the sellers with notice of this fact made certain shipments under the contract for which they were paid by means of the credit, and they obtained from the buyer an extension of time to Nov. 30, 1915, for shipment of the balance of the contract goods. Subsequently, the sellers purported to cancel the contract without giving any notice to the buyer on the ground that the credit was not in accordance with the terms of the contract.

Held: the fact that for a time the sellers had waived the breach of the condition providing for a confirmed credit did not prevent them at a later stage from requiring the performance of that condition, but as they had previously waived the breach, they were not entitled to cancel the contract without giving the buyer reasonable notice of their intention to cancel so as to enable him to provide a confirmed credit.

A Notes. Applied: *Hartley v. Hymans*, [1920] All E.R.Rep. 328. Considered: *Re Moore & Co., Ltd. and Landauer & Co.*, [1921] All E.R.Rep. 466. Applied: *A/S Tankeexpress v. Compagnie Financière Belge des Petroles S.A.*, [1948] 2 All E.R. 939. Referred to: *Ayrey v. British Legal and United Provident Assurance Co.*, [1918] 1 K.B. 136; *Cape Asbestos Co. v. Lloyds Bank*, [1921] W.N. 274; *Charles Rickards, Ltd. v. Oppenheim*, [1950] 1 All E.R. 420; *Trans Trust S.P.R.L. v. Danubian Trading Co.*, [1952] 1 T.L.R. 13.

B As to breach of condition in contracts for the sale of goods, see 34 HALSBURY'S LAWS (3rd Edn.) 43, 44; as to confirmed credits, see *ibid.*, 185-187. For cases on breach of condition, see 39 DIGEST 466 et seq.

Cases referred to:

C (1) *Bentsen v. Taylor, Sons & Co.* (2), [1893] 2 Q.B. 274; 63 L.J.Q.B. 15; 69 L.T. 487; 42 W.R. 8; 9 T.L.R. 552; 4 R. 510; 7 Asp.M.L.C. 385, C.A.; 12 Digest (Repl.) 391, 3032.
(2) *Re Tyrer & Co. and Hessler & Co.* (1902), 86 L.T. 697; 18 T.L.R. 589; 9 Asp.M.L.C. 292; 7 Com. Cas. 166, C.A.; 12 Digest (Repl.) 392, 3035.

D Appeal by the sellers from an order made by BAILHACHE, J., on a Special Case stated by arbitrators.

By an agreement dated Sept. 27, 1915, the sellers sold to the buyer 4,000 tons of flour, to be dispatched from Atlantic ports to Greece per steamer or steamers as per bill or bills of lading dated or to be dated not later than Nov. 7, 1915. Each shipment was to be deemed a separate contract. The contract contained also the following stipulations:

E "Cash against documents in New York. Payment by confirmed bankers' credit. Buyers to guarantee arrangement for shipment with British envoy at Athens. War risk insurance to be effected by buyers."

F On Oct. 16, 1915, the National Bank of Commerce of New York by letter informed the sellers that a credit had been opened in their favour for about 270,000 dollars in respect of the shipment of 4,000 tons shipped up to Nov. 7, 1915. The letter contained no guarantee as to the period for which the credit was to remain in force. On or about Oct. 21 to 30 the sellers made shipments of flour in accordance with the contract, for which they were duly paid by the New York bank in exchange for shipping documents. On Oct. 27 the sellers took exception to the credit on the ground that it was not irrevocable. About Nov. 15 the sellers requested the
G buyer to extend the time for the shipment of the balance of the flour to Nov. 30, and to this the buyer agreed. On Nov. 25 the New York bank informed the sellers that they did not assume any responsibility for the continuance of the credit and it could not therefore be construed as a confirmed credit, and on Dec. 13 the bank advised the sellers that the credit of Oct. 15 had been cancelled. The sellers then cancelled the balance of the contract on the ground that the credit opened at New
H York was not in accordance with the contract. The buyer refused to accept the cancellation of the balance of the contract, and the dispute was referred to arbitration.

I Before the arbitrators the sellers contended (*inter alia*) that the buyer had failed to comply with the conditions of the contract as he had failed to open a credit at New York which was to be irrevocable until Nov. 15, 1915, under which the sellers would be assured that they would receive cash in New York against presentation at any time up to that date of the shipping documents. That the fact that the sellers had made one shipment without insisting upon this condition did not release the buyer with regard to subsequent shipments, especially having regard to the term that "each shipment shall be deemed a separate contract." The buyer contended (a) that the contract was clear and the sellers must justify their failure to fulfil it; (b) that the statement that the credit opened by the buyer was not a confirmed credit was not established, but that the credit was fully satisfactory; and (c) that in any case the sellers had accepted it as satisfactory, and, having

made a shipment under it, had waived any possible objection to it, and were not in a position to repudiate their obligation to ship the balance of the flour, or could not do so without giving due notice to the buyer so as to enable him to remove any valid objection and furnish such a credit as would satisfy them. The arbitrators awarded that the sellers were in default in not shipping the balance of the flour, and should pay a certain sum of damages for their default, and they stated a Special Case for the opinion of the court.

The question for the opinion of the court was whether upon the above facts there was evidence upon which the arbitrators could properly find that the sellers had waived the term in the contract that payment should be by confirmed bankers' credit, and whether their award was correct. BAILHACHE, J., held that the sellers, by waiving for a time the breach of the buyer as to the confirmed bankers' credit, were not bound to act upon the unconfirmed credit up to the end of the shipments, but that they could not cancel the balance of the shipments without giving the buyer reasonable notice of their intention to cancel. He therefore confirmed the award. The sellers appealed. There was no evidence before BAILHACHE, J., that a cablegram dispatched by the sellers to their London house on Oct. 27 (after some shipments had been made) had been brought to the notice of the buyer, but it was proved in the Court of Appeal that it was so communicated to him. It was agreed by the parties that the Court of Appeal should deal with the new facts without sending the case back to the arbitrators.

J. B. Matthews, K.C., and Stuart Bevan for the sellers.

R. A. Wright (Roche, K.C., with him) for the buyer.

VISCOUNT READING, C.J., after stating the facts, continued: The question put to the court by the arbitrators is "whether or not upon the above findings of fact"—to which must now be added "coupled with our findings of fact"—"there was any evidence upon which the arbitrators could properly find that the sellers had waived the term in the contract that payment should be by confirmed bankers' credit." It was, therefore, admitted that there was in fact no confirmed bankers' credit, but it was contended by the buyer that there had been a waiver of that condition of the contract. In answer to that the sellers answered that there had been no such waiver, and, if there had been a waiver that they were entitled at any time after such waiver to insist upon the condition being performed. The buyer replied that no doubt the sellers could insist upon the performance of the condition, but that, having waived its performance up to a certain date, they must give reasonable notice to the buyer of their intention to insist upon its performance in the future so as to allow him an opportunity of putting the credit right. BAILHACHE, J., held that the sellers must be taken to have waived the performance of the condition, that the buyer was entitled to reasonable notice, and that such notice had not in fact been given. He, therefore, answered the question in favour of the buyer.

In my view, the learned judge was right. It is open to a party to a contract to waive a condition in the contract which is inserted for his benefit. If the sellers chose to ship without the protection of a confirmed bankers' credit, they were entitled to do so, and the buyer performed his part of the contract by paying for the goods shipped, though there was no confirmed bankers' credit, inasmuch as that condition had been waived. If at a later stage the sellers wished to avail themselves of the condition precedent, in my opinion there was nothing in the facts to prevent them from demanding the performance of the condition, provided they gave reasonable notice to the buyer that they would not make a further shipment unless there was a confirmed bankers' credit. If they had done that and the buyer had then failed to comply with the condition, he would have been in default, and the sellers would have been entitled to cancel the contract without being liable to any claim by the buyer for damages.

The question then arises whether there has been such a notice by the sellers as was necessary to inform the buyer that henceforth he must comply with the

A condition of the contract. In *Bentsen v. Taylor, Sons & Co.* (2) (1) BOWEN, L.J., stated the law as to waiver thus ([1893] 2 Q.B. at p. 283):

“Did the defendants by their acts or conduct lead the plaintiff reasonably to suppose that they did not intend to treat the contract for the future as at an end, on account of the failure to perform the condition precedent?”

B If we read sellers for defendants and buyer for plaintiff in that passage, it applies exactly to the present case. The sellers did lead the buyer to think so, and when they intended to change that position they were bound to give reasonable notice of that intention to the buyer so as to enable him to comply with the condition which up to that time they had waived. *Re Tyrer & Co. and Hessler & Co.* (2) was cited as an authority for the proposition that the moment the sellers chose to avail themselves of the failure by the buyer to perform the condition precedent they could put an end to the contract without giving the buyer an opportunity of remedying the default which had hitherto been waived. That case is not an authority for that proposition. It shows that, where there are stipulated times in a charterparty for payment of the hire of a ship and a power to withdraw the ship if the payment is not made at the stipulated time, the mere fact that there has been default in payment at one or more stipulated times, of which advantage has not been taken, does not entitle the party in default at a subsequent time to a notice so as to enable him to comply with the condition before the right to withdraw arises. That is a totally different case from the present. I cannot find any authority to support the proposition that, when one party has led another to believe that he may continue in a certain course of conduct without any risk of the contract being cancelled, the first-named party can cancel the contract without giving any notice to the other so as to enable the latter to comply with the requirement of the contract. It seems to me to follow from the observations of BOWEN, L.J., in *Bentsen v. Taylor, Sons & Co.* (2) (1) which I have read that there must be reasonable notice given to the buyer before the sellers can take advantage of the failure to provide a confirmed bankers' credit. That is the decision of BAILHACHE, J.

F The question remains whether reasonable notice has in fact been given. We have more material before us than BAILHACHE, J., had when he came to the conclusion that no reasonable notice had been given. I am not prepared to draw the inference of fact that reasonable notice by the sellers had been given before they cancelled the contract. If notice had been given on Oct. 27 and on Nov. 25 the sellers had cancelled the contract, I think that that would have been ample notice to enable the buyer to provide the confirmed credit in New York. But I cannot find any such notice on the part of the sellers of their intention to insist upon the performance of the condition. [His LORDSHIP referred to the letters and came to the conclusion that the sellers were content to make shipments upon the credit, which they knew was not a confirmed bankers' credit, until they determined to cancel the contract, which they did on Nov. 25 without giving reasonable notice to the buyer of their intention to cancel.] The result is that the decision of BAILHACHE, J., is right and the appeal must be dismissed.

LORD COZENS-HARDY, M.R., and SCRUTTON, L.J., concurred.

Appeal dismissed.

Solicitors: *Coward & Hawksley, Sons & Chance; Stibbard, Gibson & Co.*

[Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.]

LONDON ASSOCIATION FOR PROTECTION OF TRADE AND ANOTHER *v.* GREENLANDS, LTD.

[HOUSE OF LORDS (Lord Buckmaster, L.C., Earl Loreburn, Lord Atkinson and Lord Parker of Waddington), October 21, 22, 25, 26, 29, November 23, December 7, 1915, January 31, 1916]

[Reported [1916] 2 A.C. 15; 85 L.J.K.B. 698; 114 L.T. 434;
32 T.L.R. 281; 60 Sol. Jo. 272]

Libel—Privilege—Qualified privilege—Trade protection society—Information as to trader's credit supplied to member—Need for bona fide belief by informer of truth of information given and of inquirer's legitimate interest—Inquiries made through agent—Agent's privilege—Remuneration of agent.

Having regard to the way in which business is carried on in this country occasions must arise in which it is not only legitimate but necessary for one trader to inquire into the financial circumstances and credit of another. A person asked for information in such circumstances may be said to be under a social duty to communicate it, and it is in the interests of society generally that he should be able to do so without fear of an action for libel. It is, therefore, a principle of law that a person asked for information affecting the credit of another is justified in giving it provided (i) that he bona fide believes in the truth of the information which he gives; (ii) that he bona fide believes that the person making the inquiry has a legitimate interest which justifies it and is not actuated by mere curiosity; and (iii) if *Macintosh v. Dun* (1), [1908] A.C. 390, is to be considered good law, that he is not actuated by motives of private gain or any other motive excluding the possibility of the communication being made under a sense of social duty. In such circumstances the implication of malice arising out of a false statement to the discredit of another is displaced and the communication is privileged. This (per LORD ATKINSON) will be so whether either or both of the beliefs mentioned in (i) and (ii), formed by the person inquired of, be reasonable or not, and whether the inquirer in fact desired the information for the purpose mentioned. It will be sufficient if the person inquired of honestly believed he did so require it.

If a person may himself legitimately inquire as to the credit of another, it must necessarily follow that he is justified in making the inquiry through an agent confidentially employed for that purpose, and if a person asked for information may himself give it, he may give it through an agent whom he employs for that purpose. There is, however, this difference between the two cases. If a confidential agent be employed to make inquiries, he is under a legal duty to communicate the result of his inquiries to his principal, and this duty is the basis of a distinct privilege arising for the protection of the agent out of the relationship between principal and confidential agent. On the other hand, if the person from whom information is asked communicates it through an agent, the privilege of the agent is the privilege of his principal.

Per LORD BUCKMASTER, L.C.: The circumstances which constitute a privileged occasion can themselves never be catalogued and rendered exact. New arrangements of business, even new habits of life, may create unexpected combinations of circumstances which, though they differ from well-known instances of privileged occasion, may none the less fall well within the plain yet flexible language of the definition by PARKE, B., in *Toogood v. Spyring* (2), 1 Cr.M. & R. at p. 193, that an occasion was privileged when the publication complained of was "fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned." . . . If the inquiry be honestly and prudently made, it is impossible to fix exact limits within which it must be confined. The extended character of trade, the modern combination of

many businesses of a different nature under one control, the innumerable and far-reaching branches by which modern enterprise is extended, are all considerations which must be borne in mind in considering how far inquiry as to a new customer can be properly made. At the same time there is the essential need of safeguarding commercial credit against the dissemination of prejudicial rumour.

Per LORD PARKER OF WADDINGTON: If a trader is justified in making inquiries through an agent on a proper occasion as to the credit of another, it can make no difference whether the agent receives, or does not receive, a remuneration for his services. Again, if a single trader is justified in making an inquiry through an agent, there is no reason why two or more traders so justified should not combine to pay a common agent to make, on behalf of each as occasion arises, such inquiry as may be necessary. A common agent so paid and making an inquiry at the request of any particular trader would not be the agent for that purpose of all the traders who joined in providing his salary, but only of that particular trader at whose instance the inquiry was made.

Notes. Applied: *Adam v. Ward*, ante p. 157. Referred to: *Knupffer v. London Express Newspaper, Ltd.*, [1942] 2 All E.R. 555.

As to qualified privilege as a defence to an action for libel, see 24 HALSBURY'S LAWS (3rd Edn.) 54 et seq.; and for cases see 32 DIGEST 112 et seq.

Cases referred to:

- (1) *Macintosh v. Dun*, [1908] A.C. 390; 77 L.J.P.C. 113; 99 L.T. 64; 24 T.L.R. 705, P.C.; 32 Digest 120, 1520.
- (2) *Toogood v. Spyring* (1834), 1 Cr.M. & R. 181; 4 Tyr. 582; 3 L.J.Ex. 347; 149 E.R. 1044; 32 Digest 117, 1489.
- (3) *Whiteley v. Adams* (1863), 15 C.B.N.S. 392; 3 New Rep. 126; 33 L.J.C.P. 89; 9 L.T. 483; 10 Jur.N.S. 470; 12 W.R. 153; 143 E.R. 838; 32 Digest 130, 1615.
- (4) *Harrison v. Bush* (1856), 5 E. & B. 344; 3 C.L.R. 1240; 25 L.J.Q.B. 25, 99; 25 L.T.O.S. 194; 26 L.T.O.S. 196; 20 J.P. 147; 1 Jur.N.S. 846; 2 Jur.N.S. 90; 3 W.R. 474; 4 W.R. 199; 119 E.R. 509; 32 Digest 123, 1550.
- (5) *Stuart v. Bell*, [1891] 2 Q.B. 341; 60 L.J.Q.B. 577; 64 L.T. 633; 39 W.R. 612; 7 T.L.R. 502, C.A.; 32 Digest 122, 1545.
- (6) *Davies v. Snead* (1870), L.R. 5 Q.B. 608; 39 L.J.Q.B. 202; 23 L.T. 126, 609; 34 J.P. 693; 32 Digest 114, 1455.
- (7) *Bromage v. Prosser* (1825), 4 B. & C. 247; 1 C. & P. 673; 6 Dow. & Ry.K.B. 296; 3 L.J.O.S.K.B. 203; 107 E.R. 1051; 32 Digest 154, 1857.
- (8) *Clark v. Molyneux* (1877), 3 Q.B.D. 237; 47 L.J.Q.B. 230; 37 L.T. 694; 42 J.P. 277; 26 W.R. 104; 14 Cox, C.C. 10, C.A.; 32 Digest 159, 1922.
- (9) *Waller v. Loch* (1881), 7 Q.B.D. 619; 51 L.J.Q.B. 274; 45 L.T. 242; 46 J.P. 484; 30 W.R. 18; 32 Digest 113, 1445.

Also referred to in argument:

- Edmondson v. Stephenson* (1766), Bull.N.P. 8; 32 Digest 119, 1503.
- Smith v. Thomas* (1835), 2 Bing.N.C. 372; 4 Dowl. 333; 1 Hodg. 353; 2 Scott, 546; 5 L.J.C.P. 52; 132 E.R. 146; 32 Digest 113, 1448.
- Storey v. Challands* (1837), 8 C. & P. 234, N.P.; 32 Digest 175, 2144.
- Corhead v. Richards* (1846), 2 C.B. 569; 15 L.J.C.P. 278; 10 Jur. 984; 135 E.R. 1069; 32 Digest 122, 1539.
- Amann v. Damm* (1860), 8 C.B.N.S. 597; 29 L.J.C.P. 313; 2 L.T. 322; 7 Jur.N.S. 47; 8 W.R. 470; 141 E.R. 1300; 32 Digest 31, 229.
- Fleming v. Newton* (1848), 1 H.L.Cas. 363; 9 E.R. 797, H.L.; 32 Digest 127, 1584.
- Searles v. Scarlett*, [1892] 2 Q.B. 56; 61 L.J.Q.B. 573; 66 L.T. 837; 56 J.P. 789; 40 W.R. 696; 8 T.L.R. 562, C.A.; 32 Digest 127, 1586.
- Barr v. Musselburgh Merchants' Association*, 1912 S.C. 174; 49 Sc.L.R. 102; 1911 2 S.L.T. 402; 32 Digest 127, 1582 *iv*.

Robshaw v. Smith (1878), 38 L.T. 423; 32 Digest 120, 1519.

Jenoure v. Delmege, [1891] A.C. 73; 60 L.J.P.C. 11; 63 L.T. 814; 55 J.P. 500; 39 W.R. 388, P.C.; 32 Digest 156, 1887.

David Jones v. Basma House (1907), *Times*, March 6; *Shoe and Leather Record*, March 8; cited in [1913] 3 K.B. at p. 552.

Bayne and Thomson v. Stubbs, Ltd., 1901, 3 F. (Ct. of Sess.) 408; 38 Sc.L.R. 308; 8 S.L.T. 412; 32 Digest 120, *d.*

Keith v. Lauder, 1905, 8 F. (Ct. of Sess.) 356; 43 Sc.L.R. 230; 13 S.L.T. 650; 32 Digest 127, *d.*

Howe and McColough v. Lees (1910), 11 C.L.R. 361.

Foley v. Hall (1891), 12 N.S.W.L.R. 175.

Robinson v. Dun (1897), 24 A.R. 287; 32 Digest 127, *c.*

Todd v. Dun, Wiman & Co. (1887), 15 A.R. 85.

Ormsby v. Douglass (1868), 37 N.Y. (C.A.) 477.

Sunderlin v. Bradstreet (1871), 46 N.Y. (C.A.) 188.

Erber v. Dun (1882), 12 Fed. Rep. 526.

Locke v. Bradstreet Co. (1885), 22 Fed. Rep. 771.

King v. Patterson (1887), 60 Amer. Rep. 622.

Douglass v. Daisley (1902), 114 Fed. Rep. 628.

Smith v. Streatfield, [1913] 3 K.B. 764; 82 L.J.K.B. 1237; 109 L.T. 173; 29 T.L.R. 707; 32 Digest 155, 1876.

Parkes v. Prescott (1869), L.R. 4 Exch. 169; 38 L.J.Ex. 105; 20 L.T. 537; 17 W.R. 773, Ex. Ch.; 32 Digest 83, 1139.

Pasley v. Freeman (1789), 3 Term. Rep. 51; 2 Smith, L.C., 12th ed., 71; 100 E.R. 450; 1 Digest (Repl.) 27, 205.

Gardner v. Slade (1849), 13 Q.B. 796; 18 L.J.Q.B. 334; 13 L.T.O.S. 282; 13 J.P. 490; 13 Jur. 826; 116 E.R. 1467; 32 Digest 122, 1535.

Appeal by the defendants in the action from an order of the Court of Appeal, [1913] 3 K.B. 507, directing a new trial of the action.

The facts appear in the opinion of the LORD CHANCELLOR.

Sir Robert Finlay, K.C., Leslie Scott, K.C., and Heber Hart, K.C., for the appellants.

Dickens, K.C., Clavell Salter, K.C., and Hugh Fraser for the respondents.

The House took time for consideration.

Jan. 31, 1916. The following opinions were read.

LORD BUCKMASTER, L.C.—This case affords the unedifying spectacle of litigation conducted with such disregard of the rules of procedure that extrication from the resulting tangle has been all but hopeless. The plaintiffs, who are a limited company, instituted proceedings in respect of a libel. They added three defendants to their writ—an unincorporated association known as the London Association for the Protection of Trade, a man called Hadwen, who was the secretary of the association, and a man called Wilmshurst—and sued them all as jointly responsible for the wrong done by the publication of an untruthful report sent by the defendant Hadwen to a Mr. Shand Kydd. The association was unincorporated, and consequently could not be made a defendant to the action in any capacity whatever. As an entity it could neither publish nor authorise the publication of a libel; and this appears to have been recognised before your Lordships' House, as the defendants have consented to strike out the association from the action. Wilmshurst, again, was no member or servant of the association. He supplied them with information at certain prices, and he had not, in fact, published the libel which was the subject of the suit. At the hearing no amendment whatever was attempted of the proceedings; and two judgments, separate in form and different in amount, were entered against Wilmshurst, on the one hand, and the association and Hadwen, on the other, for the one libel, judgment being entered against Wilmshurst, who was found guilty of malice, for £750, and against the

other defendants, who were held not to have been malicious, for £1,000; and it certainly appears as though the judgment against Wilmshurst was due to his having published a libel which was not the subject of the suit. In these circumstances the association and Hadwen appealed to the Court of Appeal and served Wilmshurst. They asked for judgment on the grounds that the judgment was wrongly entered, and that the occasion of the publication was privileged, or, alternatively, for a new trial, on the ground that the damages were excessive, and were wrongly found against the separate defendants. The latter relief was accorded to them, and they have appealed to your Lordships' House, asking for the larger measure, which was denied. The argument before your Lordships was entirely directed to the question of privilege, but before this could be decided it became plain that it was necessary to remove the confusion caused by the circumstances to which I have alluded. Accordingly the plaintiffs agreed to strike out the association as defendant, and then, to avoid the result of the remaining defendant, Hadwen, pleading the existence of the judgment of Wilmshurst as a complete defence in any new trial, they asked, at the suggestion of your Lordships, that Wilmshurst might be brought before this House to show cause why the judgment against him should not be set aside. He duly appeared and raised no objection, but as the majority of your Lordships' House are of opinion that the judgment against Hadwen cannot stand, the reason for setting aside the judgment against Wilmshurst is removed, and that judgment may remain.

The principles that regulate an action for defamation of character are well known; nor do I think advantage would arise from any attempt to re-state or recapitulate the conditions which have been so often the subject of consideration in all the courts. There is, indeed, danger of confusion if new words are used to define or explain that which is already well established and clear. In the present case, although much discussion has arisen about many of the authorities in which these principles are encased, there has not, except in *Macintosh v. Dun* (1), been any real controversy either as to their validity or their meaning. The question here is whether certain words, published under circumstances which I will shortly detail, were published on a privileged occasion. If they were, judgment ought to have been entered for the appellants, since LORD ALVERSTONE, C.J., who tried the case, held that against them there was no evidence of malice, and from that decision no appeal has been brought. If they were not, the action must go back to be re-tried.

A privileged occasion such as that said to exist in the present case is an occasion when the publication complained of was—to use the words of PARKE, B., in *Toogood v. Spyring* (2) (1 Cr.M. & R. at p. 193):

“fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned.”

The learned judge continues with these important words:

“If fairly warranted by any reasonable occasion or exigency, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits.”

I do not think that any of the subsequent explanations, or definitions, have made any variation in the principle thus enunciated, nor added anything by way of explanation to this clear exposition of the law. Indeed, the long list of subsequent authorities, to which your Lordships were referred, do nothing but afford illustrations of the different circumstances to which this principle may be applied, and, with the exception of *Macintosh v. Dun* (1), none of the facts is in close relation to those of the present case. Indeed, the circumstances that constitute a privileged occasion can themselves never be catalogued and rendered exact. New arrangements of business, even new habits of life, may create unexpected combinations

of circumstances which, though they differ from well-known instances of privileged occasion, may none the less fall within the plain yet flexible language of the definition to which I have referred. Again, it is, I think, essential to consider every circumstance associated with the origin and publication of the defamatory matter, in order to ascertain whether the necessary conditions are satisfied by which alone protection can be obtained, but in this investigation it is important to keep distinct matter which would be evidence of malice, and matter which would show that the occasion itself was outside the area of protection.

The facts of the present case are these. The London Association for the Protection of Trade is an unincorporate body consisting of about 6,300 members, and regulated by certain rules. Its objects, as defined in the prospectus, are as follows: (i) The making of private inquiries as to the means, respectability, and trustworthiness of individuals and firms. (ii) The collection of debts. (iii) The detection and exposure of swindlers. (iv) The issue of gazettes, containing authentic particulars of bills of sale, county court judgments, bankruptcies, and other preferential securities; also lists of creditors in bankruptcies. (v) To afford gratuitous legal advice to members on all matters connected with their trading operations. (vi) To aid in amending the laws affecting trade and commerce, and to suggest proper remedies for what may appear injurious to traders generally. (vii) To forward a monthly report to members containing information of frauds and attempts at swindling, which may be proceeding at the time. (viii) To keep a register of the names of known swindlers, and also of persons whose addresses are required by members of the association. According to the rules, members are enrolled after their names have been approved by a committee of management. There is no considerable body of evidence as to whether or not this rule is strictly obeyed, but it appears that a firm known as Whitmore's Trading Co., Ltd., were treated as entitled to the rights of a member before, in fact, they had filled up the necessary application form, and consequently before their name could have been submitted to the committee for approval. For the present purpose, the only branch of the association's business to which it is necessary to refer is that associated with the inquiry department. This department is open to all members, whether they be town, country, or foreign members, and whether they have subscribed upon the footing of obtaining all the full benefits of the society, or only subscribe to the gazette. In each case single inquiries are made by the association for 1s. 6d. apiece, or a book of ten prepared inquiry-checks are furnished for 10s. 6d. The operations of the society are very widespread, and in their prospectus they announce that by their affiliation with the Association of Trade Protection Societies of the United Kingdom the members have at their service an organisation extending throughout the whole of the kingdom and to all parts of the world. It is a strict condition of membership that all information supplied is supplied in strict confidence and for the exclusive use of the member who seeks it, and he is bound not to divulge it to any person upon any pretext whatever. This condition is imposed by the application for membership, and by the rules it is provided that any member who divulges any such information shall be deemed ineligible to continue a member, and shall forfeit his subscription. The society does not distribute any profit, nor does it trade with the object of making a profit, but in fact it has a considerable surplus on the year's accounts, and its property consists of assets to the value of upwards of £11,000.

It appears that a Mr. Shand Kydd, who trades at No. 73, Highgate Road, Kentish Town, was a member of the association. He is a designer of wall-paper decorations, and he was anxious to obtain information as to the credit of the respondents, a firm known as Greenlands & Co., Ltd., who carried on business at Hereford as house furnishers and drapers. He, accordingly, applied on Mar. 30, 1910, to the association, asking if Greenlands & Co. were safe for £20 to £30, and also for their length of credit and general information. This application was made upon a form which the association issue for that purpose, and that again contained the statement that the information was given in strict confidence, and was not to

be divulged. The association had at Hereford an agent of the name of Wilmshurst. He had acted as their agent since 1895, and he carried on business as an accountant and auditor and fire-loss assessor at Broad Street, Hereford. It appears that he furnished information from time to time to the association for a payment of 6d. in respect of each inquiry, but although he had been bankrupt, it was stated by the secretary of the association in evidence, and was not challenged in cross-examination, that the association had never had any reason to doubt the good faith of his answers. In answer to the request of the secretary, he furnished a statement which was slightly altered by the secretary, and by him published to Mr. Shand Kydd. It is this publication that is the subject of the present proceedings, and it is set out in full in the statement of the claim. The grave and essential feature of the libel is this. It states that there are heavy debentures charged on the assets of the company to the amount of £36,100, but that for the credit asked they might be taken as a fair trade risk. This statement was inaccurate in a very material respect. The sum of £36,100 was not in fact charged upon the assets of the company, but two sums of £18,100 and £18,500, the former secured by specific mortgage and the other by mortgage debentures, were charged upon the real and leasehold property which the company owns. The whole of the stock-in-trade of the company, their book debts, their goodwill, and all their floating assets were entirely free from any mortgage whatever, and constituted a large and valuable property. The evidence, which is uncontradicted, establishes that this company was in an exceptionally strong financial position, and had carried on a large and very successful business for some time past. The obvious innuendo, therefore, of the libel, and the actual statement of fact that it made, were both inaccurate, and the only question that arises is whether the circumstances under which it was published constitute a privileged occasion, and thus throw upon the plaintiff the burden of proving that the publication was maliciously made.

In my opinion, they do. A trader is clearly entitled to make inquiries about the commercial credit of a person with whom he proposes to trade. He need not make those inquiries himself. He may constitute an agent to make them on his behalf. He need not inquire of any person of whom he has personal knowledge, or with whom he has had trade relations. If the inquiry be honestly and prudently made, it is impossible to fix exact limits within which the inquiry must be confined. The extended character of trade, the modern combination of many businesses of a different nature under one control, the innumerable and far-reaching branches by which modern enterprise is extended, are all considerations which must be borne in mind in considering how far inquiry as to a new customer can be properly made. This, of course, is not the only consideration; there is at the same time the essential need of safeguarding commercial credit against the most dangerous and insidious of all enemies—the dissemination of prejudicial rumour, the author of which cannot be easily identified, nor its medium readily disclosed.

The present case is an illustration of both sides of the question. Mr. Shand Kydd was in London, and desired to enter into trade relations with a company in Hereford. It would, I think, have been a perfectly reasonable occasion for inquiries honestly made in Hereford as to the standing of this concern, and those inquiries might have been made on Mr. Shand Kydd's behalf by a proper agent appointed for the purpose, and in such circumstances, whatever considerations might attach to the communication to such agent, his answer to his principal would clearly have been made on a privileged occasion. I cannot help thinking that in these circumstances the fact that Mr. Shand Kydd made the inquiry through the large group of traders who had associated themselves together for the purpose of providing an agent through whom such inquiries were to be made cannot of itself take away the privilege that would have existed if the association had never intervened. It is said, however, that *Macintosh v. Dun* (1) is a clear expression of opinion that such a means of obtaining knowledge is not permitted. I do not think that *Macintosh v. Dun* (1) affects the consideration of this case,

beyond showing that in determining what is a privileged occasion, all the circumstances under which the publication is made need to be considered for the purpose of determining whether privilege attaches or no. In that case an association was conducted for profit by certain people, themselves wholly unconnected with trade. They acquired from all sources information about traders, and carried on the business of disseminating this information for reward to the various subscribers to their agency. It was decided that such a communication was not made either in discharge of a public or a private duty, and was not warranted by any reasonable occasion or exigency. That decision leaves untouched the wider question whether groups of people, however large, may not combine together in order to obtain for the benefit of each other the necessary information for carrying on business. They can themselves control, through their committee, the person by whom the inquiries are made and the method by which such inquiries are conducted, and they obviously have an interest in not receiving inaccurate and misleading statements, for no man in trade is desirous to avoid entering into a profitable trade transaction; his only interest is to render himself secure by the disclosure of trustworthy information. To some extent the same thing might be urged on behalf of the defendant in *Macintosh v. Dun* (1). It may be said that the success of the business of the defendant in that case depended upon his news being accurate. The essential difference lies in this—that, accurate or no, no single one of the persons who inquired through him could possibly influence in any way the means by which his inquiries were set on foot. Nor could he have fairly been regarded as the agent of the person to whom he sold the information he acquired.

There are further circumstances in the present case upon which the respondents place great reliance. The fact that the answers to the inquiries were obtained upon payment of a trivial sum of money; the fact that the information was capable of being corrected by reference to the register of companies, and that this was not done—these facts, it is suggested, show that the method of carrying on business is of such a character that it cannot be to the public good to obtain inquiries by these means. These are some of the circumstances which, I believe, weigh with the noble Lord (LORD LOREBURN) in the opinion which he entertains that this communication in the present case ought not to be protected. I need not say with what uneasiness I find myself unable to accept his view. To my mind, the first of these considerations applies to determining the question whether the publication of the libel by Wilmshurst to Hadwen was made on a privileged occasion, and it is not this libel which is sued on and the latter is relevant only on the question of malice. For these reasons I think that the learned judge, when once he held there was no evidence of malice, should, upon the evidence before him, have dismissed the case.

EARL LOREBURN.—The parties in this case desire a decision upon the evidence as it stands, unsatisfactory though it be, whether or not the occasion on which this libel was published ought to be regarded as privileged.

The law was established long ago in *Toogood v. Spyring* (2), and its application was illustrated in the case before the Privy Council of *Macintosh v. Dun* (1). That case is of equal authority with our own decisions, and I think it shows that considerations of public policy must influence a court in deciding these questions of privilege. I agree that the defendant association ought to be struck out of the record, for the reasons already stated. As to the defendant Wilmshurst, it would be necessary to discharge the judgment against him if a judgment against Hadwen were to be entered, for they were sued as joint tortfeasors. But unless it is necessary in order to remove an impediment in the way of proceeding against Hadwen, I am ill-disposed to interfere. For Wilmshurst has not appealed against the judgment, and there is no doubt that he acted maliciously. As regards the defendant Hadwen no malice has been proved. Accordingly, he must succeed if the occasion was privileged, and that depends on one question. In publishing this libel was he acting as agent of the association, or was he merely an agent for Mr.

A Shand Kydd, on whose behalf he made inquiry and to whom he reported? That remits us to the facts, and no question was put to the jury upon this point.

If this gentleman was the agent of the association to inquire for each member who might invoke his services, then, upon the evidence as it now stands, I do not think the occasion would be privileged. For I think we should look at who and what are the persons to whom and by whom the libellous communication is made, and to the manner in which they conducted themselves, before admitting the privilege claimed. It is right that proper facilities should be given for ascertaining the financial position of traders. But we must remember that private reputation and credit are at stake, and I cannot think that a privilege should be allowed unless there is not merely good faith but also real care to make inquiry only in reliable quarters, and to verify it where practical. The absence of such care may, no doubt, be evidence of malice, but it is also relevant on the point whether there is privilege or not, and may, in my judgment, be fatal to the privilege even if malice be disproved. The court has to hold the balance, and, looking at who published the libel, and why, and to whom, and in what circumstances, to say whether it is for the welfare of society that such a communication, honestly made, should be protected by clothing the occasion of the publication with privilege.

D The facts here were imperfectly presented at the trial, and, therefore, I may easily be at fault in coming to a conclusion. I do not think on those facts there was a privileged occasion if Mr. Hadwen is to be regarded as acting in a capacity of agent for the association as a whole. I will not review the facts, but I do not think the methods of this association, consisting as it does of 6,000 persons, are salutary or deserve protection. But if he is to be regarded as confidential agent of Mr. Shand Kydd alone when he wrote the libel sued on, then I think the occasion is privileged. And that is the view your Lordships take of his agency on these imperfect materials. It ought to have been left to the jury to say whose agent Mr. Hadwen was. That being so, Hadwen succeeds. I must express my strong feeling that Messrs. Greenlands have been cruelly defamed, and that they may have lost a remedy, to which they were entitled, by a miscarriage at the hearing more difficult to repair than any I have met with in my former experience. I believe they have acted wisely in seeking a final decision, even on imperfect materials, so as to end this litigation, and though the decision will be adverse to them, they have at least had the satisfaction of amply vindicating their good fame, which has been so unjustly assailed.

LORD ATKINSON discussed the facts and the course of the trial and continued : In my view, therefore, this verdict and the judgment entered upon it cannot be allowed to stand. They must, I think, be set aside as wholly illegal and improper. It is agreed upon both sides that the association must be struck out from the pleadings. They cannot be sued as a legal entity in the manner in which they have been sued; but it is deemed desirable by all the parties concerned that the question should be determined by the House whether or not the judge at the trial should have ruled on the evidence then before him that the occasion upon which the libel complained of was published was a privileged occasion. Accordingly, I proceed to deal with that question.

I shall not attempt to hazard a new definition, or description of a privileged occasion. I do not think that the statements as to what constitutes a privileged occasion made by PARKE, B., in *Toogood v. Spyring* (2) (1 Cr.M. & R. at p. 193), by ERLE, C.J., in *Whiteley v. Adams* (3) (15 C.B.N.S. at p. 414), by LORD CAMPBELL in *Harrison v. Bush* (4) (5 E. & B. at p. 348), and by LINDLEY, L.J., in *Stuart v. Bell* ([1891] 2 Q.B. at p. 347) can be improved upon. PARKE, B., speaking of privileged communications, said :

"If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society."

In an earlier portion of the passage, however, he had said that the law considers such a publication as malicious unless it is fairly made by a person in discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. These are, apparently, the tests by which, in the learned judge's opinion, it may be determined whether a defamatory matter has been published under circumstances which rebut implied malice. In the latter part of the passage he gives the reason why a publication which fulfils these tests is protected, "and that reason is the common convenience and protection of society." But PARKE, B., never meant, I think, to lay it down that implied malice is to be taken to be rebutted where those tests have not been fulfilled, although the common interest and protection of society might be served by the publication of the defamatory matter in question. ERLE, C.J., in *Whiteley v. Adams* (3) laid down what are the tests in these words (15 C.B.N.S. at p. 414):

"If the circumstances bring the judge to the opinion that the communication was made in the discharge of some social or moral duty or on the ground of an interest in the party making or receiving it, then if the words pass in the honest belief on the part of the party writing or uttering them, he is bound to hold that the action fails. . . . Judges who have had to deal with this question have felt great difficulty in defining what kind of social or moral duty or what amount of interest will afford a justification."

That, he said, was clearly a question for the judge to decide. Later on he points out that the law as to privileged communication was much more restricted formerly than in modern times, and says:

"The rule has become gradually more extended upon the principle that it is to the general interest of society that correct information should be obtained as to the character of persons in whom others have an interest."

It was in this connection that the Chief Justice used the words quoted by LORD MACNAGHTEN in *Macintosh v. Dun* (1) [1908] A.C. at p. 399). In *Harrison v. Bush* (4) LORD CAMPBELL described what I have styled the "test" to the same effect, but in somewhat different language. He said (5 E. & B. at p. 348):

"A communication made bona fide upon a subject-matter in which the party communicating had an interest or in reference to which he had a duty is privileged if made to a person having a corresponding interest or duty, although it contains 'defamatory matter.' " . . . In the proposed 'canon' the word 'duty' cannot be confined to duties which can be enforced by indictment, action, or mandamus, but must include moral and social duties of imperfect obligation."

He said nothing whatever about the "general interest of society," because his apparent object was to lay down the "canon" itself and not to justify it by showing its foundation. In *Stuart v. Bell* (5), LINDLEY, L.J., no doubt used the following words ([1891] 2 Q.B. at p. 346):

"The reason for holding any communication privileged is 'the common convenience and welfare of society' [quoting PARKE, B.'s words], and it is obvious that no definite line can be drawn so as to mark with precision those occasions which are privileged and those which are not."

Further on he approved of and adopted the Chief Justice's statement of the law as to what is necessary to make an occasion privileged. BLACKBURN, J., in *Davies v. Sneed* (6), said (L.R. 5 Q.B. at p. 611) where a person is so situated that it becomes right in the interest of society that he should tell a third person certain facts, then, if he, bona fide, and without malice, does tell them, it is a privileged communication. But this is only another way of saying that where a social or moral duty rests upon a person to tell a thing, and he does tell it, under the circumstances mentioned, it is a privileged communication. In my view, therefore, it is not enough that the judge should be satisfied in any given case that the publication of the defamatory matter is of service to "the common convenience

A and welfare of society," irrespective of the tests so laid down, of which this "common convenience and welfare of society" is the foundation and justification. He must, in addition, be of opinion that these tests have been satisfied before he can rule the occasion privileged. I think this is entirely consistent with the passage in LORD MACNAGHTEN's judgment in *Macintosh v. Dun* (1) ([1908] A.C. at p. 399), touching the protection of defamatory communications.

B It was decided as long ago, I think, as *Bromage v. Prosser* (7), and many times since, that if one person makes an inquiry of another touching the position or character of a third, and the person inquired of makes a reply which he bona fide believes to be true, and also bona fide believes that the inquirer desires the information, not merely to gratify idle curiosity, but for some purpose in which he, the inquirer, has a legitimate interest of his own, the occasion upon which the answer is communicated to him is a privileged occasion. This will be so, I think, whether either or both of the beliefs so formed by the person inquired of be reasonable or not (*Clark v. Molyneux* (8)), and also whether or not the inquirer, in fact, desired the information for the purpose mentioned. It will be sufficient if the other person honestly believed he does so require it: *Waller v. Loch* (9). Now, if the person inquired of can himself reply with this protection, it necessarily follows that he can deliver his reply through the mouth of an agent duly accredited by him in that behalf, but if he does so the privilege which the agent's publication will have will be that which his principal would have had if he had replied himself. Nothing less and nothing more, since, presumably, he only gives indirectly the information which he bona fide believes to be true. If the agent should contribute anything from himself, that would alter matters entirely. So likewise may the inquirer make his inquiry through an agent, otherwise no incorporated company or municipal corporation could ever make an inquiry touching the character of a servant they were about to employ, since they can only act through and by agents. But if this latter agent should publish the information he receives by repeating it to his principal, and be sued in respect of that publication, the privilege, if any, protecting him is his own. He must, I think, defend himself on the ground that, being employed as a confidential agent to obtain information for his principal, he was under a legal, moral, or social duty to his principal to repeat truly what he had been informed of.

I suppose the evidence of Hadwen may be taken to amount to a statement that he bona fide believed in the accuracy of the information conveyed by him to Shand Kydd, in reply to the latter's request or inquiry, and also bona fide believed that Shand Kydd made the inquiry for the purpose of obtaining the information touching a matter in which he had a lawful interest—namely, the conduct of his own trade. It, therefore, becomes necessary, in the first instance, to determine what was the precise relation in which Hadwen stood to Shand Kydd when he repeated this libel to him: (i) Was he the confidential agent employed by Shand Kydd to obtain information in which he (Shand Kydd) was interested in his trade touching the solvency of a contemplated customer; or (ii) Was the association as a body the confidential agent of Shand Kydd, employed by him for the same purpose, Hadwen being only a servant, aiding his employers, the association, in their work; or (iii) Were the association a body trading for gain in the characters of other people, and ready to sell their wares for money to any customer who might ask for them, their sole motive being pecuniary profit to themselves, Hadwen being, as it were, their principal shopman, who took the orders of the customers and delivered the goods? If they were this last, then they were in the same position as the defendant in *Macintosh v. Dun* (1), and the occasion of the publication of the libel sued on would not be privileged. But I do not think the association was in that position. It was not incorporated. It was not a legal partnership, and was not created or worked solely from motives of pecuniary gain. It was formed by men, I think, for the protection in their trade, or business, of each of its members. Neither do I think the association as a body were the agents to make this inquiry. By No. 2 of the rules of the association the business of the association was carried on by the

committee of management. But the association, not being either a firm or an incorporated company, I do not see how it could be such an agent. And it would appear to me that the true condition of things was that members associated themselves together to appoint an officer, with certain machinery at his disposal, whom each member was entitled to employ as his own confidential agent, to obtain for him information beneficial to him in the conduct of his own trade or business, the secretary, when requested to obtain the information desired, becoming *pro hac vice* the confidential agent of the member who asked him to procure it. If that be the true condition of things, as in my opinion it is, then Hadwen was Shand Kydd's confidential agent to obtain this information touching the defendants' position, and, being so, he disclosed it to his principal Shand Kydd, if not in discharge of a legal duty, certainly in discharge of a moral one. The occasion of the publication sued on was therefore, in my opinion, a privileged occasion, and I think the Chief Justice at the trial should have so ruled.

LORD PARKER OF WADDINGTON, having referred to the facts and the course of the trial: Having regard to the way in which business is carried on in this country occasions must arise in which it is not only legitimate but necessary for one trader to inquire into the financial circumstances and credit of another. A person asked for information under such circumstances may be said to be under a social duty to communicate it, and it is in the interests of society generally that he should be able to do so without fear of an action for libel. It is, therefore, a principle of law that a person asked for information affecting the credit of another is justified in giving it, provided (i) that he bona fide believes in the truth of the information which he gives; (ii) that he bona fide believes that the person making the inquiry has an interest which justifies it; and (iii) if *Macintosh v. Dun* (1) is to be considered good law, that he is not actuated by motives of private gain or other motives excluding the possibility of the communication being made under a sense of social duty. Under such circumstances the implication of malice arising out of a false statement to the discredit of another is displaced and the communication is privileged. If a person may himself legitimately inquire as to the credit of another, it must necessarily follow that he is justified in making the inquiry through an agent confidentially employed for that purpose, and if a person asked for information may himself give it, he may give it through an agent whom he employs for that purpose. There is, however, this difference between the two cases. If a confidential agent be employed to make inquiries, he is under a legal duty to communicate the result of his inquiries to his principal, and this duty is the basis of a distinct privilege arising out of the relationship between principal and confidential agent. On the other hand, if the person from whom information is asked communicates it through an agent, the privilege of the agent is the privilege of his principal.

The question, therefore, arises whether Hadwen was in the position of an agent confidentially employed by Shand Kydd to make inquiries on his behalf, or whether Hadwen was in a position either (i) of a person of whom an inquiry is made, or (ii) of the agent of such last mentioned person for the purpose of communicating the information. For the reasons hereinbefore appearing, I do not think he can be held to be the agent of the association for the purpose of making the communication, and there is no evidence that any member of the association (unless it be Shand Kydd himself) made himself responsible in any way for what Hadwen did. Either, therefore, Hadwen was in the position of the person from whom the inquiry was made, or he was the confidential agent of Shand Kydd to make the inquiry and communicate the result. In the former case, there being no malice alleged, your Lordships are bound to assume that he bona fide believed in the truth of the information he gave, and also that he bona fide believed, as, indeed, appears from the form of inquiry made by Shand Kydd, that the latter had a legitimate interest in asking for the information. It is not alleged that Hadwen acted from motives of private gain or from any motive which is inconsistent with his having

A acted under a sense of social duty. To establish this it would be necessary to prove that the association was a mere sham, and that the secretary was carrying on the business of inquiring into and selling information as to the financial position of traders, the members of the association being purchasers of the information, and the real object being to secure subscriptions sufficient to pay the secretary's salary. It appears to me quite impossible for your Lordships to come to this conclusion on

B the evidence before you, and it follows that, on the supposition that the secretary was in the position of a person from whom inquiry was legitimately made, he was entitled to privilege. On the other hand, if, and this I think is the true inference from the facts, the secretary was in the position of a confidential agent employed by Shand Kydd to make inquiries on his behalf, his report was a fortiori a privileged document, unless in making it he were guilty of actual malice, which was neither

C alleged nor proved. If a trader is justified in making inquiries through an agent on a proper occasion as to the credit of another, it can make no difference whether the agent receives, or does not receive, a remuneration for his services. Again, if a single trader is justified in making an inquiry through an agent, there is no reason why two or more traders so justified should not combine to pay a common agent to make, on behalf of each as occasion arises, such inquiry as may be

D necessary. A common agent so paid and making an inquiry at the request of any particular trader would not be the agent for that purpose of all the traders who joined in providing his salary, but only of that particular trader at whose instance the inquiry was made, just as if two persons employ a common chauffeur to drive the motor of each as required, such chauffeur would not be the agent of the one while employed in driving the car of the other. In my opinion, in making the

E inquiry on which the report was based and the report itself, the true inference is that Hadwen acted as confidential agent of Shand Kydd, and that the report was, therefore, a privileged communication.

In my opinion, therefore, the proper course will be to allow the appeal and enter judgment for Hadwen and the association. The appellants, having obtained a decision in their favour on the only point they raised upon the appeal, are entitled

F to their costs here and below.

Solicitors: *Hutchinson & Cuff; Ford, Lloyd & Co., for Houchen, Greenland & Co., Attleborough.*

[*Reported by W. E. REID, ESQ., Barrister-at-Law.*]

A

**R. v. HAMMERSMITH SUPERINTENDENT REGISTRAR.
Ex parte MIR-ANWARUDDIN**

[COURT OF APPEAL (Swinfen Eady and Bankes, L.J.J., and A. T. Lawrence, J.),
November 23, 1916]

[Reported [1917] 1 K.B. 634; 86 L.J.K.B. 210; 115 L.T. 882;
81 J.P. 49; 33 T.L.R. 78; 61 Sol. Jo. 130; 15 L.G.R. 88]

B

*Divorce—Dissolution of marriage under foreign law—Mohammedan declaration
of divorce by husband—Efficacy to dissolve English marriage.*

A marriage solemnised in England according to English law between a Mohammedan and an English woman cannot be dissolved by the husband executing under his hand a Talak Nama, i.e., a document declaring that he thereby divorced his wife, which was efficacious under Mohammedan law to dissolve a Mohammedan marriage.

C

Notes. Applied: *Maher v. Maher*, [1951] 2 All E.R. 37. Considered: *Har-Shefi (otherwise Cohen-Lask) v. Har-Shefi*, [1953] 2 All E.R. 373. Referred to: *Nachimson v. Nachimson*, [1930] All E.R.Rep. 114; *Apt (otherwise Magnus) v. Apt*, [1947] 1 All E.R. 620.

D

As to foreign decrees of divorce, see 7 HALSBURY'S LAWS (3rd Edn.) 112 et seq.; and for cases see 11 DIGEST (Repl.) 466 et seq.

Cases referred to:

- (1) *Warrender v. Warrender* (1835), 2 Cl. & Fin. 488; 9 Bli.N.S. 89; 6 E.R. 1239, H.L.; 11 Digest (Repl.) 356, 250.
 - (2) *Hyde v. Hyde and Woodmansee* (1866), L.R. 1 P. & D. 130; 35 L.J.P. & M. 57; 14 L.T. 188; 12 Jur.N.S. 414; 14 W.R. 517; 11 Digest (Repl.) 455, 906.
 - (3) *Harvey v. Farnie* (1880), 6 P.D. 35; 50 L.J.P. 17; 43 L.T. 737; 29 W.R. 409, C.A.; affirmed (1882), 8 App. Cas. 43; 52 L.J.P. 33; 48 L.T. 273; 47 J.P. 308; 31 W.R. 433, H.L.; 11 Digest (Repl.) 481, 1084.
 - (4) *Chetti v. Chetti*, [1909] P. 67; sub nom. *Venugopal Chetti v. Venugopal Chetti*, 78 L.J.P. 23; 99 L.T. 885; 25 T.L.R. 146; 53 Sol. Jo. 163; 11 Digest (Repl.) 460, 941.
- E

Also referred to in argument:

Bater v. Bater, [1906] P. 209; 75 L.J.P. 60; 94 L.T. 835; 22 T.L.R. 408; 50 Sol. Jo. 389, C.A.; 11 Digest (Repl.) 482, 1087.

Wilson v. Wilson (1872), L.R. 2 P. & D. 435; 41 L.J.P. & M. 74; 27 L.T. 351; 20 W.R. 891; 11 Digest (Repl.) 468, 1010.

G

Le Mesurier v. Le Mesurier, [1895] A.C. 517; 64 L.J.P.C. 97; 72 L.T. 873; 11 T.L.R. 481; 11 R. 527, P.C.; 11 Digest (Repl.) 468, 1011.

Stathatos v. Stathatos, [1913] P. 46; 82 L.J.P. 34; 107 L.T. 592; 29 T.L.R. 54; 57 Sol. Jo. 114; 11 Digest (Repl.) 472, 1039.

Ganer v. Lady Lanesborough (1790), Peake, 25, N.P.; 22 Digest (Repl.) 613, 7072.

H

Skinner v. Skinner (1897), L.R. 25 Ind. App. 34.

Appeal by the applicant from a decision of the Divisional Court discharging a rule nisi for a writ of mandamus addressed to the registrar of births, deaths, and marriages for the district of Hammersmith, to show cause why he should not issue a certificate and licence authorising Dr. Mir-Anwaruddin to marry one Violet Louise Ling.

I

The facts appear in the judgment of SWINFEN EADY, L.J.

The applicant in person.

The Solicitor-General (Sir George Cave, K.C.) and G. A. H. Branson, for the respondent, were not called on to argue.

SWINFEN EADY, L.J.—This is an appeal by the applicant, Dr. Mir-Anwaruddin, from an order of the Divisional Court of the King's Bench Division

discharging a rule that he had obtained for a mandamus to the superintendent registrar of Hammersmith commanding him to show cause why he should not issue, pursuant to the statutes in that behalf, to the applicant a certificate in the form or to the effect of the certificate set forth in the schedule (B) annexed to the Marriage and Registration Act, 1856, and at the same time a licence authorising the applicant to marry Miss Violet Louise Ling.

It is provided by the Marriage and Registration Act, 1856 [see now Marriage Act, 1949, s. 32 (2): 28 HALSBURY'S STATUTES (2nd Edn.) 650] s. 9:

"Every superintendent registrar receiving notice of an intended marriage to be solemnised by licence as aforesaid shall, after the expiration of one whole day next after the day of the entry of such notice in his 'marriage notice book,' issue under his hand, upon the request of the party giving such notice, a certificate in the form or to the effect of the certificate set forth in . . . schedule (B) to this Act annexed, and also a licence to marry, provided that in the meantime no lawful impediment to the issuing of such certificate be shown to the satisfaction of the same superintendent registrar . . ."

An application was made by the applicant for that certificate and licence, dated Aug. 12, 1916, and in that he gives his name and the lady's name, Violet Louise Ling, and in the column headed "Condition," he describes his condition: "Formerly the husband of Ruby Pauline Hudd from whom he is divorced according to Mohammedan law." Then Miss Ling is described as a spinster; he is twenty-seven, and she is nineteen years of age, both residing at No. 85, Sinclair Road, West Kensington. Then the form says:

"And I hereby solemnly declare that I believe there is no impediment of kindred or alliance or other lawful hindrance to the said marriage."

That application having been made to the registrar, the objection was raised that the applicant, the intended husband, is already married. Of course, if that were so, it could not be disputed that the registrar was not bound to give a certificate and licence, because there is a proviso in the section which I have just read that in the meantime there is no lawful impediment to the issuing of that certificate shown.

The question raised upon this appeal is whether the applicant is now a married man, and, as such, precluded from obtaining a licence and certificate to take another wife in England, his first wife being still living, and the bonds of matrimony not being dissolved. The applicant was born on Dec. 18, 1888, and is of the Mussulman faith—born in, permanently resident in, and domiciled in India, in the province of Madras. On Mar. 18, 1913, he intermarried in England with an Englishwoman, named Ruby Pauline Hudd. That marriage was duly solemnised on that day. Differences afterwards arose between him and his wife. It is not necessary to go through the various proceedings. The wife left him, refused to live with him; he obtained by an application to the City Civil Court at Madras a decree of restitution of conjugal rights, whereby the wife was ordered to return to cohabitation within three months. That order she has not obeyed. An application was then made by the appellant to the Divorce Division of the High Court in England. He presented a petition for divorce on the ground of his wife's alleged adultery. The petition came before BARGRAVE DEANE, J., and was dismissed, the learned judge holding that if there was a subsisting marriage, the Divorce Division of the High Court had no jurisdiction to dissolve it. His order was founded upon this, that the domicile of the applicant was in India. The applicant points out that in India there is no jurisdiction in the High Court there to dissolve the marriage, because under the circumstances the jurisdiction of that court does not extend to his case, so that, having regard to the provisions of the Indian Divorce Act (No. 4 of 1869), he is unable to obtain a divorce in India. That Act recites that it is expedient to amend the law relating to divorced persons professing the Christian religion and to confer upon certain courts jurisdiction in matters matrimonial. Then it provides by s. 2:

"This Act shall extend to the whole of British India . . . nothing hereinafter contained shall authorise any court to grant any relief under this Act except in cases where the petitioner professes the Christian religion and resides in India at the time of presenting the petition, or to make decree of dissolution of marriage except in the following cases: (a) Where the marriage shall have been solemnised in India, or (b) where the adultery, rape, or unnatural crime complained of shall have been committed in India, or (c) where the husband has, since the solemnisation of the marriage, changed his profession of Christianity for the profession of some other form of religion."

The applicant says: "There is a limit, therefore, to the jurisdiction of the Indian courts, and, as I am a Mussulman professing the religion of Islam, I do not come within the provisions of the Indian Divorce Court. Therefore, my position is that in England, as I am not domiciled here, there is no jurisdiction in the courts here to dissolve my marriage; in India, where I am domiciled, the jurisdiction conferred on the Indian courts does not extend to my case."

That being so, on Aug. 27, 1915, by a writing under his hand called Talak Nama, he purported to divorce his wife. The writing was signed by him in the presence of two witnesses, and it recites:

"Whereas Ruby Pauline Mir-Anwaruddin, my lawfully wedded wife (the second daughter of Charles Sterling Hudd and Florence Fanny Hudd, of 5, Hambly Mansions, Streatham Common, in the county of London), has of her free will and accord left my protection and lived separately and apart from me since the 3rd day of May, 1913. And whereas the said Ruby Pauline Mir-Anwaruddin has deliberately treated with contempt the decree and order of His Majesty's City Civil Judge at Madras in the Empire of India dated the 15th day of December, 1913, which commanded her to rejoin me and live with me at Madras. And whereas the courts of His Majesty in England have no jurisdiction to try a suit for dissolution of my marriage owing to my being domiciled in the Empire of India, and the courts of His Majesty in the Empire of India have no jurisdiction to dissolve a marriage between parties who do not profess the religion of Christ, I have no alternative but to exercise my privilege as a Mohammedan, which I hereby do by pronouncing Talak in the name of God and His Holy Prophet Mohammed (on whom be peace). Witness my hand this 27th day of August, 1915."

That is the writing of divorce, and the applicant has argued before us that, being a Mohammedan, and being entitled according to the law of his religion and of his domicile to divorce a wife without giving any reason for it, he has exercised that right, that the marriage is thereby dissolved between him and Ruby Pauline Hudd, and that his status is now not that of a married man, but that of an unmarried man capable of contracting, according to English law, another marriage. No question arises on this appeal with regard to the rights which a Mohammedan has of marrying several wives. A Mohammedan is entitled, according to the applicant's evidence, to have four wives, and no question arises as to what his position in India would be with regard to taking further wives. Whatever rights he may have in that respect do not come before us here, and they call for no comment.

The applicant has done this. He has contracted in England with an Englishwoman, according to the form prescribed by law, an English marriage. In doing so the obvious intention of both parties to the contract was to confer upon the lady whom he took to wife the status and position of a married woman. Such a position, the position of a wife, as known to the English law, is the voluntary union of one man with one woman to the exclusion of all others. That has been frequently said to be a Christian marriage. A Mohammedan marriage, using the term "marriage," is something quite different. Ladies taken to wife in the Mohammedan sense do not acquire that status and that position which the sole wife allowed in Christian countries is given and enjoys. The difference between these two positions has been often pointed out. So far back as 1835 LORD

A BROUGHAM in *Warrender v. Warrender* (1) expressed himself thus (2 Cl. & Fin. at p. 532):

B "Marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe, that we regard it as a wholly different thing, a different status from Turkish or other marriages among infidel nations ['infidel' nations there means 'infidel' as distinguished from Christian nations] because we clearly never should recognise the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the law of those countries authorise and validate. This cannot be put upon any ground except our holding the infidel marriage to be something different from the Christian, and our also holding Christian marriage to be the same everywhere."

C In 1866 *Hyde v. Hyde and Wodmansee* (2) came before the judge ordinary, LORD PENZANCE, and there he dealt with same subject thus (L.R. 1 P. & D. at p. 133):

D "Marriage has been well said to be something more than a contract, either religious or civil. It is an institution. It creates mutual rights and obligations, as all contracts do; but, beyond that, it confers a status. The position or status of husband and wife is a recognised one throughout Christendom; the laws of all Christian nations throw about that status a variety of legal incidents during the lives of the parties, and induce definite rights upon their offspring. What, then, is the nature of this institution as understood in Christendom? Its incidents vary in different countries, but what are its essential elements and invariable features? If it be of common acceptance and existence, it must needs (however varied in different countries in its minor incidents) have some pervading identity and universal basis. I conceive that marriage, as understood in Christendom, may for the purpose be defined as the voluntary union for life of one man and one woman to the exclusion of all others. There are, no doubt, countries peopled by a large section of the human race in which men and women do not live or cohabit together upon these terms—countries in which this institution and status are not known. In such parts the men take to themselves several women, whom they jealously guard from the rest of the world, and whose number is limited only by considerations of material means. But the status of these women in no way resembles that of the Christian 'wife.' "

G I should say, pausing there, that I have already referred to the fact that, according to the Mohammedan faith, the number is not unlimited; it is limited to four; so with regard to a Mohammedan those remarks must be taken with that qualification. LORD PENZANCE continued (ibid. at p. 133):

H "In some parts they are slaves, in others perhaps not; in none do they stand, as in Christendom, upon the same level with the man under whose protection they live. There are, no doubt, in these countries laws adapted to this state of things—laws which regulate the duties and define the obligations of men and women standing to each other in these relations. It may be, and probably is, the case that the women there pass by word or name which corresponds to our word 'wife.' But there is no magic in a name; and, if the relation there existing between men and women is not the relation which in Christendom we recognise and intend by the words 'husband' or 'wife,' but another and altogether different relation, the use of a common term to express these two separate relations will not make them one and the same, though it may tend to confuse them to a superficial observer."

I Later still, in *Harvey v. Farnie* (3) in the Court of Appeal, LUSH, L.J., said (6 P.D. at p. 53):

"Now, as Mr. Fooks has referred to what is called 'marriage' in a country where polygamy is the law, I must take the opportunity also of saying, in

accordance with what has fallen from COTTON, L.J., that there is no analogy whatever between the union of a man and a woman in a country where polygamy is allowed, and the union of a man and a woman in a Christian country. Marriage in the contemplation of every Christian community is the union of one man and one woman to the exclusion of all others. No such provision is made, no such relation is created, in a country where polygamy is allowed."

In these circumstances the marriage which was celebrated between the applicant and Ruby Hudd on Mar. 18, 1913, has not been dissolved by any court of competent jurisdiction (the applicant says there is none), and it is not a marriage in the Mohammedan sense which can be dissolved in the Mohammedan manner. No question arises that, according to the Mohammedan law, if a member of that persuasion has taken several wives (within the limit allowed) and has entered into a union of that kind with each of those ladies according to his law, he may terminate that union by the writing of divorce, and such a union is so terminated. The applicant has adduced evidence to make it clear that the husband has that right without assigning any reason; where to him, and him alone, it seems good to put her away, in those circumstances he can do it; but it is quite impossible to hold that such a writing of divorce could dissolve a marriage contracted here in England with an Englishwoman the husband being of Mohammedan faith. In fact, the case was put in the House of Lords by LORD BROUGHAM in *Warrender v. Warrender* (1) in language which I will read. LORD BROUGHAM is pointing out the difference between the nature of the contract which is entered into in a Christian marriage and the jurisdiction of the courts and their power of dealing with the rights of parties thereto, and he says (2 Cl. & Fin. at p. 354):

"Indeed, another consequence would follow from this doctrine of confounding with the nature of the contract that which is only a matter touching the jurisdiction of the courts, and their power of dealing with the rights and duties of the parties to it; if there were a country in which marriage could be dissolved without any judicial proceeding at all, merely by the parties agreeing in pais to separate, every other country ought to sanction a separation had in pais there, and uphold a second marriage contracted after such a separation. It may safely be asserted that so absurd a proposition never could for a moment be entertained."

That is the proposition which the applicant has sought to make good here—by power in pais, by writing under his hand, and without even the concurrence of the wife, without accord between them, at the mere will of the husband, to put her away, and then say that this English marriage is thereby dissolved. In my opinion, it is quite impossible to maintain that argument. The English marriage is still subsisting, and there is a lawful impediment to the applicant taking a second wife, standing the first marriage. I am of opinion that the appeal fails, and should be dismissed.

BANKES, L.J.—I agree. According to the appellant's statement, he, on Mar. 18, 1913, contracted a civil marriage with Ruby Pauline Hudd, at the superintendent registrar's office at Wandsworth. The first question that has to be decided is: What kind of marriage was that? And it seems to me that question is answered by a reference to the Act of Parliament under which the marriage took place. It took place under an Act which was one of a series that laid down certain regulations and gave certain facilities for the contracting of Christian marriages, and Christian marriages alone. The distinction between such a marriage and the marriage of a Mohammedan is well indicated by LORD BROUGHAM in the passage which the lord justice has referred to, where he says, referring to a statement that he had made (*ibid.* at p. 532):

"This cannot be put upon any rational ground except our holding the infidel marriage to be something different from the Christian."

A Later on he says the fallacy of the argument to the contrary, in his opinion, is confounding incidents with essence, and the essence of the two marriages is entirely distinguishable. The essence of the Christian marriage is, if I may adopt the language of LORD PENZANCE in *Hyde v. Hyde and Woodmansee* (2), where he says the matrimonial law of this country is adapted to the English marriage and it is wholly inapplicable to polygamy (L.R. 1 P. & D. at p. 133):

B "I conceive that marriage as understood in Christendom may for this purpose be defined as the voluntary union for life of one man and one woman to the exclusion of all others."

C Having contracted that particular form of marriage, the applicant, on Aug. 27, 1915, claimed to dissolve it by a writing of divorce, and he claimed to dissolve it because he was a Mussulman, contending that upon his marriage his wife acquired his status, and that, therefore, his law as a Mussulman applied to her, and that law included his right to put her away by a writing of divorce. Of course that law, if it exists, must be proved by evidence; and the evidence which has been brought forward on affidavit, in my opinion, indicates something very different. All that is said is that according to the Mussulman law administered in British courts in India a Mussulman has a right to dissolve his own marriage either by word of mouth or in writing; but no reference is made to what kind of marriage—whether it is his own Mussulman marriage to which the Mussulman law applies—and when the applicant was asked whether he could produce a single instance of this law having been applied to a Christian marriage, he replied in the negative. Therefore it is, in my opinion, sufficient to dispose of this appeal to say that there is no evidence of any personal law applicable to the applicant which gives him the right to put away a wife whom he has married by a Christian marriage by a writing of divorce.

E But I am prepared to go further and adopt the language of LORD BROUGHAM, which has already been referred to in *Warrender v. Warrender* (1), where he says (2 Cl. & Fin. at p. 534) that the suggestion that the marriage could be dissolved without any judicial proceedings at all, merely by the parties agreeing in pais to separate, would be absurd. It appears to me that the applicant is in this difficulty: Assuming he was to establish, as he says he thinks he has established, that this marriage of his in 1913 was a Mussulman marriage, of course the effect of it, whether it was Mussulman marriage or a Christian marriage, is pointed out by LORD GORELL, P., in *Chetti v. Chetti* (4), where he says ([1909] P. at p. 87):

G "Ought a foreigner domiciled abroad, who comes to this country and here marries in due form according to English law another person domiciled in England, to be allowed to assert that he carries about with him, while here, the burden of an incapacity imposed by the laws of a foreign domicile to do that which he has done voluntarily and in due form according to the laws of England, or to repudiate his marriage on the ground that he is incapable of doing what he has done, and ought our courts to support such an assertion and repudiation, with the consequent effects on the position of the wife and legitimacy of the child? To my mind the answer should be 'No.' "

H Therefore, whatever the form of marriage contended for by the foreigner domiciled abroad may be, if he chooses to enter into a form of marriage according to the English law, he is bound by it. The applicant suggests that the marriage, after all, was a Mohammedan marriage, and, though he may have been bound by it originally, he was entitled to put it aside by his writing of divorce. What is it he is coming to ask for now? It is exactly the same as he applied for in the first instance. If, according to his contention, that is a Mohammedan marriage, the registrar, in my opinion, was quite right to refuse it, because he acts under a statute which gives him authority to assent to the request of persons who are asking for Christian marriages and no other form of marriage. Therefore, whichever way it is looked at, it is clear to me that this appeal fails, and that the

superintendent registrar was right in holding that there was, in the language of the section, a lawful impediment to the marriage which the applicant was anxious to contract.

A. T. LAWRENCE, J.—I am of the same opinion. The short point is whether this court should grant a mandamus compelling the registrar to issue this certificate under the Marriage and Registration Act, 1856. It appears that when that certificate was applied for he was also very properly informed of the previous marriage which had taken place in the year 1913. That marriage had been validly solemnised in the registry office in that year, and the only ground for saying that a new certificate for another marriage could be granted was that the applicant here had himself, by his own writing, purported to dissolve that marriage. I think that that is an even stronger case than the one mentioned by LORD BROUGHAM as absurd in *Warrender v. Warrender* (1) (2 Cl. & Fin. at p. 534). Here it is not suggested that there was any consent on the part of the woman; it is the man seeking to be, or purporting to be, a judge in his own cause, and dissolving his marriage without any communication with the woman or any consent on her part, affecting her rights as well as his own. I think it is contrary to natural justice that a man should be judge in his own cause and determine his marriage at his own will and pleasure, and that the registrar was perfectly right in refusing to grant another certificate while that marriage was a subsisting marriage and only purported to be affected by this writing of divorcement.

Appeal dismissed.

Solicitor: *Treasury Solicitor.*

[Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.]

TINGLEY v. MÜLLER

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Swinfen Eady, Bankes, Warrington and Scrutton, L.JJ., and Bray, J.), March 23, 26, May 11, 1917]

[Reported [1917] 2 Ch. 144; 86 L.J.Ch. 625; 116 L.T. 482;
33 T.L.R. 369; 61 Sol. Jo. 478]

Alien—Enemy—Sale of property in England through agent—Irrevocable power of attorney—Proceeds to be retained in England during war—No need of intercourse with alien—Legality of sale.

On May 20, 1915, during the 1914-18 war between Great Britain and Germany, the defendant, who had been resident for many years, but not naturalised, in England, and wished to proceed to Germany, gave a power of attorney, irrevocable during twelve months, to his solicitor in England enabling him to sell the defendant's house and furniture in England. The defendant, being beyond military age, then obtained a permit from the Foreign Office to enable him to go to Germany, and he travelled from London to Tilbury on May 26, 1915, and embarked for Holland. On June 2, 1915, auctioneers, who had been instructed by the defendant before his departure, purported to sell the premises and furniture to the plaintiff who signed a contract for purchase and paid a deposit. The solicitor was instructed by the Custodian of Enemy Property to retain the proceeds of the sale until after the end of the war. On a claim by the plaintiff that the contract was illegal and void by reason of the defendant being an alien enemy when it was entered into, and for the return of the deposit,

Held (SCRUTTON, L.J., dissenting): when the defendant gave the power of

- A attorney to his solicitor he was not an alien enemy; the authority conferred on the solicitor was complete and irrevocable, the defendant could not interfere with regard to the sale, and the making of the contract and the completion of the sale did not involve any further intercourse between him and the solicitor; as the money must be retained in England during the war the transaction could not benefit either the defendant or the enemy as a whole; and, therefore,
- B the transaction did not constitute trading with the enemy at common law and the contract of sale was not illegal and void.

Domicil—Commercial or trade domicil—Acquirement by residence—Loss by relinquishing residence with no intention of immediate return—Reversion to character of allegiance.

- C Per SCRUTTON, L.J.: To gain a commercial or trade domicil residence in a country with no intention of leaving shortly is sufficient. Time is the principal element in the domicil. Such a domicil may be lost by an intention to abandon it, coupled with some overt act or step taken to effect the change. Leaving the country with no intention of immediate return, and with a sale of one's property therein, seems clearly to destroy a commercial domicil.
- D Until he acquires another trade domicil a person who has lost such a domicil reverts to the national character determined by his allegiance.

- Notes.** Distinguished: *Naylor, Benzon & Co. v. Krainische Industrie*, [1918] 1 K.B. 331; *Rodriguez v. Speyer Bros.*, [1918-19] All E.R.Rep. 884. Considered: *V/O Soufracht v. Van Udens Scheepvaart en Agentuur Maatschappij*, [1943] 1 All E.R. 76; *Hangkam Kwintong Woo v. Liu Lan Fong*, [1951] 2 All E.R. 567.
- E Applied: *Barclays Bank, Ltd. v. Bird*, [1954] 1 All E.R. 449. Referred to: *Re Sutherland, Bechoff v. Bubna* (1921), 65 Sol. Jo. 513.

As to aliens generally, see 1 HALSBURY'S LAWS (3rd Edn.) 498 et seq.; and for cases on trading with the enemy, see 2 DIGEST (Repl.) 251 et seq. As to commercial domicil, see 7 HALSBURY'S LAWS (3rd Edn.) 25-27; and for cases see 11 DIGEST (Repl.) 360-364.

- F Cases referred to:

- (1) *Porter v. Freudenberg*, [1915] 1 K.B. 857; 84 L.J.K.B. 1001; 112 L.T. 313; 31 T.L.R. 162; 59 Sol. Jo. 216; 20 Com. Cas. 189; 32 R.P.C. 109, C.A.; 2 Digest (Repl.) 213, 275.
- (2) *Williams v. Paine* (1897), 169 U.S. 55.
- G (3) *Daimler Co., Ltd. v. Continental Tyre and Rubber Co. (Great Britain), Ltd.*, ante p. 191; [1916] 2 A.C. 307; 85 L.J.K.B. 1333; 114 L.T. 1049; 32 T.L.R. 624; 60 Sol. Jo. 602; 22 Com. Cas. 32, H.L.; 2 Digest (Repl.) 219, 315.
- (4) *Halsey v. Lowenfeld*, post p. 1044; [1916] 2 K.B. 707; 85 L.J.K.B. 1498; 115 L.T. 617; 32 T.L.R. 709, C.A.; 2 Digest (Repl.) 243, 459.
- H (5) *The Hoop* (1799), 1 Ch. Rob. 196; 2 Digest (Repl.) 241, 435.
- (6) *Robson v. Premier Oil and Pipe Line Co., Ltd.*, [1915] 2 Ch. 124; 84 L.J.Ch. 629; 113 L.T. 523; 31 T.L.R. 420; 59 Sol. Jo. 475, C.A.; 2 Digest (Repl.) 258, 573.
- (7) *R. v. Kupfer*, [1915] 2 K.B. 321; 84 L.J.K.B. 1021; 112 L.T. 1138; 79 J.P. 270; 31 T.L.R. 223; 24 Cox, C.C. 705; 11 Cr. App. Rep. 91, C.C.A.; 2 Digest (Repl.) 259, 579.
- I (8) *Hugh Stevenson & Sons, Ltd. v. Aktiengesellschaft für Cartonnagen-Industrie*, [1916] 1 K.B. 763; 85 L.J.K.B. 847; 114 L.T. 180; 32 T.L.R. 299; on appeal [1917] 1 K.B. 842; 86 L.J.K.B. 516; 115 L.T. 594; 33 T.L.R. 84; 61 Sol. Jo. 146, C.A.; affirmed [1918-19] All E.R.Rep. 600; [1918] A.C. 239; 87 L.J.K.B. 416; 118 L.T. 126; 34 T.L.R. 206; 62 Sol. Jo. 290, H.L.; 1 Digest (Repl.) 794, 3217.
- (9) *Gist v. Mason* (1786), 1 Term Rep. 88; 99 E.R. 987; 2 Digest (Repl.) 255, 554.

- (10) *Bell v. Gilson* (1798), 1 Bos. & P. 345; 126 E.R. 942; 2 Digest (Repl.) 256, 556. A
- (11) *Potts v. Bell* (1800), 8 Term Rep. 548; 101 E.R. 1540; 2 Digest (Repl.) 256, 562.
- (12) *Esposito v. Bowden* (1857), 7 E. & B. 763; 8 State Tr.N.S. 807; 27 L.J.Q.B. 17; 29 L.T.O.S. 295; 3 Jur.N.S. 1209; 5 W.R. 732; 119 E.R. 1430, Ex. Ch.; 2 Digest (Repl.) 251, 524.
- (13) *The Panariellos* (1915), 84 L.J.P. 140; 112 L.T. 777; 31 T.L.R. 326; 59 Sol. Jo. 399; 13 Asp.M.L.C. 52; affirmed (1916), 85 L.J.P. 112; 114 L.T. 670; 32 T.L.R. 459; 60 Sol. Jo. 427; 13 Asp.M.L.C. 484, P.C.; 2 Digest (Repl.) 276, 640. B
- (14) *Janson v. Driefontein Consolidated Mines, Ltd.*, [1902] A.C. 484; 71 L.J.K.B. 857; 87 L.T. 372; 51 W.R. 142; 18 T.L.R. 796; 7 Com. Cas. 268, H.L.; 2 Digest (Repl.) 218, 308. C
- (15) *Calvin's Case* (1608), 7 Co. Rep. 1a; 2 State Tr. 559; Moore, K.B. 790; Jenk. 306; 77 E.R. 377; 2 Digest (Repl.) 174, 37.
- (16) *Alciator v. Smith* (1812), 3 Camp. 245; 2 Digest (Repl.) 242, 442.
- (17) *Alcinous v. Nigreu* (*Nygrew, Nygren*) (1854), 4 E. & B. 217; 24 L.J.Q.B. 19; 24 L.T.O.S. 92; 1 Jur.N.S. 16; 3 W.R. 25; 119 E.R. 84; 2 Digest (Repl.) 243, 456. D
- (18) *The Harmony* (1800), 2 Ch. Rob. 322; 2 Digest (Repl.) 212, 265.
- (19) *The Aina* (1854), 1 Ecc. & Ad. 313; Spinks, 8; 23 L.T.O.S. 211; 2 Digest (Repl.) 217, 299.
- (20) *The President* (1804), 5 Ch. Rob. 277; 11 Digest (Repl.) 364, 322.
- (21) *La Virginie* (1804), 5 Ch. Rob. 98; 2 Digest (Repl.) 215, 232. E
- (22) *The Indian Chief* (1801), 3 Ch. Rob. 12; 1 Eng. Pr. Cas. 251; 2 Digest (Repl.) 253, 539.
- (23) *Udny v. Udny* (1869), L.R. 1 Sc. & Div. 441, H.L.; 11 Digest (Repl.) 326, 22.
- (24) *Harman v. Kingston* (1811), 3 Camp. 150; 2 Digest (Repl.) 212, 261.
- (25) *Casseres v. Bell* (1799), 8 Term Rep. 166; 101 E.R. 1325; 2 Digest (Repl.) 251, 515. F
- (26) *Maxwell v. Grunhut* (1914), 31 T.L.R. 79; 59 Sol. Jo. 104, C.A.; 2 Digest (Repl.) 240, 424.
- (27) *Schmitz (Schmidt) v. Van der Veen & Co.* (1915), 84 L.J.K.B. 861; 112 L.T. 991; 31 T.L.R. 214; 2 Digest (Repl.) 260, 581.
- (28) *Brandon v. Nesbitt* (1794), 6 Term Rep. 23; 101 E.R. 415; 2 Digest (Repl.) 254, 548. G
- (29) *Flindt v. Waters* (1812), 15 East, 260; 104 E.R. 842; 2 Digest (Repl.) 250, 509.
- (30) *Daubuz v. Morshead* (1815), 6 Taunt. 332; 128 E.R. 1062; 2 Digest (Repl.) 222, 337.
- (31) *Antoine v. Morshead* (1815), 6 Taunt. 237 1 Marsh. 558; 128 E.R. 1025; 2 Digest (Repl.) 254, 544.
- (32) *Tappenden v. Randall* (1801), 2 Bos. & P. 467; 126 E.R. 1388; 12 Digest (Repl.) 316, 2437. H
- (33) *Kearley v. Thomson* (1890), 24 Q.B.D. 742; 59 L.J.Q.B. 288; 63 L.T. 150; 54 J.P. 804; 38 W.R. 614; 6 T.L.R. 267, C.A.; 12 Digest (Repl.) 318, 2453.
- (34) *Carlisch v. Salt*, [1906] 1 Ch. 335; 75 L.J.Ch. 175; 94 L.T. 58; 54 W.R. 244; 50 Sol. Jo. 157; 40 Digest (Repl.) 144, 1105.
- (35) *R. v. Lynch*, [1903] 1 K.B. 444; 72 L.J.K.B. 167; 88 L.T. 26; 67 J.P. 41; 51 W.R. 619; 19 T.L.R. 163; 20 Cox, C.C. 468; 2 Digest (Repl.) 206, 234. I
- (36) *R. v. Middlesex Regiment* (30th Battalion, Commanding Officer), *Ex parte Freyberger*, [1917] 2 K.B. 129; 86 L.J.K.B. 943; 116 L.T. 237; 81 J.P. 161; 33 T.L.R. 275; 61 Sol. Jo. 367; 15 L.G.R. 327; 25 Cox, C.C. 607, C.A.; 2 Digest (Repl.) 207, 239.
- (37) *Robinson & Co. v. Continental Insurance Co. of Mannheim*, [1915] 1 K.B. 155; 84 L.J.K.B. 238; 112 L.T. 125; 31 T.L.R. 20; 59 Sol. Jo. 7; 12 Asp.M.L.C. 574; 20 Com. Cas. 125; 2 Digest (Repl.) 247, 483.

A (38) *The Cosmopolite* (1801), 4 Ch. Rob. 8; 2 Digest (Repl.) 278, 653.

Also referred to in argument:

London and Northern Estates Co. v. Schlesinger, [1916] 1 K.B. 20; 85 L.J.K.B. 369; 114 L.T. 74; 32 T.L.R. 78; 60 Sol. Jo. 223; 2 Digest (Repl.) 274, 634.

B **Appeal** by the plaintiff from an order made by EVE, J.

The facts appear in the judgments of LORD COZENS-HARDY, M.R., SWINFEN EADY, L.J., and BANKES, L.J.

Edward Clayton, K.C., and *W. S. Sherrington* for the plaintiff.

C. E. E. Jenkins, K.C., and *J. F. W. Galbraith* for the defendant.

Cur. adv. vult.

C May 11, 1917. The following judgments were read.

LORD COZENS-HARDY, M.R.—This appeal raises some important and difficult questions arising out of the recent emergency legislation. The defendant Müller is by birth a German. For many years, probably for forty years, he has resided in England, and during part of that period, though not in recent years, he has carried on business in London. He was never naturalised in this country. He owned and occupied a house and grounds at Herne Hill, held under a long lease at a ground rent of £22 10s. In the summer of 1915 he was desirous of proceeding to Germany, and of selling his house and also the furniture therein. He gave a power of attorney, dated May 20, 1915, to his solicitor, Mr. White. It was a very full power, authorising Mr. White to sell by public auction or private contract, and to execute transfers to the purchaser and give receipts for the purchase money, and in the meantime to receive the rents and profits and generally to manage the premises. The power was declared irrevocable for twelve months. It was subject to ss. 46 and 47 of the Conveyancing Act, 1881, and s. 9 of the Conveyancing Act, 1882 [now Law of Property Act, 1925, ss. 123, 124]. Mr. Bott was named in the power as the auctioneer, who had Müller's instructions to sell the premises. It is perhaps right that I should refer to the correspondence which passed between Mr. White and the Public Trustee before the sale. On May 27 Mr. White wrote as follows:

"Our client, the above-named Mr. Müller, left this country for Germany last night, via Flushing. We inclose a list of the securities, &c., which he informs us he has deposited at his bankers, the London County and Westminster Bank, Camberwell Green. We have also to inform you that we hold a power of attorney from Mr. Müller to sell his leasehold house, Hill Crest, Sunray Avenue, Herne Hill, and the furniture and effects upon the premises there. We shall be obliged if you will inform us whether we shall be at liberty to pay the purchase money to Mr. Müller's credit at his bankers, or whether such purchase money is to be paid to you."

On May 29 the Public Trustee replied as follows:

"In reply to your letter of the 27th inst., I am directed by the Public Trustee to forward you a copy of Registration Order B, on which you should make a return to him of the proceeds of the sale of the lease and furniture and effects belonging to Mr. F. N. G. Müller. The money is not to be paid over to the Public Trustee, but should be retained by you during the war. J. F. SWAIN, for the Public Trustee."

This letter cannot, of course, be regarded otherwise than as a statement of the view of the Public Trustee at the time when it was written, but the correspondence shows what has never been challenged, that Mr. White throughout the transaction acted with the utmost propriety.

A sale by auction took place on June 2, the plaintiff becoming the purchaser for £1,050 and paying £100 deposit. The endorsed memorandum was signed by Bott.

who was described as agent for Müller, the vendor. Mr. White settled the conditions of sale. In the meantime Müller had applied to the Home Office for a permit, and one was granted on May 26 to proceed from Denmark Hill to Tilbury for the purpose of embarking to Germany and to "proceed direct." All that we know is that he embarked at Tilbury on the evening of the 26th. There is no evidence when he arrived in Germany, but he was at Hamburg in August. In these circumstances the purchaser claims the return of his deposit on several grounds. He contends that Müller was an alien enemy on June 2, and that, therefore, the contract was illegal. EVE, J., held that this fact had not been proved; and this being the sole point raised before him, he dismissed the action. I cannot agree with this view. I think there is a presumption of fact that a man who left Tilbury on the evening of May 26 for Flushing reached Germany before June 2, and that in the absence of any other evidence a jury would be justified in finding that he did reach Germany before June 2. He was not an alien enemy while he was in England. He did not become such the moment he left our shores. The meaning of "alien enemy" has from time to time varied. "Nationality" and "domicil" have both been treated as the critical test. The question was elaborately discussed in the full Court of Appeal in *Porter v. Freudenberg* (1), and it was held that neither domicil nor nationality is the true test. That decision is final so far as this court is concerned. Residence in Germany, not merely crossing the German frontier from Holland, made a man an alien enemy. Intention to reside is not sufficient. Residence implies a certain lapse of time. But, having regard to the abandonment of his British residence and to the fact that he was resident in Hamburg at least from August, if not earlier, I think it is right to hold that on June 2 Müller had become an alien enemy. The point taken before EVE, J., cannot, in my opinion, be supported. (I only mention residence because there is no suggestion of carrying on business apart from residence.)

This, however, by no means disposes of the case. I attach great weight to the power of attorney of May 20. At that date it is beyond dispute that Müller was not an alien enemy. The authority conferred upon White was complete and irrevocable. No further "intercourse" with Müller was needed. White could not be interfered with in reference to the sale. White's position was, having regard to the provisions of the Conveyancing Acts, practically the same as if Müller had conveyed the property to White upon trust for sale. LORD PARKER, in the passage to which I shall refer, seems to me to assert that a trust for sale may be executed although the sole beneficiary is an alien enemy. The transaction is not trading with the enemy within the mischief of the common law, or within the mischief of the proclamation of Sept. 9, 1914. Paragraph 3 adopts the rule in *Porter v. Freudenberg* (1) by stating it in a positive and also in a negative form:

"The expression 'enemy' means any person . . . resident or carrying on business in the enemy country, but does not include persons of enemy nationality who are neither resident nor carrying on business in the enemy country."

Paragraph 5 (1) applies only to a payment during the continuance of the war. Paragraph 5 (9) has no application if, as I hold, the power of attorney was the only contract or obligation with or for the benefit of Müller.

But can it be said that the power of attorney was necessarily revoked when Müller became an alien enemy? I think not. It is true that most agencies, involving as they do continuous intercourse with an alien enemy, are revoked, or at least suspended. But such considerations have no bearing upon a special agency of this nature. Counsel for the defendant drew our attention to a case decided in 1897 in the Supreme Court of the United States: *Williams v. Paine* (2). A power of attorney granted by an officer and his wife resident in Pennsylvania to convey land in the city of Washington was held not to be revoked by the war in which the grantors of the power took an active part with Confederates, but to be well executed notwithstanding the war. It must not be forgotten that a

A contract for sale of land stands in a peculiar position. It is for many purposes to be regarded as an equitable conveyance. The objection taken by the purchaser is not really as to title, but only as to conveyance. Time was not of the essence of the contract. The legal estate, if not got in by a deed executed by Mr. White, as I think it might be, could probably be got in by an application under the Trustee Acts, and certainly by an application under the Trading with the Enemy Act, 1916, s. 2. If an order was made under that section all difficulty would be removed.

B The recent case in the House of Lords of *Daimler Co., Ltd. v. Continental Tyre and Rubber Co. (Great Britain), Ltd.* (3) is not a direct decision on the points raised in the present case. But I have derived great assistance from the observations of LORD PARKER. He points out (ante p. 208) :

C "I see no reason why a company should not trade merely because enemy shareholders may after the war become entitled to their proper share of the profits of such trading. I see no reason why the trustee of an English business with enemy *cestuis que trust* should not during the war continue to carry on the business, although after the war the profits may go to persons who are now enemies, or why moneys belonging to an enemy but in the hands of a trustee in this country should not be paid into court and invested in government stock or other securities for the benefit of the persons entitled after the war. The contention appears to me to extend the principle on which trading with the enemy is forbidden far beyond what reason can approve or the law can warrant. In early days the King's prerogative probably extended to seizing enemy property on land as well as on sea. As to property on land, D this prerogative has long fallen into disuse. Subject to any legislation to the contrary or anything to the contrary contained in the treaty of peace when peace comes, enemy property in this country will be restored to its owners after the war as property in enemy countries belonging to His Majesty's subjects will or ought to be restored to them after the war. In the meantime it would be lamentable if the trade of this country were fettered, businesses shut down, or money allowed to remain idle in order to prevent any possible benefit accruing thereby to enemies after peace. The prohibition against doing anything for the benefit of an enemy contemplated his benefit during the war and not the possible advantage he may gain when peace comes."

F The weight attributable to those observations is greatly increased by the circumstance that LORD PARKER's judgment was formally approved of and concurred in by G LORD MERSEY, LORD KINNEAR and LORD SUMNER. The result is that, in my opinion, the plaintiff is not entitled to demand a return of his deposit, and the appeal fails.

I **SWINFEN EADY, L.J.**—The plaintiff in this action is the purchaser of a leasehold house and premises at Denmark Hill, and he bought at an auction sale held on June 2, 1915. The defendant was the vendor, and the contract was signed by John Bott & Sons "as agents for the vendor." The defendant is of German nationality, and, although resident in England for a considerable period, has not been naturalised here. In the month of May, 1915, the defendant intended leaving England for Germany, and instructed the firm of John Bott & Sons, auctioneers, to sell his residence—namely, the said leasehold premises, and also the furniture and effects therein—by public auction. On May 20, 1915, the defendant, being then about to proceed to Germany, duly executed a deed poll whereby he appointed his solicitor, Mr. John White, to be his attorney in his name and on his behalf to sell the said premises and to execute such transfers and deeds as might be necessary for conveying the same, and to give receipts for the purchase money and for other purposes therein set out. The said deed poll contained a declaration that the power should be irrevocable for twelve calendar months from the date thereof. On May 26 the defendant obtained a police permit authorising him to proceed from Denmark Hill, S.E., to Tilbury for the purpose of embarking for Germany via

Flushing. The document contains the statement "This permit holds good from 5 p.m., May 26, 1915, to proceed direct." It was given up to the aliens embarkation officer at Tilbury, upon the defendant embarking there for Flushing, and was returned by this officer to the police. The police reported to the plaintiff that the defendant left this country voluntarily for Germany on May 27. The date of his arrival in Germany was not proved. His solicitor has received letters from him from Hamburg and has corresponded with him there; but the date of the earliest letter so received was not proved at the trial. The defendant arrived in Germany and has since been and still is voluntarily resident there. In the answers to requisitions delivered by defendant's solicitors on June 15 they say, "We believe he is now in Germany." The defendant's solicitors have from time to time corresponded with the defendant at Hamburg, the defendant's last address being Ohnhorst No. 9, Klein Flottbeck, Altona, Hamburg.

Those being the facts, the plaintiff has brought this action in which he claims that his contract to purchase the said leasehold property has been dissolved by the act of the defendant in becoming an alien enemy, or, in the alternative, that it is void as being made with an alien enemy, and he asks for a return of his deposit and consequential relief. The defendant denies that the contract is invalid. His solicitor communicated with the Public Trustee immediately upon the defendant leaving for Germany, and explained the facts and asked whether the purchase money for the property should be paid to Mr. Müller's credit at his bankers or should be paid to the Public Trustee, and that official answered by enclosing a copy of Registration Order B, on which Mr. White was requested to make a return of the proceeds of the sale of the lease and furniture and effects belonging to defendant, and the Public Trustee further informed Mr. White that the money was not to be paid over to him, but was to be retained by Mr. White during the war. By his defence the defendant expressed his willingness that the purchase moneys should be paid to and received by the Public Trustee as custodian under the Trading with the Enemy Acts, 1914 to 1916, or otherwise dealt with as the court may direct. The defendant also thereby offered to consent to any order under the Trustee Act, 1893, or otherwise, vesting the premises in the plaintiff which might be necessary or advisable for the purpose of carrying the agreement into effect. The action was dismissed by EVE, J., and the plaintiff appeals. The plaintiff has contended before us that as the defendant, having broken up his establishment here and given directions for realising his house and furniture, left England on May 27, 1915, to go direct to Germany, and as he was certainly in Germany at a later date, the inference to be drawn from the facts proved is that he went direct to Germany and arrived there on or before June 2, and that, therefore, the contract of June 2 was illegal as made with an alien enemy. Further, that in any case it would be illegal to carry out the contract as any payment he might make would be a payment to or for the benefit of an alien enemy, which is forbidden by the proclamation against trading with the enemy and therefore illegal.

The question upon which this appeal turns therefore resolves itself into this: Was the agreement of June 2 illegal when it was made, or has it since become illegal to carry it out? The Trading with the Enemy Act, 1914 [repealed], which imposes penalties for trading with the enemy, provides, s. 1 (2), as follows:

"For the purposes of this Act a person shall be deemed to have traded with the enemy if he has entered into any transaction or done any act which was, at the time of such transaction or act, prohibited by or under any proclamation issued by His Majesty dealing with trading with the enemy for the time being in force, or which at common law or by statute constitutes an offence of trading with the enemy"

By the Trading with the Enemy Proclamation No. 2, dated Sept. 9, 1914, it is provided as follows:

"5. From and after the date of this proclamation the following prohibitions shall have effect (save so far as licences may be issued as hereinafter provided),

and we do hereby accordingly warn all persons resident, carrying on business, or being in our dominions—(1) Not to pay any sum of money to or for the benefit of an enemy. . . . (9) Not to enter into any commercial, financial, or other contract or obligation with or for the benefit of an enemy."

It was urged by the plaintiff that entering into the contract of purchase on June 2 was a transaction forbidden by cl. 5 (9) of the proclamation, as on that date it must be taken that the defendant had reached Germany and was an alien enemy. It was also urged on behalf of the plaintiff that, if he were now to pay the balance of his purchase money to Mr. White in order to complete his purchase, he would be offending against cl. 5 (1) of the proclamation.

In my opinion, neither of these contentions is well founded. It was the auctioneers who as agents for the vendor knocked down the property to the plaintiff and made the contract of June 2, the authority so to do having been conferred upon the auctioneer by the defendant when in this country. The making of this contract did not involve any intercourse with the enemy, nor will the completion of the contract and the conveyance of the property necessitate any such intercourse, as the irrevocable power of attorney to Mr. John White fully empowers that gentleman to convey the property and receive the purchase money without communicating further with the defendant. A contract entered into in England, with an agent in England, who derives his authority from instructions given to him in England or from a deed poll executed in England by a German principal, who subsequently proceeds to Germany, is not a transaction forbidden by the proclamation, nor in particular by cl. 5 (9) of it. It is not a transaction entered into "for the benefit of an enemy," which "contemplates his benefit during the war and not the possible advantage he may gain when peace comes": per LORD PARKER in the *Daimler Case* (3), ante p. 209. In his judgment VISCOUNT MERSEY, LORD KINNEAR, and LORD SUMNER concurred. The money paid for the property will be retained by Mr. John White or paid to the Public Trustee, and will not be remitted to the defendant during the war, nor will he derive any benefit from it during the war. The consideration money will not be paid "to or for the benefit of an enemy" within the meaning of the proclamation, nor, in particular, within the meaning of para. 5 (1). Nor is the contract in question one entered into "with an enemy" within the meaning of para. 5 (9). It does not involve any communication or intercourse with the enemy. It is not the case of a person who, being an enemy and while he is such, purports to confer an authority on someone here. Such an authority could not lawfully be given except under licence from the Crown.

That a contract entered into in England with a person here who simply holds or manages property belonging to an enemy is not unlawful is apparent from the provisions of the Trading with the Enemy Amendment Act, 1914 [repealed]. Thus s. 2 (1) of that Act provides that any "share of profits" payable to any enemy shall be paid to the Custodian of Enemy Property; and s. 2 (5) provides that where a person is carrying on any business on behalf of an enemy, any sum which, had a state of war not existed, would have been transmissible by a person to the enemy by way of profits from that business shall be deemed to be a sum which would have been payable and paid to that enemy. This section thus contemplates that a person may lawfully be carrying on business here on behalf of an enemy. Again, s. 3 (1) requires that any person who holds or manages for or on behalf of an enemy any property, real or personal, shall furnish the custodian with certain particulars. The Public Trustee, who is the custodian for England and Wales, required Mr. White to make a return on the form applicable (Registration Order B, s. 3 (1)), and this was duly done. This again recognises that persons here may lawfully hold or manage property on behalf of an enemy, but they are bound to obey the statutory provisions with reference to it. In one sense, every contract made by such persons with reference to such property is a contract made for the benefit of an enemy, because an enemy may gain a benefit from it when peace comes, but such a contract is not, in my opinion, a contract forbidden by

the proclamation. Again, s. 4 (1) has further reference to real or personal property belonging to or held or managed for or on behalf of an enemy, thus recognising such a state of things as existing legally. Again, the Trading with the Enemy Amendment Act, 1916, is to the like effect. By s. 4 (1) the Board of Trade is empowered to vest in the custodian any real or personal property belonging to or held or managed for or on behalf of an enemy.

I am of opinion that the contract of June 2, 1915, was a legal contract, and that the property can be lawfully and effectually conveyed to the plaintiff, and that Mr. White, as the attorney of the defendant, can receive and give a valid discharge for the balance of the purchase money, and that the plaintiff is not entitled to have the contract rescinded or to be relieved from it. In my judgment, the appeal fails and should be dismissed.

BANKES, L.J.—The defendant in this action is a German by birth. For many years prior to May, 1915, he had resided in this country, but had never been naturalised. He was the owner of certain leasehold premises situate at Denmark Hill, where he resided. Being over military age and being desirous of returning to Germany, he obtained permission to do so from the proper authorities, and on the night of May 26, 1915, he left Tilbury on board a vessel bound for Flushing, on his way to Germany. On May 20, 1915, he executed a power of attorney in favour of Mr. John White, his solicitor, authorising him to sell his leasehold premises and to execute any deed which might be required for conveying the premises and to give an effectual receipt for the purchase money; also to sell his household effects and to give effectual receipts for the purchase money. The power was declared to be irrevocable for twelve months from the date thereof. At some date which is not in evidence, but before leaving this country, the defendant instructed Messrs. John Bott & Sons, a firm of auctioneers, to offer the leasehold premises and effects for sale by public auction. The sale was advertised to take place, and did take place, on June 2, 1915. By the conditions of sale the purchaser required to pay the auctioneers a deposit of £10 per cent. on the amount of the purchase money, and to sign an agreement in the form subjoined to the conditions, and to pay the residue of the purchase money to the vendor, or as he should direct, on June 24, 1915, at the office of the vendor's solicitors, Messrs. Whites & Co., at which time and place the purchase should be completed. The plaintiff purchased the leasehold premises at the sale for a sum of £1,050, and he signed the agreement subjoined to the conditions in which the name of the defendant was inserted as the vendor. The plaintiff also purchased at the sale certain household effects. Apparently no point is made with reference to these in the plaintiff's claim for relief. It is part of the plaintiff's case that, at the time of the purchase of the leasehold premises, he had no knowledge of the defendant, or that he was a German, or that he had left this country on his way to Germany, or that there was any reason that he might not lawfully enter into the contract of purchase. Requisitions in title were delivered on June 14, 1915, and the first requisition was in the following terms:

"Information is required by the purchaser as to the nationality by birth of the vendor, and whether, if of foreign birth, he has at any time become a naturalised Englishman, and, if so, when and where he is now residing, so that the purchaser can satisfy himself that he is in nowise precluded by the provisions of the Trading with the Enemy Act from proceeding with the contract for sale and purchase."

The reply was as follows:

"The vendor is a German by birth and has not been naturalised. We believe he is now in Germany. We send herewith a copy of our letter to the Public Trustee and of his reply. The purchase money will be dealt with in accordance with the directions of the Public Trustee."

The letter referred to in the reply is dated May 27 and asks for instructions as

to how the purchase money is to be dealt with, in reply to which the Public Trustee informs Messrs. Whites that the money is not to be paid to him, but should be retained by them during the war. Correspondence followed the replies to the requisitions, and ultimately the present action was commenced on Dec. 21, 1915.

The writ was endorsed with a claim

"for a declaration that the agreement dated June 2, 1915, and purporting to have been made between the plaintiff and the defendant for the sale of a leasehold house known as Hill Crest, Sunray Avenue, Denmark Hill, is void, or has been dissolved by reason of the defendant, without the knowledge of the plaintiff, being at that time an alien enemy or having since become so."

The first ground of this claim must be founded upon the fact that the defendant was an alien enemy at the date when the agreement was made. The second ground must be founded upon the impossibility of completing the purchase without infringing the law against trading with the enemy. The learned judge in the court below decided against the plaintiff's claim. He refused to draw the inference from the evidence that the plaintiff had arrived and was resident in Germany by June 2, and was, therefore, an alien enemy at that date. If it was necessary to decide this point, I should not be prepared to agree with the view of the learned judge. After making all due allowance for delays and difficulties arising from the state of war, I think the natural inference from the facts is that the defendant must have arrived in Germany before June 2, and if so, that he was at that date resident there within the meaning of that expression when used in reference to an alien enemy. Assuming that to be so, how does it affect the plaintiff's claim? It is said that it brings the case within the provisions of the Trading with the Enemy Act, 1914, and of the Trading with the Enemy Proclamation (No. 2), and that the agreement of June 2 is invalid because it comes within the language of the prohibitions contained in the proclamation. In my opinion, this is not so. The statute and the proclamation are both dealing with criminal offences. The particular offence of entering into a contract with an enemy, which is forbidden by cl. 5 (a) of the Trading with the Enemy Proclamation (No. 2), is one where, in my opinion, a knowledge of the facts which render the act unlawful is an essential element of the offence. In the present case it is part of the plaintiff's case that he entered into the agreement of purchase quite innocently, and in entire ignorance that he was dealing with an enemy. Under these circumstances he cannot, in my opinion, claim to be relieved of his bargain on the ground that he was guilty of a crime, when the fact is that he was entirely innocent.

There remain, therefore, the two questions whether the contract was unlawful at common law, and whether, assuming that not to be so, any proceedings to complete the purchase with knowledge that the defendant is an enemy is forbidden by the statute and the proclamation. I think that these two questions, under the peculiar circumstances of this case, should be considered together. The material facts appear to be these. The defendant while in this country had given the auctioneers the necessary authority to put the property up for auction. There is no evidence that at the time they did so they were aware that the defendant was in Germany, or that he had left this country. The plaintiff was certainly unaware of either fact. Before leaving this country the defendant had given to Mr. White a power of attorney which purported to be irrevocable for twelve months, which gave him full authority to complete the sale, and which did not necessarily involve any communication with the defendant, either in reference to the sale or to the disposal of the purchase money. Before the writ was issued the attorney had taken the instructions of the Public Trustee as to the disposal of the purchase money, of which he had informed the plaintiff. By his defence the defendant expressed his willingness that the purchase money should be paid to, and received by, the Public Trustee as custodian under the Trading with the Enemy Acts, 1914 to 1916, or otherwise dealt with as the court might direct, and he further consented to any order being made under the Trustee Act, 1893, or otherwise vesting the

premises in the plaintiff which might be necessary or advisable for the purpose of carrying the agreement into effect. I do not see any ground for saying that the fact that the defendant has become an enemy has put an end to the power of attorney. Even if it had, there is power in the Board of Trade under s. 4 of the Trading with the Enemy Amendment Act, 1916, to give the Custodian full power to convey the property so that no difficulty need arise on that ground. The completion of the sale will not involve any communication with the defendant or any payment to him, or for his benefit while the war lasts. Why, then, should the court interfere? Is there anything in the contractual relations of the parties at their present stage which can be said to offend against either the principles of the common law or the provisions of any statute, if the purchase is allowed to proceed to completion. I think not. The alternative seems either to condemn the property to remain derelict until the end of the war or to hold the plaintiff to his bargain with the variation imposed by statute that the purchase money is to be held up and not paid over to the vendor until the war is over. I think that the latter is not only the reasonable course, but it is the one which is in accordance with the law. In my opinion, the appeal fails.

WARRINGTON, L.J., stated the facts and continued: I think the true inference from the facts is that the defendant arrived in Germany for the purpose of taking up his residence there some time before June 2, and was, therefore, an alien enemy at the date of the contract. His expressed object in leaving this country was to proceed to Germany and nowhere else, and this is also admitted on the pleadings, and in the absence of evidence to the contrary I cannot hold that he abandoned this intention. There was ample time, even allowing for abnormal delays occasioned by the state of war, to reach Germany before June 2. On the whole, then, I think the case must be dealt with on the footing that the defendant was an alien enemy on the date of the contract and I propose to deal with it on that footing.

The contract which is in question in this case is one for the sale of land. Until the passing of the Naturalization Act, 1870, no alien was capable of acquiring, holding, or disposing of land except as leasehold residence or place of business for a term not exceeding twenty-one years. This disability was first removed by s. 2 of the Naturalization Act, 1870 [repealed], which provided that real and personal property of every description might be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject. This provision is re-enacted by s. 17 of the British Nationality and Status of Aliens Act, 1914 [repealed by British Nationality Act, 1948], the statute in force at the date of the contract in question. A contract for the sale of land is a preliminary to a final disposition of the land, and is indeed in equity itself a conditional disposition, and the land from the date of the contract is considered as belonging to the purchaser, subject, of course, to the payment of the purchase money and the vendor's lien therefor: see *WILLIAMS, VENDOR AND PURCHASER* (2nd Edn.), vol. 1, p. 504. The contract, therefore, is not simply executory, although the purchase money is not paid; it at once gives the purchaser an equitable interest in the land, and it confers on the vendor a lien for his purchase money. Again, a recognised mode of dealing with land is through an attorney acting under a power of attorney. If such a power is made irrevocable, as is the case with that of May 20, 1915, then, in favour of a purchaser, not only can it not be revoked in the ordinary sense, but any act done by the donee within the limits of the authority conferred by the power will be as valid as if anything done by the donor of the power without the concurrence of the donee had not been done: *Conveyancing Act, 1882, s. 9*. The attorney under such a power is not like an ordinary agent. As between him and a purchaser he is, so long as he does not exceed his authority, absolutely independent of the principal. He has no occasion to consult or confer with him, and he need pay no attention to any directions he may give. The attorney in fact, when dealing with a purchaser, is exclusively clothed with all the capacities of the principal in reference to the subject-matter. The contract in the present case is

A made by the attorney. It is true it is signed by the auctioneer, who received his original instructions from the defendant himself, but before the sale was effected the attorney was the only person who had power to sell, the auctioneer became subject to his directions, and must be taken to have been acting on his behalf.

B The question then is: Does the fact that the principal is an alien enemy avoid a contract for the sale of land made by his attorney, appointed by an irrevocable power before he had assumed enemy character? In the first place to so hold would involve the further decision that a final disposition of the land by the attorney would also be void, inasmuch as there is no difference in principle between the two classes of disposition. There is no reported decision bearing directly on the question, owing no doubt to the modern origin of the holding of land by aliens. C The decisions (except *Halsey v. Lowenfeld* (4), which is not in point) are in reference to commercial transactions and transactions of a similar nature. It is necessary, therefore, to ascertain what are the principles of law on the subject and how they are applicable to the novel circumstances with which we have to deal in the present case. I propose to consider—first, the principles of the common law, and to inquire whether there is anything in them to require the avoidance of the contract, and then to ascertain whether there is anything in the statutes or the D proclamation bearing on the subject which affects the question.

E In the first place, it is, I think, well settled that by the rules of the common law when this nation is at war with another no British subject can lawfully have any intercourse, commercial or otherwise, with an enemy except by the permission, express or implied, of the executive authority of the State. As to commercial intercourse, this is clearly laid down by LORD STOWELL in *The Hoop* (5). I attach great importance to the ground on which that very learned judge rests the principle. It is this, that such intercourse pro tanto interrupts the state of war which exists between the subjects of enemy States, and as the Sovereign alone has power to declare peace and war he alone can make lawful such an interruption. That intercourse, other than commercial, is also forbidden: see *Robson v. Premier Oil and Pipe Line Co., Ltd.* (6). This rule is, I think, absolute, and the prohibition does F not depend on the question whether the intercourse may or may not tend to the advantage of the enemy or the detriment of this country. As to this there is a further rule which I will mention and discuss presently. Does the rule which I am now considering prohibit intercourse between two British subjects, one of whom is the attorney of an enemy but in a position to deal with the subject-matter independently of the enemy? I cannot think it does. On this point the ground of G the rule as stated by LORD STOWELL seems to me of great importance. The intercourse between two British subjects under such circumstances causes no interruption of the state of war, and the reason for the prohibition does not exist. So far, then, as the common law is concerned, the rule I am now discussing does not render it necessary to avoid the present contract.

H Is there anything in the proclamation or the statutes which compels me to arrive at a different conclusion? [HIS LORDSHIP then considered the Trading with the Enemy Acts, which have been repealed, and said that their terms confirmed the view that such a contract as the present was not to be treated as within the prohibition which he was considering. He continued:] But there is a further rule of the common law which it is necessary to consider. That is, that no British I subject can, without the permission of the executive, have any dealings with any person, whether an enemy himself or some other person in this or in a neutral country on behalf of an enemy, which may possibly tend to the benefit or advantage of the enemy or the detriment of this country: *R. v. Kupfer* (7). The question whether a transaction which cannot possibly so tend is within the prohibition was left open by this court in *Robson v. Premier Oil and Pipe Line Co., Ltd.* (6). It was said by LORD PARKER in the *Daimler Case* (3), in effect, that the benefit or advantage contemplated by this rule is a benefit or advantage accruing during war, and the fact that after the war and not till then a benefit will accrue

to the enemy is not sufficient to render a transaction illegal. He sums up his view on this point in the following words (ante pp. 208, 209):

"The prohibition against doing anything for the benefit of an enemy contemplates his benefit during the war and not the possible advantage he may gain when peace comes."

This judgment was prepared with the assistance and collaboration of LORD SUMNER and was adopted as their own by LORDS MERSEY and KINNEAR. The proclamation of Sept. 9, 1914, in cl. 5 (1) warns persons not to pay any sum of money to or for the benefit of an enemy. It is contended on behalf of the plaintiff that it would, under the rules of the common law and under the proclamation, be illegal for him to pay the purchase money, inasmuch as that would be a payment for the benefit of the enemy, and that, therefore, he is excused from performance. The payment in the present case would properly be made to the attorney in this country and not to the enemy himself. The attorney in the present case has complied with s. 3 of the Trading with the Enemy Amendment Act, 1914, by communicating the facts to the Custodian and asking for his directions, and the Custodian in reply has directed him to keep the money. It must, I think, be presumed that Mr. White will do his duty as he has hitherto done it, and, if so, the result will be that the enemy will part with his property and be kept out of his purchase money till the end of the war. Moreover, if there be any doubt as to the propriety of the payment of the purchase money to the attorney, the last-mentioned statute provides machinery, extended by the Trading with the Enemy Amendment Act, 1916, s. 4, whereby the right to recover and receive the purchase money may be vested in the Custodian, who will in that case hold it until the termination of the present war and thereafter deal with the same in such manner as His Majesty may by order in Council direct. The result is, in my opinion, that the contract can be carried out without requiring the plaintiff to do any act which is illegal either at common law or under the proclamation or the statutes.

There remains one point to consider. It has been contended that the authority of the attorney was determined by the assumption by the principal of enemy character, and *Hugh Stevenson & Sons, Ltd. v. Aktiengesellschaft für Cartonnagen-Industrie* (8) is relied upon in support of that contention. In that case, however, it was pointed out by ATKIN, J., that the agency agreement there held to be determined necessarily involved commercial intercourse with an enemy, and I gather that this was also the ground of the assent to ATKIN, J.'s conclusion expressed by the Court of Appeal. As I have already pointed out, the attorney in the present case exercises his powers without reference to his principal, and that being so I can find nothing in reason or authority which would justify me in saying that the power of attorney is avoided. On this point I also refer to the American case of *Williams v. Paine* (2). On the whole I come to the conclusion that, although, in my opinion, the defendant had assumed enemy character at the date of the contract, the contract was a valid and binding contract. If I am wrong in finding that the defendant was an enemy at the date of the contract, then it follows from what I have said that his subsequent assumption of enemy character did not involve the doing by the plaintiff of an illegal act in performing his part of the contract and did not therefore excuse him from performance. EVE, J., was, in my opinion, right in dismissing the plaintiff's action, though not for the reason given by him, and this appeal fails and should be dismissed.

SCRUTTON, L.J., stated the facts and continued: Two main questions were involved in the appeal. (i) Did any part of the transaction involve Tingley in the offence of trading with the enemy, if Müller were an alien enemy? (ii) When did Müller become an alien enemy? Trading with the enemy was at first committed principally in relation to ships, their cargoes, and the insurances thereon, and the first detailed exposition of the law was given by LORD STOWELL in *The Hoop* (5) in 1799. At common law, owing to the attitude of LORD MANSFIELD toward insurances, the law had been uncertain: see per LORD MANSFIELD in *Gist*

v. *Mason* (9), and per BULLER, J., in *Bell v. Gilson* (10); but in 1800, in *Potts v. Bell* (11), LORD KENYON practically adopted verbatim the judgment of LORD STOWELL "that trading with the enemy without the King's license was illegal in British subjects." In LORD STOWELL's view neither commercial intercourse with the enemy, nor, under its cover, any other species of intercourse, could be carried on, except with the direct permission of the State. This was both because of the danger to the State from such intercourse and the impossibility of enforcing any such contracts by suit. As stated by WILLES, J., in *Esposito v. Bowden* (12) (7 E. & B. at pp. 779, 783), a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country; and in the case of contracts made before the declaration of war, but which remain unexecuted when it is declared, if the further execution is unlawful or impossible as involving intercourse with the enemy, the contract is dissolved, and both parties are absolved from further performance of it. When the present war [1914-1918] broke out the President in the Probate Division collected the authorities in his judgment in *The Panariellos* (13) stating the illegality to extend to all intercourse, whether commercial or otherwise; and a similar conclusion was reached in this court in *Robson v. Premier Oil and Pipe Line Co., Ltd.* (6), where PICKFORD, L.J., stated that all intercourse, whether commercial or otherwise, with an alien enemy which might injure this country or help the enemy was illegal, but reserved the question whether intercourse which could not possibly have the above effect was illegal. I think it very dangerous that British citizens should be allowed to speculate whether their intercourse with the enemy can injure their country, or help the enemy and to deal with the enemy if they persuade themselves such intercourse is harmless. This may open an excuse for many undetected, but injurious, transactions. LORD STOWELL in *The Hoop* (5) (1 Ch. Rob. at p. 199) took the view that

"it is not for individuals to determine on the expediency of such occasions in their own notions of commerce . . . and possibly on grounds of private advantage not very reconcilable with the general interests of the State. It is for the State alone, on more enlarged views of policy and in consideration of all circumstances that may be connected with such an intercourse, to determine where it shall be permitted and under what regulations."

In my view, the question left undetermined by the Court of Appeal in *Robson's Case* (6) should be answered emphatically, by saying that no intercourse with an alien enemy should take place, unless by permission of the State. What at the time constitutes an "alien enemy"? In the *Driefontein Case* (14) LORD DAVEY said ([1902] A.C. at p. 499):

"There are three rules which are established in our common law. The first is that the King's subjects cannot trade with an alien enemy, i.e., a person owing allegiance to a government at war with the King, without the King's licence."

In the same case, LORD LINDLEY said (*ibid* at pp. 505, 506):

"When considering questions arising with an alien enemy, it is not the nationality of a person but his place of business during war that is important . . . the validity of his contracts does not depend on his nationality, nor even on what is his real domicile, but on the place or places where he carries on his business or businesses."

The full Court of Appeal in *Porter v. Freudenberg* (1) state the law thus ([1915] 1 K.B. at pp. 867, 868, 869):

"The term alien enemy in its natural meaning indicates a subject of enemy nationality; . . . but that is not the sense in which the term is used in reference to civil rights. . . . It is clear law that the test for this purpose is not nationality, but the place of carrying on the business. . . . For the

purpose of determining civil rights a British subject or the subject of a neutral State, who is voluntarily resident or who is carrying on business in hostile territory, is to be regarded and treated as an alien enemy."

And turning to one of the leading authorities on international law, MR. HALL (*INTERNATIONAL LAW* (6th Edn.), p. 491) says:

"The chief test of the existence of such an identification of a neutral subject with an enemy State as will suffice to clothe him with an enemy character is supplied by the fact of domicile."

These passages are at first sight sufficiently contradictory to render it necessary to examine carefully what the present basis of enemy character is, for the Court of Appeal and LORD DAVEY appear directly to contradict each other, and LORD LINDLEY and MR. HALL seem to take exactly opposite views of the importance of domicile.

Originally war declared by one prince against another involved in its consequences all the subjects of both who were exhorted in the customary proclamation, "*Courir sus aux ennemis*": WESTLAKE, *INTERNATIONAL LAW*, pt. ii, War, p. 36. GROTIUS (*III.3.9*) states that

"a war declared against him who has the supreme authority in a population is considered to be declared against all his subjects."

Allegiance was then the test of an alien enemy. In the time of *Calvin's Case* (15) the alienigena, alien born, might become an enemy by a war with his prince. It is the governing principle that is stated by LORD DAVEY in the *Driefontein Case* (14). But with the growth of commerce and greater tenderness to private property an alleviation or exception was introduced into the rule of allegiance or nationality. An alien enemy by allegiance could lose his enemy character for the time if he was residing in the King's dominions or trading there by the licence of the Crown. It used to be, and probably still is, necessary to show a licence or permission from the Crown, express or implied: *Alciator v. Smith* (16); *Alcinous v. Nigreu* (17). A subject by allegiance could for the time lose his friendly or national character by residing or trading in the enemy's dominions. Either party, by residing or trading in a neutral country, might acquire for the time a neutral character. The conditions under which this loss of national character might be achieved, and under which the new character by residence might be lost, have been carefully considered by LORD STOWELL in several cases where questions of trading with the enemy or the enemy ownership of property seized as prize were in dispute. The conditions of this character are sometimes called "domicil," which explains the statement already quoted from MR. HALL, but by that phrase is not meant civil domicile, what LORD LINDLEY calls in the passage cited his "real domicile," but a condition more easily acquired and lost, called by some of the test writers "commercial" or "trade domicile"—"domicil in a peculiar sense differing considerably from ordinary domicile, which is known as 'trade domicile' in war, but is equally applicable to persons not engaged in trade": see DICEY, *CONFLICT OF LAWS* (2nd Edn.), App. note vii, p. 741; WESTLAKE, *INTERNATIONAL LAW*, pt. ii, War, p. 54. Civil domicile is such a permanent residence in a country as makes that country a person's home. Commercial domicile is such a residence in a country for the purposes of trade or otherwise as makes a person's trade or estate form part of its resources: see HALL, *INTERNATIONAL LAW* (6th Edn.), p. 491. To gain a civil domicile, residence is required with an intention of making the country one's home. To gain a commercial domicile residence with no intention of leaving shortly is sufficient, and time is the principal element in the domicile. "Time is the grand ingredient in constituting domicile," says LORD STOWELL in *The Harmony* (18) (2 Ch. Rob. at p. 324), and the whole judgment is worth consideration. DR. LUSHINGTON in *The Aina* (19) (Spinks at p. 10) defines the condition as one

"where a man after the declaration of war continues to reside in the enemy's country for the purpose of trade."

It is not necessary here further to consider the numerous authorities bearing on the acquisition and nature of this "commercial domicile," for it is clear that Mr. Müller by long residence, and registration as an alien, had up to the day that he left England such a domicile that he was not then an "alien enemy" in the view of the common law.

How does an enemy subject who has temporarily lost his enemy character by acquiring such a commercial domicile lose that domicile? A civil or real domicile can only be lost by complete abandonment in fact and intention of the domicile. When it is lost, if there is no other domicile acquired, the domicile of origin reverts. A commercial or trade domicile may be lost by intention to abandon it, coupled with some overt act or step taken to effect the change, and leaving the country with no intention of immediate return, and with a sale of one's property therein, seems clearly to destroy a commercial domicile. Thus in *The President* (20) a natural-born English subject was American consul and trading at the Cape of Good Hope, then in the possession of the Dutch enemy, but was intending to return to America. LORD STOWELL, treating him as an enemy, said (5 Ch. Rob. at p. 280):

"A mere intention to remove has never been held sufficient without some overt act—something more than mere verbal declaration, some solid fact showing that the party is in the act of withdrawing has always been held necessary to divest enemy character."

In *La Virginie* (21), where a Frenchman trading in America left it temporarily, shipped goods from a French colony, and returned to America, LORD STOWELL, holding him an enemy, said (*ibid.* at p. 99):

"It is always to be remembered that the national character easily reverts, and that it requires fewer circumstances to constitute domicile (i.e., 'his national domicile') in the case of an enemy subject than to impress the national character on one who is originally of another country."

I agree with the language of ARNOLD ON MARINE INSURANCE (9th Edn.), vol. i, s. 92, p. 130, in discussing alien enemies:

"A national character, acquired in a foreign country by residence, changes immediately the party has left such country *animo non revertendi*; and this is especially the case if he be returning to his native country, *sine animo revertendi*. In such case the native domicile revives while he is yet in transitu, for it very easily reverts, and is re-acquired the moment the foreign domicile is abandoned."

Similar language is used by DICEY, CONFLICT OF LAWS, App. note 7, p. 744; DUEK ON MARINE INSURANCE, vol. i, pp. 514-15; HALL, INTERNATIONAL LAW (6th Edn.), p. 493; WESTLAKE, INTERNATIONAL LAW, pt. i, Peace, p. 206. This is, indeed, founded on the language of LORD STOWELL in *The Indian Chief* (22) (3 Ch. Rob. at p. 20):

"The national character of Mr. Johnson [born in the United States] as a British merchant was acquired by residence and rested on that circumstance alone; it must be held that from the moment he turns his back on the country where he has resided on his way back to his own country he was in the act of resuming his original character, and is to be considered as an American. The character that is gained by residence ceases by residence. It is an adventitious character which no longer adheres to him from the moment that he puts himself in motion *bona fide* to quit the country *sine animo revertendi*."

This passage was approved by the House of Lords in *Udny v. Udny* (23) (L.R. 1 Sc. & Div. at pp. 451, 454). When, then, Mr. Müller left England on May 26 or 27 intending to go to Germany, and having made arrangements to sell his house and furniture, I think it is clear that at any rate he lost the English commercial domicile he had acquired by residence in England with the permission of the Crown. There is no evidence that he acquired any other character. What then was his character?

In my view, the original and fundamental rule of nationality provides the answer. Until he has acquired another trade domicile by residence or trade sufficient to establish such a domicile, his national character determined by allegiance reverts, and he was a German, and, therefore, an alien enemy the moment he left England. LORD ELLENBOROUGH in *Harman v. Kingston* (24) (3 Camp. at p. 153) required proof that a man was an enemy "by birth or domicile." If you can find no domicile his birth or allegiance settles the question. Otherwise a British subject is justified in trading with a German wherever found, unless it can be proved that the German is resident or carrying on business in Germany, a position which, in view of the very various and dubious purposes for which a German may be at present found outside Germany, seems a very dangerous one.

I am of opinion, therefore, that Mr. Müller was, on and before June 2, 1915, an alien enemy. If it had been necessary I should have been prepared to find that he had reached Germany on June 2. It is true that long ago LORD KENYON called the plea of "alien enemy" "that odious plea" (*Casseres v. Bell* (25), 8 Term Rep. at p. 167), and LORD ELLENBOROUGH in *Harman v. Kingston* (24) said: "A defence of this sort which goes merely in disability of the person is to be made out by the strictest proof." But I respectfully agree with LORD DAVEY's observation in the *Driefontein Case* (14) ([1902] A.C. at p. 499) that "the objection being one based on considerations of public policy affecting the Sovereign, courts should be held bound to take notice of the plaintiff's inability to sue," and to decide it with strictness against neither party, but on the ordinary rules of proof. I can see nothing strained in holding that a German who says he is going back direct to his native country, and is known to have started, has got there in less than five times the ordinary time of transit. And I doubt whether the position would be any better if Mr. Müller is only taken to have arrived after June 2, but before the time fixed for completion.

If Mr. Müller was an alien enemy on June 2, I think it is clear that by the common law to contract with him personally, though through an agent, and for the sale of land in England was the offence of trading or having commercial intercourse with the enemy. Perhaps selling land is not ordinarily called trading, though it is the trade of land companies; but selling English land to Germans must be against the spirit and the letter of the law, and the selling of English land by Germans seems to me the same. If Müller was one party to the contract, it can make no difference that he contracted through an English agent. LORD SUMNER, in giving the judgment of the Privy Council in *The Panariellos* (13) says (85 L.J.P. at p. 116):

"Intercourse with an enemy subject resident in an enemy country is forbidden even though it takes place through his agent in the United Kingdom."

The full Court of Appeal in *Maxwell v. Grunhut* (26) say (31 T.L.R. at p. 79):

"It is obvious the agent could have no greater right than his principal, who, being an alien enemy, could not sue."

ROWLATT, J., in *Schmitz (Schmidt) v. Van der Veen & Co.* (27) allowed an agent to recover who sold goods as a principal in England for the best price he could get, accounting percentage for the excess over a minimum price to his principal in Germany. The learned judge took the view that the sale by principal to principal in England was in order; what the principal-agent did with the price was another matter, and he had consented to its being vested in the Public Trustee, which removed any objection as to the destination of the price during the war. It may be that a principal to a contract may sue though he is an agent for an alien enemy and a trustee for an alien enemy may sue. *Brandon v. Nesbitt* (28) is to the contrary effect. There a broker in whose name a policy was effected for and on account of alien enemies was held by the court not entitled to recover. *Flindt v. Waters* (29), cited by ROWLATT, J., turns on a question of pleading—that only the general issue had been pleaded, and not a plea of alien enemy. The other trustee cases—*Daubuz v. Morshead* (30) and *Antoine v. Morshead* (31)—were both brought

after the war on bills given during the war by English prisoners in France, endorsed to enemies, and GIBBS, C.J., treats them as an exception to the general rule in favour of English prisoners, who can only raise money during the war by discounting their bills with enemies: see WESTLAKE, *War*, p. 51. I observe that LORD PARKER in the *Daimler Case* (3) appears to treat the carrying on of business by trustees on behalf of alien enemies as quite lawful provided the enemies get no benefit till the end of the war. I am not aware of any authority for this, and I do not know that it was necessary for the decision of the case before the House. If correct, it will allow all the German businesses in this country to be carried on by trustees though their owners, the *cestuis que trust*, are fighting against us, a procedure which, if legally correct, which I doubt, will very much startle public opinion. In my view, the appointment of an English trustee or attorney during the war would be illegal when *cestui que trust* or principal became an alien enemy. I note that Parliament, in spite of LORD PARKER's view, has, by Trading with the Enemy Amendment Act, 1916, s. 1, empowered the Board of Trade to prohibit all such business carried on by trustees for the benefit of alien enemies. It is also suggested that under s. 46 of the Conveyancing Act, 1881 [Law of Property Act, 1925, s. 123], the holder of the power of attorney might convey in his own name, and so the conveyance be effected from Englishman to Englishman. I do not find it necessary for my decision to determine this or the position of trustees, for in this case the oral contract is one made on June 2 by the auctioneer in the name of and by direct instruction from Müller. The written document necessary for any enforceable contract is made with Müller who I have held was then an alien enemy. If that was illegal as trading with the enemy, it need not be considered what would be the effect if the contract had been made and carried out in another way.

I am of opinion, therefore, that the contract was illegal at common law, and as the plaintiff did not know that the defendant was an alien enemy at the time and repudiated the contract as soon as he knew, he has not such criminality as prevents him recovering the money paid, no part of the agreement having been performed: *Tappenden v. Randall* (32); *Kearley v. Thomson* (33). This does not apply to the furniture, where the contract was completely executed, or for the cost of investigating title and appealing against the assessment, which are in the nature of damages. I am not sure, however, that the same or a larger result might not be obtained in an action for rescission for concealment of a material fact. In *Carlisch v. Salt* (34) JOYCE, J., states the law thus ([1906] 1 Ch. at p. 341):

"Upon consideration of the authorities, I am of opinion that the vendor of real estate is under a similar obligation [to disclose defects] with respect to a material defect in the title or in the subject of the sale, which defect is exclusively within his knowledge, and which the purchaser would not be expected to discover for himself with the care ordinarily used in such transactions."

I am inclined to think that the fact that the vendor was an alien enemy was a material defect in the title, which should have been disclosed, but it is not necessary to discuss this.

If, then, the contract of June 2 would have been illegal at common law, and if, as I have held, it is immaterial that it was not hurtful to this country, if the purchase money was not paid over, the remaining question is whether the statutes and proclamations have superseded the common law, and whether the contract can be justified under the statutes and proclamations. [HIS LORDSHIP examined the statutes and proclamations and said:] I come, therefore, to the conclusion that the only way in which the transaction can be attacked successfully is, that under the common law the contract of June 2, being a financial transaction with Müller, a German then returning to Germany, and having no residence or place of business in any other country, was trading with the enemy, but that by reason of the definition of enemy in the proclamation incorporated in the statute this transaction is not a statutory offence.

I am not impressed with the argument that this transaction should be allowed, for otherwise the land of England would lie idle. If the government think it right, any land held by an alien enemy can under s. 4 of the Trading with the Enemy Amendment Act, 1914, be vested in the Custodian by order of the court, on the application of the Custodian or any government Department, with power to the Custodian to manage it; it may also under the Trading with the Enemy Amendment Act, 1916, be so vested by the Board of Trade in the Custodian without any application to the court. The government have the power to prevent any land owned by alien enemies from remaining unprofitable; if they do not choose to use this power it is not for private individuals to rectify their omission by dealing with the enemy. The history of this war has shown that leniency to the subjects of some belligerent nations in their private affairs is only abused by them in the interests of their country. I am very much impressed by the public danger of a decision which, at a time when British subjects are being called upon to give up their businesses to serve their country, will enable alien (German subjects resident in Germany, and perhaps fighting against this country, to carry on competing English businesses through trustees or agents and to deal in the same way with English property. That Parliament has given statutory power to a government Department to stop such action by trustees supports my view. It is, I think, very dangerous to allow British subjects to speculate as to what dealings with Germans are not injurious to this country; the safer rule is to treat all dealings with alien enemies as forbidden unless the Crown expressly sanctions them. In my opinion, the appeal should be allowed, and the plaintiff should be granted a declaration that the contract of June 2, 1915, was by the common law of England illegal ab initio, as being made with an alien enemy, and an order for the return of the deposit with 5 per cent. interest from June 2, 1915, and costs here and below except so far as they were increased by the claim for furniture, and costs, and charges.

BRAY, J. [having stated the facts]: The contentions of the plaintiff were (a) that the court ought to draw the inference that on June 2, the date of the contract, the defendant was residing in Germany and, therefore, an alien enemy; (b) that as soon as he became an alien enemy the power of attorney was revoked or ceased to have any force; (c) that the contract was void ab initio on the ground that, being made with an alien enemy, it was illegal; or (d) then, if he was not an enemy on the date of the contract, it was dissolved when he became an alien enemy before completion, on the ground that he could not complete the purchase either personally or by his agent.

As to the contention (a) the learned judge held that no such inference could be drawn, and he dismissed the action on that ground. I prefer not to decide the case on that ground, although the inclination of my opinion is that we ought not to differ from **EVANS, J.**'s decision. No doubt, before the war a man intending to go to Germany via Flushing, and shown to have left for Flushing by the Flushing boat on the evening of May 26, could be certain to arrive in Germany before June 2, and might be said to be residing there unless there was some change of intention on his part or something unusual had happened, but in times of war some delay is sure to occur. The Germans, I take it, do not admit anyone into their territory without inquiries, and inquiries may cause more or less delay. I do not know what inquiries they make or what delays occur. I think it probable that he would arrive in Germany before June 2, but I feel I should be guessing, and guessing is not sufficient. It is said that if he had not arrived by June 2 he could have easily proved that fact. I do not think it would be so easy. He cannot come here and give evidence. His evidence cannot be taken on commission. A letter from him to say that he arrived there, say, on June 5 would not be evidence. On the other hand, the plaintiff might be able to get evidence from Holland to say that he was seen to go by a certain train which would in the ordinary course arrive in Germany, say, on May 28, and that the German government put no difficulties

in the way of German subjects passing through the frontier. But there is no such evidence. For these reasons I think that I should have considerable hesitation in reversing EVE, J.'s decision on this point. It was argued that the defendant became an alien enemy the moment he embarked on the boat at Tilbury with the intention of going to Germany. I do not agree. The probability that he may become an enemy is not the same as becoming an enemy: see per LORD HALSBURY in *Janson v. Driefontein Consolidated Mines, Ltd.* (14). However, for the purpose of considering the other points, I will assume that the defendant was an alien enemy on June 2.

The next contention on the part of the plaintiff was that the power of attorney was revoked when the defendant became an alien enemy. No doubt if the fact that the defendant became an alien enemy made it unlawful for the attorney to sign the contract or complete the sale the contract would be void, and it would be unnecessary to consider this point, but I understand the contention to be that the power of attorney was revoked by the mere fact that the defendant became an alien enemy, and that this was so whether the contract were lawful or unlawful. In other words, it was put as a separate point independent of the alleged illegality of the contract. I will consider this point first independently of s. 9 of the Conveyancing Act, 1882 [see now Law of Property Act, 1925, s. 127]. I cannot understand why it should be said that the power is revoked. There was no change of intention on the part of the defendant. He gave the power of attorney to Mr. White in order that Mr. White or the auctioneers might make the contract on his behalf while he was in Germany, and had so become an alien enemy. Death revokes the power of attorney because the grantor has thereby lost the power of forming an intention, and insanity for the same reason; marriage revokes it because a change of intention is presumed; a bankruptcy because a bankrupt cannot deal with his property or give anyone authority to do so; but I fail to see any reason why the mere fact of becoming an alien enemy should revoke the power. I think, apart altogether from the Conveyancing Act, this contention on the part of the plaintiff fails. Then as to s. 9 of the Conveyancing Act. If this section applies at all to an alien enemy it is conclusive against the plaintiff on this point because the power was made irrevocable for twelve months. It might possibly be contended that this section had no application at all when the grantor became an alien enemy, and that an exception should be read into it, as was done to s. 6 of the Naturalization Act, 1870: see *R. v. Lynch* (35), and to s. 14 of the British Nationality and Status of Aliens Act, 1914, in the recent case in this court of *Ex parte Freyberger* (36). I prefer to hold that, apart from this section, this power of attorney was not revoked.

The real question we have to consider is whether it became unlawful for Mr. White or the auctioneers (it matters not which) to make this contract on behalf of the defendant on June 2, the defendant then being, as I have assumed, an alien enemy. No doubt, this is an important and difficult question. First, it seems to me that Mr. White under his power could, through the auctioneers, sell his property, execute the transfer, and complete the sale without communicating in any way with the defendant. No intercourse with the defendant would be necessary. Mr. White had undertaken with the Public Trustee to deal with the money as directed. The defendant, if he could not touch the money till after the war, would derive no benefit from the contract till after the war. LORD PARKER in *Daimler Co., Ltd. v. Continental Tyre and Rubber Co. (Great Britain), Ltd.* (3) said (ante pp. 208, 209):

"The prohibition against doing anything for the benefit of the enemy contemplates his benefit during the war and not the possible advantage he may gain when peace comes."

The defendant, being the original lessee, would remain liable for the rent, and although he would be entitled to be indemnified by the purchaser yet he could not during the war enforce that right: see *Halsey v. Lowenfeld* (4). Then is it against public policy that an alien enemy having an interest in real property should be at

liberty to sell it if this involves no intercourse and the alien enemy cannot receive the price? How could it be a detriment to the State? Surely it would be a detriment to the State if he could not. If he cannot sell it he cannot let it, and as far as I can see he could not even engage a caretaker to look after it or employ a person to keep it in repair. No doubt the Public Trustee could intervene, but he was not bound to do so, and he would probably hesitate to do so, as he would render himself liable to the landlord to pay the rent and observe the covenants. It seems to me that it would be to the interest of the State that the alien enemy should be able to sell his property if it can be done, as I think it could be done in this case without intercourse and without benefiting the enemy.

How do the authorities stand? What is the common law as shown by the authorities? There are no authorities with reference to contracts for the sale of interests in real property, and as until 1870 aliens could not lawfully hold land the judges, in deciding cases prior to that date upon other contracts, could not have had in contemplation contracts for the sale of land. This must be remembered, but still the principles on which the earlier cases were decided must be regarded, so far as they are applicable to contracts for the sale of land, and the authorities must, therefore, be examined. These authorities, including the important case of *The Hoop* (5), have been recently considered in this court. In *Porter v. Freudenberg* (1) LORD READING, C.J., says ([1915] 1 K.B. at pp. 867, 868, 880):

“Ever since the great case of *The Hoop* (5) the law has been firmly established as pronounced in the judgment of LORD STOWELL (then SIR WILLIAM SCOTT) that one of the consequences of war was the absolute interdiction of all commercial intercourse or correspondence by a British subject with the inhabitants of the hostile country except by permission of the Sovereign (see also *Potts v. Bell* (11), per LORD KENYON, C.J. (8 Term. Rep. at p. 561)). This branch of law was again considered as a result of the Crimean War, and WILLES, J., in delivering the judgment of the Court of Queen’s Bench in *Esposito v. Bowden* (12) said (7 E. & B. at p. 779):

‘It is now fully established that the presumed object of war being as much to cripple the enemy’s commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy’s country, and that such intercourse, except with the licence of the Crown, is illegal.’

This law was founded in earlier days upon the conception that all subjects owing allegiance to the Crown were at war with the subjects of the State at war with the Crown, and later it was grounded upon public policy, which forbids the doing of acts that will be or may be to the advantage of the enemy State by increasing its capacity for prolonging hostilities in adding to the credit, money or goods, or other resources available to individuals in the enemy State. . . . The rule of law suspending the alien enemy’s right of action is based upon public policy, but no considerations of public policy are apparent which would justify preventing the enforcement by a British or neutral subject of a right against the enemy. As was said by BAILHACHE, J., in *Robinson & Co. v. Continental Insurance Co. of Mannheim* (37) ([1915] 1 K.B. at p. 159):

‘To hold that a subject’s right of suit is suspended against an alien enemy is to injure a British subject and to favour an alien enemy and to defeat the object and reason of the suspending rule.’

In our judgment the effect would be to convert that which during war is a disability, imposed upon the alien enemy because of his hostile character, into a relief to him during war from the discharge of his liabilities to British subjects.”

In *Halsey v. Lowenfeld* (4), where the question was whether the liability of an alien enemy lessee for rent accruing after the outbreak of war under a lease granted before the war was thereby extinguished or suspended, LORD READING says (post p. 1046):

"The prohibition of intercourse between persons in this country and alien enemies is based on public policy, and it would indeed be a strange result if a law so founded was held to apply to relieve an alien enemy of obligations incurred before the war in respect of property of which he is not deprived by the Crown, for the property of alien enemies is at common law subject to confiscation by the Crown in virtue of the Royal Prerogative: see *HALE'S PLEAS OF THE CROWN*, vol. i, p. 95; and *Porter v. Freudenberg* (1). But if the Crown refrains from exercising the right to confiscate, and allows the alien enemy to continue in ownership of the property, he holds it subject to all its obligations; it would be manifestly absurd that he should derive the advantage of holding the property without liability to perform the obligations incident to his right of ownership."

In *Rosson v. Premier Oil and Pipe Line Co., Ltd.* (6), where the question was whether alien enemies were entitled to exercise the right of voting, *PICKFORD, L.J.*, in delivering the judgment of the court, says ([1915] 2 Ch. at pp. 135, 136):

"The prohibition of intercourse was stated as extending to much wider limits by *LORD STOWELL* in *The Hoop* (5) and *The Cosmopolite* (38), and reference was made in the judgment to writings of jurists on the subject. The statement there contained has been followed in several cases in the courts of this country, and also in America by such great authorities as *STORY* and *KENT*. . . . The prohibition of intercourse with alien enemies rests upon public policy, and we can see no ground either on principle or authority for holding that a transaction between an alien enemy and a British subject which might result in detriment to this country or advantage to the enemy is permissible because it cannot be brought within the definition of a commercial transaction."

Later on the same page, however, he expressly refrained from deciding whether the principle extended to intercourse which could not possibly tend to detriment to this country or advantage to the enemy.

The result of the cases I have referred to seems to be that in order to determine whether a contract such as this with an alien enemy is illegal and void it is necessary to answer the following questions: (a) Does the contract involve intercourse with an alien enemy? (b) Would it tend, if valid, to the detriment of this country or to the advantage of the enemy? (c) Is it against public policy? For the reasons I have already mentioned, having regard to the facts of this case, my answer to each of these questions is No. Therefore, so far as the common law is concerned this contract of June 2 was, in my opinion, neither illegal nor void. [His LORDSHIP then held that the contract was not a "contract with or for the benefit of the enemy" within the proclamation of Sept. 9, 1914, and concluded:] In my opinion, the contention that the contract was unlawful fails, and the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Langlois, Harding, Warren & Tate; Whites & Co.*

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

R. v. ARMY COUNCIL. Ex parte RAVENSCROFT

[KING'S BENCH DIVISION (Viscount Reading, C.J., Ridley and Avory, JJ.),
May 16, 18, 1917]

[Reported [1917] 2 K.B. 504; 86 L.J.K.B. 1087; 117 L.T. 806;
33 T.L.R. 387]

Army—Court of inquiry—Action on finding by Army Council—Review by civil court—Mandamus—Certiorari—Prohibition.

In a matter affecting discipline in the army the court cannot interfere by mandamus at the suit of an officer or soldier with the proceedings of a military court of inquiry or with any action that may thereupon be taken by the Army Council.

Nor, *semble*, can it so interfere by certiorari or prohibition.

Notes. The Army Act, 1881, expired on Dec. 31, 1956, and was replaced by the Army Act, 1955 (35 HALSBURY'S STATUTES (2nd Edn.) 443), which came into operation on Jan. 1, 1957, and has since been yearly continued in force by Order in Council.

Considered: *Heddon v. Evans* (1919), 35 T.L.R. 642.

As to military courts, see 28 HALSBURY'S LAWS (2nd Edn.) 674-676; and for cases see 39 DIGEST 325, 326.

Cases referred to:

- (1) *Dawkins v. Lord Rokeby* (1866), 4 F. & F. 806, N.P.; 39 Digest 329, 150.
- (2) *Marks v. Frogley*, [1898] 1 Q.B. 888; 67 L.J.Q.B. 605; 78 L.T. 607; 46 W.R. 548; 14 T.L.R. 393; 42 Sol. Jo. 507; 19 Cox, C.C. 91, C.A.; 39 Digest 325, 122.
- (3) *Dawkins v. Lord Paulet* (1869), L.R. 5 Q.B. 94; 9 B. & S. 768; 39 L.J.Q.B. 53; 21 L.T. 584; 34 J.P. 229; 18 W.R. 336; 39 Digest 330, 157.
- (4) *Keighly v. Bell* (1866), 4 F. & F. 763, N.P.; 39 Digest 330, 156.
- (5) *Sutton v. Johnstone*, *Johnstone v. Sutton* (1786), 1 Term Rep. 510; 99 E.R. 1225, Ex. Ch.; affirmed (1787), 1 Bro. Parl. Cas. 76; 1 Term Rep. 784, H.L.; 39 Digest 329, 149.
- (6) *Grant v. Gould* (1792), 2 Hy. & Bl. 69; 126 E.R. 434; 39 Digest 344, 299.
- (7) *R. v. Treasury Lords Comrs.* (1872), L.R. 7 Q.B. 387; 41 L.J.Q.B. 178; 26 L.T. 64; 36 J.P. 661; 20 W.R. 336; 12 Cox, C.C. 277; 16 Digest 303, 1160.

Also referred to in argument:

Re Allen (1860), 3 E. & E. 338; 30 L.J.Q.B. 38; 7 Jur.N.S. 234; 121 E.R. 469; sub nom. *Ex parte Allen*, 3 L.T. 468; 9 W.R. 99; 39 Digest 343, 289.

Rule Nisi for a writ of mandamus directed to the Army Council commanding them to cause a court of inquiry to reassemble to hear and determine, according to law, the case of Major and Honorary Lieutenant-Colonel Herbert Valentine Ravenscroft, of the 3rd Border Regiment.

The facts are set out in the judgment of the Lord Chief Justice.

By the Army Act, 1881, s. 42:

"If an officer thinks himself wronged by his commanding officer, and on due application made to him does not receive the redress to which he may consider himself entitled, he may complain to the Army Council in order to obtain justice, who are hereby required to examine into such complaint, and through the Secretary of State make their report to His Majesty in order to receive the directions of His Majesty thereon."

By s. 70 (1):

"Subject to the provisions of this Act His Majesty may, by rules to be signified under the hand of a Secretary of State, from time to time make, and when made repeal, alter, or add to, provisions in respect of the following

matters or any of them; that is to say, (a) the assembly and procedure of courts of inquiry. . . ."

The Attorney-General (Sir F. E. Smith, K.C.) and Branson showed cause. Hume-Williams, K.C., and R. D. Muir in support of the rule.

VISCOUNT READING, C.J.—In this case Colonel Ravenscroft obtained a rule nisi for a writ of mandamus directed to the Army Council, commanding them to cause a court of inquiry to reassemble, and to hear and determine the case made against him according to law. He based his application upon two grounds. In the first place he contended that he had been condemned without his defence being properly and fully heard; and in the second place he contended that the statutory rules of procedure relating to the constitution and the proceedings of a court of inquiry had not been complied with. When the rule nisi was granted by this court, it was carefully pointed out that it was not to be taken for granted that we in any way decided that we had any jurisdiction to issue the writ of mandamus to the Army Council. The Attorney-General has appeared to show cause against the rule, and he has taken three points. First, he has contended that this court cannot issue a writ of mandamus to the Army Council on the general principle that the civil courts of this country will not intervene in matters appertaining to military law, rules, and discipline. Secondly, he has contended that the Army Council had not in fact convened this particular court of inquiry, and that there was no obligation upon them to do so. Thirdly, he has contended that in any event there was another remedy open to the applicant, equally effective, and that under the circumstances the court should exercise its discretion and refuse the writ of mandamus.

As to the first point. I have no doubt that this court, as a civil court, has no power to intervene in matters which concern military conduct and purely military law affecting the rules and regulations prescribed for the guidance of officers or their military discipline. I am entirely in accord with what WILLES, J., said in *Dawkins v. Lord Rokeby* (1). These are his words (4 F. & F. at pp. 831, 832):

"It is clear that, with respect to those matters placed within the jurisdiction of the military forces, so far as soldiers are concerned, military men must determine them . . . with respect to persons who enter into military state, who take Her Majesty's pay, and who are content to act under her commission, although they do not cease to be citizens in respect of responsibility, yet they do, by a compact which is intelligible, and which requires only the statement of it to recommend it to the consideration of anyone of common sense, become subject to military rule and military discipline . . . they are subject to a test of law which is different from that administered in civil courts."

I think that the view which is there expressed applies to this case. It is an opinion which binds this court, inasmuch as it has been followed in subsequent cases; but if there had been no such authority laid down, and if I had been compelled to arrive at a conclusion for myself in the first instance, I should have come to a similar conclusion and should have decided this case upon the same principles as are there set out. It is impossible for this court to intervene in such a matter as the present; if we were to do so we should be making the military law dependent upon the civil court. There are regulations prescribed and means afforded for seeking redress when a wrong has been inflicted by a superior officer upon a subordinate officer or upon a soldier, and it is of the essence of the acceptance of a commission in His Majesty's army that the person accepting it makes himself amenable to military law, and subject to the decision of the military authorities when charges of infringement of military law are brought before them. This is expressed in *Marks v. Frogley* (2) by A. L. SMITH, L.J., in giving the first judgment in the Court of Appeal. I agree with the contention that the actual decision in the case, as well as the actual decision in *Dawkins v. Lord Rokeby* (1), does not decide the matter before us, but each of them contains passages upon the general

law applicable which are of great importance. There is the passage I have already quoted, and then there is this one further, where A. L. SMITH, L.J., says ([1898] 1 Q.B. at p. 899):

"I find in the judgment of LUSH, J., in *Dawkins v. Lord Paulet* (3), some remarks in connection with the articles of war, of which [s. 43 of the Army Act, 1881] is the equivalent, which appear to me to be such sound sense and good law that I must repeat them. He says:

'Can it be reasonably inferred that any other mode or measure of redress was intended by the Act than that which is specified in this article? It is no argument to say that the remedy is imperfect because no pecuniary compensation is given to the injured party. That defect, if it be one, is a defect in the code itself which we cannot remedy. The plaintiff has no reason to complain, for he has all which the law military to which he engaged to submit when he entered the service entitles him to have. The same code creates both the right and the remedy, and this court cannot add to the one or to the other.' "

CHITTY and COLLINS, L.JJ., concurred, and KENNEDY, J., took the same view of the law in the court below. It is upon these principles that we have to consider this case, and I propose to state very briefly the facts which appear to be material for our decision in order to determine how these principles apply in the present instance.

Colonel Ravenscroft was an officer whose conduct with other officers formed the subject of inquiry by a court of inquiry. There had been some complaint with regard to excessive drinking by some of the officers of the regiment to which Colonel Ravenscroft belonged, and in July, 1916, a court of inquiry was held in the trenches of France. As a result of the evidence given there, a court of inquiry was ordered here to be held at Conway, where the battalion was then stationed, having returned from its service in France. The general officer commanding the troops in the western command, not the Army Council, ordered the holding of the inquiry. The court of inquiry met on Sept. 5, 1916. It heard a number of witnesses. Another colonel, whose conduct was also impugned in this connection, and Colonel Ravenscroft were examined before the court. The other witnesses were examined before the court in the presence of Colonel Ravenscroft and the other officer, and were cross-examined by Colonel Ravenscroft. There was an adjournment until the next day, when the same procedure was repeated. The colonel was then told, according to him, that he would have an opportunity of calling witnesses and of making a statement at a later date when the court reassembled. The officer who presided over the court of inquiry differed from that view, but, for the purposes of the present case, not very materially. On Sept. 7 the court did reassemble, and Colonel Ravenscroft says that he had no notice of it. But it only reassembled then, so it is said, for the purpose of examining some mess bills. It met again on Sept. 12, and on that occasion it did again examine mess bills, and heard some evidence with regard to those bills. Neither on Sept. 7 nor on Sept. 12 was Colonel Ravenscroft present, and he states that he had no notice of the meeting of the court on those dates. According to the evidence of the officer presiding, notice was ordered to be given, and there were telephonic communications, from which it appears that the court was told that the commanding officer had been informed that neither of the officers (which would include Colonel Ravenscroft) intended to be present on the examination of the mess bills. The convening officer has since died, and is not, therefore, able to give any evidence. Colonel Ravenscroft, to whom we allowed an opportunity of answering the statement, denies that notice was ever given to him or that he ever stated or gave authority to anyone to state that he did not intend to be present on the examination of the bills, and this court naturally accepts his statement.

I should have said that on Sept. 7 the court came to the conclusion that, having inspected the wine books of the battalion, they were of opinion that, owing to

A the seriousness of the case and the conflicting evidence given by the several
officers, the evidence should be taken on oath, and that the officers who had given
evidence at the court of inquiry in France should be directed to come to this
country to give their evidence and to be cross-examined, or, at all events, to give
the opportunity for cross-examination. The court thought that the evidence of
B these witnesses from France was essential and that no definite finding of the whole
case was likely to be arrived at by the court without these witnesses. They,
therefore, adjourned pending further instructions. When they met on Sept. 12 and
examined the mess accounts and heard some slight evidence about them they made
this, as it is called, additional finding: "That the court considers that the amounts
underlined in red ink in the attached account are excessive." Some of the items
underlined in red ink relate to Colonel Ravenscroft, and, therefore, his counsel is
C entitled to say that the court of inquiry did consider these mess bills of Colonel
Ravenscroft were excessive, and that that finding was before the responsible
authority when considering the case.

It is apparent from these facts that this court of inquiry has never finally
reported. This recommendation that the officers should be brought from France
was, apparently, considered by the responsible military authority, and the result
D was that that authority determined, after considering the evidence of fifteen wit-
nesses given on Sept. 5 and 6, in the presence of Colonel Ravenscroft, and subject
to his cross-examination and to his calling witnesses if he wished, and acting also
upon other information which the military authorities had, that Colonel Ravenscroft
should be retired on half-pay. Colonel Ravenscroft did everything which was
possible to re-open the inquiry. He communicated with the Army Council and
E with the Secretary of State for War, and he set forth his grievance in letters written
by himself and also by the solicitor who subsequently acted for him. The Army
Council reported that the decision was final and refused to re-open the matter. It
is in consequence of that that Colonel Ravenscroft has come to this court.

It is to be observed that the complaint which is made by Colonel Ravenscroft
before this court is that he had no notice of the reassembling of the court of
F inquiry, and, therefore, no opportunity of cross-examining witnesses at the later
meetings of the court, or of giving his own explanation. These matters would,
indeed, be very relevant if we were considering the proceedings of a civil court.
Colonel Ravenscroft relies for his complaint upon the rules of procedure which
govern courts of inquiry which, as he alleges, have been infringed. These rules
are made under s. 70 of the Army Act [see now s. 103 (1) of the Army Act, 1955].
G They are made by the Secretary of State under the powers given to him by that
section, and it is stated in the rule which has been read so often—124 (e) and
124 (f)—that the effect is, as I agree that it is, that notice must be given of the
meeting of the court of inquiry and of all adjournments, to all persons concerned
in the inquiry, and that

H "whenever any inquiry affects the character or military reputation of an
officer or soldier, full opportunity must be afforded to the officer or soldier of
being present throughout the inquiry, and of making any statement and of
giving any evidence he may wish to make or give, and of cross-examining any
witness whose evidence, in his opinion, affects his character or military repu-
tation, and producing any witnesses in defence of his character or military
reputation."

I It is because these two rules of procedure have not been fully complied with that
Colonel Ravenscroft urges that he is entitled to redress at the hands of a civil court.

My difficulty throughout the case has been to understand how in any circum-
stances it can be established that there has been any breach by the Army Council
of any legal obligation imposed upon the Army Council which Colonel Ravenscroft
has any legal right to enforce. These are fundamental matters when considering
whether or not a writ of mandamus should issue. The whole basis of the applica-
tion is that the Army Council has refused to perform its statutory obligation. We

have again and again asked counsel supporting the rule to point out to us what was the statutory obligation which the Army Council failed to perform or infringe. I do not know at the present moment what the answer is. I cannot find that the Army Council has infringed anything, but what is said is that the Army Council has the power to direct the reassembly of the court of inquiry, and, therefore, that this court, when it finds that the rules of procedure have not been followed, should direct the Army Council to reassemble this court, which means, translated into precise legal language, that this court is directed to command the Army Council to exercise its discretionary right to order the reassembly of the court of inquiry in the way which is asked by Colonel Ravenscroft. I cannot think that this court has any such right. If it is discretionary in the Army Council, this court cannot command it to exercise it in a particular way. If it is discretionary in the Army Council, it does not amount to a statutory obligation which Colonel Ravenscroft has a right to enforce. If it is discretionary in the Army Council, they have exercised their discretion, and have refused to re-open the matter. Again, if it is open to the Army Council to consider other matters, it seems to me that this court cannot order the Army Council to reassemble a court of inquiry, which does not touch the other information, whatever its result, which was before the military authority who recommended the retirement on half-pay of Colonel Ravenscroft. For these reasons I come to the conclusion that the application for a mandamus must fail.

It appears to me that this is a military matter. Colonel Ravenscroft was under military law. His complaint, if any, is against his superior officer who directed the convening of the court of inquiry, and against the officer who, in his view, wronged him by not giving him the proper opportunity of presenting himself on the last two occasions when the court of inquiry met. I should be prepared to decide this case upon the ground that it is a military matter, and, therefore, is not for a civil court, agreeing, as I do, with every word that has been said by the learned judges in the past on this subject. But I do not wish it to be understood that I am deciding that in no circumstances could this court issue a writ of mandamus to the Army Council if it was proved that the Army Council had in fact infringed a statutory obligation which the applicant had a right to enforce. It is not necessary that I should go so far, and, upon so important and so far-reaching a proposition of law, I will only say that I reserve my view.

I am further of opinion that this writ of mandamus ought not to issue even if the first point had been decided in Colonel Ravenscroft's favour, because I think that another remedy, which would be at least equally convenient, beneficial, and appropriate, was open to Colonel Ravenscroft. He could equally have applied under s. 42 of the Army Act [now s. 180 (1) of the Army Act, 1955], and could have complained to the Army Council, who are thereby required to examine into the complaint, and, through the Secretary of State, to make a report to His Majesty, in order to receive the directions of His Majesty thereon. Once it is established that such another remedy is open to Colonel Ravenscroft, it follows, according to the ordinary principles of law applicable to mandamus, that the court will not issue the writ. On that ground also I am of opinion that the applicant fails.

Further, the court will not grant a writ of mandamus unless it is satisfied that the remedy will be effectual. If I am right in the view that I have taken that the Army Council would have the power to consider other information on these military matters that come before them, it is obvious that, even if they were ordered to reassemble the court of inquiry and it was reassembled, it cannot be said that the result would be effectual, because it would still be open to them to decide as they have decided upon the information which was before them from other sources. Moreover, this court would not order the Army Council to reassemble the court of inquiry in order to bring officers home from the field in France to give evidence upon this matter.

I think, further, that this court would be slow to interfere where the complaint is that the rules of procedure have not been strictly followed. The issue of a writ

of mandamus is under any circumstances discretionary in the court. It is not a matter of right. I do not think that this court ought, in the exercise of its discretion, to order the reassembly for the purpose which I have indicated. Again, satisfied as I am by the evidence which has been produced by the military authorities that they acted, not upon the events of Sept. 7 and 12, 1916—when the reassembly of the court of inquiry took place without notice—but that they acted upon the evidence which was collected on Sept. 5 and 6, that is, upon the statements of the fifteen officers as to what had happened at mess and otherwise in this battalion of this Border Regiment, I do not think that it would be right in these circumstances to order the Army Council to take a step which is based solely upon their not having complied in strictness with the rules of procedure. I do not mean by this in any way to intimate that I do not think that it is necessary that an officer accused of any matter which affects his reputation or character ought not to have the fullest opportunity of being heard. What I do mean is that I am satisfied that in substance the military authorities have acted upon information which they got by means of these officers giving evidence on the first two days, and have not acted upon the report of the court of inquiry, which was never final in any sense, but have acted on the whole information which they have been able to collect. Having come to these conclusions, I think that, if there was a right to the issue of a writ of mandamus, it could only be if this court exercised its discretion in favour of the applicant, and I should not under the circumstances of this case issue it. I desire only to say that I am satisfied that the application is made with the object of re-opening in some form or other the decision arrived at by the Army Council. It is, in truth, a kind of appeal from the decision of the Army Council, and the actual infringement of these two rules of procedure with regard to the reassembly of the court of inquiry are the pegs upon which the appeal is really sought to be hung. In my view, the applicant has made out no right to the issue of a writ of mandamus, and it follows that this rule must be discharged.

RIDLEY, J.—I entirely agree with what my Lord has said. I think that it is very important to recognise fully the rules laid down in *Marks v. Frogley* (2) by A. L. SMITH, L.J., which are really taken from *Dawkins v. Lord Rokeby* (1) and other cases previously decided. Civil courts cannot be invoked to redress grievances arising between persons both of whom are subject to military law. Put in other words, the same doctrine is expressed, as I have said, in *Dawkins v. Lord Rokeby* (1) and also in *Keighly v. Bell* (4), which was decided at the same period and which appears in the same volume as *Dawkins v. Lord Rokeby* (1). I think that we ought to do nothing which could fritter away that very important doctrine. I want to say one other word, and it is this. I think, though the point has not been thoroughly argued before us, that no mandamus will lie to the Army Council to bid them act in any particular way in any matter of military discipline. I think that it will not lie to the Army Council any more than it would have done, or ever has done, to the commander in chief, whose duties were taken over by the Army Council in 1904. Those matters are entirely in their hands, and it is impossible that a mandamus could be directed to them to act in any particular way in any such matter. If, however, there is a duty imposed by statute which involves no exercise of discretion, but has to be performed, matters assume a different aspect. I do not desire to deal with that point, which does not arise here. There can be no question at all but that in this case the matter was one of military discipline. It appears to be established beyond doubt by the affidavits, and particularly by the affidavit of General Childs, which states that the applicant was reverted to retired pay by him, and that his action was approved by the Adjutant-General upon all the information in his possession, and not upon the evidence given before the court of inquiry alone. I think that under the circumstances it cannot be disputed that this was a matter of military discipline, and I, therefore, agree in its entirety with the judgment that has been given by my Lord. This rule must be discharged.

AVORY, J.—I agree that this rule should be discharged for the special reasons applicable to this particular case which have been stated by the Lord Chief Justice. But, as the Crown has invited us to decide this question on a much broader basis, I think that it is also right to say that I concur in the general principle which has been already expressed by the other members of the court. Putting it, if I may venture to do so, in my own words, I express it in this way—that, in a matter affecting discipline in the army, this court cannot interfere, either by mandamus, prohibition, or certiorari, at the suit of an officer or soldier, with the proceedings of a military court of inquiry, or with any action that may thereupon be taken by the Army Council. There are other passages in the judgment of **WILLES, J.**, in *Dawkins v. Lord Rokeby* (1) which may be quoted beyond those to which the Lord Chief Justice has referred. Thus the learned judge says (4 F. & F. at pp. 831, 832):

“The reading of the oath of the court at a court-martial, out of art. 102, which has been referred to in the course of the case, is abundant to show, with respect to all matters which come under the cognisance of the military tribunals, they are subject to a test of law which is different from that administered in civil courts; it is to be according to military usage and their approval.”

He goes on to refer to *Johnstone v. Sutton* (5) which was in the House of Lords, and he says (*ibid.*):

“Not only in the case of *Johnstone v. Sutton* (5) was it shown that military matters, properly brought within the true limits of military jurisdiction, are not to be called in question in civil courts; but also in a subsequent case, in the last century, of *Grant v. Gould* (6), it was laid down, upon an application for a prohibition, that a man, by becoming a soldier, and receiving the Queen's pay, does agree and consent that he shall be subject to military discipline, and he cannot appeal to civil courts to rescue him from his own compact. . . . It is not competent for this court to undo that which Her Majesty has done, upon the advice of the proper authorities in these matters.”

He goes on to state that at that date, namely, in 1866, there was one of the articles of war which provided redress in such a case:

“That if any officer shall think himself wronged by his commanding officer, and upon due application shall not receive the redress to which he is entitled, he is to make his complaint in the manner there pointed out, and he is to seek redress in that manner.”

WILLES, J., says (*ibid.* at p. 833):

“I cannot entertain a doubt that this is the law; whatever responsibility may attach to me for pronouncing it, I must pronounce it, as I am satisfied that it exists.”

He also goes on to say, in a passage which may be appropriate perhaps to this particular case (*ibid.*):

“Nor ought I to allow any feeling of sympathy for Colonel Dawkins, even if I felt it, to interfere with the discharge of my plain duty, that is, to abstain from matters with which I have no concern.”

There is also a passage in the judgment of **COCKBURN, C.J.**, which I think is appropriate to this principle, in *R. v. Treasury Lords Comrs.* (7). It is this (L.R. 7 Q.B. at p. 394):

“It is not because there is no other remedy but that which may be a fruitless and abortive one, that this court has jurisdiction to issue a writ of mandamus. I take it, with reference to that jurisdiction, we must start with this unquestionable principle, that when a duty has to be performed (if I may use that expression) by the Crown, this court cannot claim even in appearance to have any power to command the Crown; the thing is out of the question.

Over the Sovereign we can have no power. In like manner, where the parties are acting as servants of the Crown, and are amenable to the Crown, whose servants they are, they are not amenable to us in the exercise of our prerogative jurisdiction."

In this case the real complaint which is made is that one of the regulations for courts of inquiry has not been complied with. In my opinion, if that is so, and it is not necessary to express any opinion if that is so or not for the reasons that I have given, the remedy is by complaint to the superior officer who has command and control over these proceedings, and ultimately under s. 42 of the Army Act which corresponds to the article of war in force in 1866. For these reasons I agree that this rule should be discharged.

Rule discharged.

Solicitors: Norton, Rose, Barrington & Co.; Treasury Solicitor.

[Reported by J. A. SLATER, ESQ., Barrister-at-Law.]

FLACK v. CHURCH

[KING'S BENCH DIVISION (Darling, Avory and Sankey, JJ.), October 26, 1917]

[Reported 87 L.J.K.B. 744; 117 L.T. 720; 82 J.P. 59;

34 T.L.R. 32; 15 L.G.R. 951; 26 Cox, C.C. 110]

Animal—Dog—Licence—Keeping dog without licence—Conviction of owner in respect of one date—Liability to conviction in respect of later date in same year—Dog Licences Act, 1867 (30 & 31 Vict., c. 5), s. 8.

An information was preferred against the respondent for keeping a dog on May 30, 1917, without a licence; which, in fact, he had done. On April 18, 1917, he had been convicted of keeping the same dog on March 28, 1917, without a licence. The justices were of opinion that, as the respondent had been convicted during 1917 of keeping a dog without a licence for that year, he could not again be convicted of the offence during the same year in view of the fact that the licence required under the Dog Licences Act, 1867, was a licence which need only be taken out once in each year, and they dismissed the information.

Held: the offence of which the respondent had been previously convicted, namely, keeping a dog on Mar. 28 without a licence, was a different offence from that with which he was subsequently charged, namely, keeping the dog on May 30 without a licence, and, therefore, he was liable to conviction on the later charge.

Notes. Section 8 of the Dog Licences Act, 1867, has been replaced by s. 12 (1) of the Dog Licences Act, 1959 (see 39 HALSBURY'S STATUTES (2nd Edn.) 24).

As to dog licences, see 1 HALSBURY'S LAWS (3rd Edn.) 698-700 and *ibid.*, 2nd Edn., vol. 28, pp. 420-422. For cases see 39 DIGEST 245-247.

Case referred to in argument:

Phillips v. Stevens (1898), 79 L.T. 280; 62 J.P. 789; 15 T.L.R. 5; 43 Sol. Jo. 14; 19 Cox, C.C. 172, D.C.; 33 Digest 462, 1734.

Case Stated by Essex justices.

On June 6, 1917, an information was preferred by Frederick Charles Flack (the appellant) under s. 8 of the Dog Licences Act, 1867, against John Church (the respondent), for that he on May 30, 1917, at Thaxted, Essex, did unlawfully keep a dog without having in force a licence authorising him to do so, contrary to the statute in such case made and provided. On the hearing of the information the following facts were proved: The respondent kept at his residence at Thaxted a

greyhound dog on May 30, 1917, on which day he had not in force a licence under the Dog Licences Act, 1867, authorising him to keep a dog. On April 18, 1917, before a court of summary jurisdiction sitting at the petty sessional courthouse, Great Dunmow, the respondent was convicted of the offence of keeping a dog without a licence at Thaxted on Mar. 28, 1917, and fined 15s. The dog kept by the respondent on both Mar. 28, 1917, and May 30, 1917, was the same dog. The justices were of opinion that, as the respondent had been convicted during the year 1917 of the offence of keeping a dog without a licence for that year, he could not again be convicted of the offence during the same year, having regard to the fact that the licence required under the Dog Licences Act, 1867, was a licence which need only be taken out once in each year.

By the Dog Licences Act, 1867, s. 8:

"If any person shall keep a dog without having in force a licence granted under this Act authorising him so to do, or shall keep a greater number of dogs than he shall be licenced to keep, he shall for every such offence forfeit the sum of £5."

Bernard Campion for the appellant.

The respondent did not appear.

DARLING, J.—In this case the respondent had been convicted of keeping a dog on Mar. 28, 1917, without a licence, and he was afterwards summoned for keeping the same dog on May 30, 1917, without a licence. On the hearing of the second summons the magistrates were of opinion that, as the respondent had already been convicted of keeping a dog without a licence for the year 1917, he could not again be convicted of the offence during the same year, and they dismissed the summons. The magistrates appear to have been misled by s. 33 of the Interpretation Act, 1889, which provides:

"Where an act or omission constitutes an offence under two or more Acts, or both under an Act and at common law, whether any such Act was passed before or after the commencement of this Act, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those Acts or at common law, but shall not be liable to be punished twice for the same offence."

The second summons was not an attempt to punish the respondent twice for the same offence. It is true that, if he had taken out a licence, it would have been good till Dec. 31, 1917, but he had no licence on Mar. 28 and equally he had no licence on May 30, and in each case the offence was keeping the dog without a licence on the particular day in respect of which he was summoned. The offence on May 30 was not the same offence as the offence on Mar. 28, though it was an offence of the same kind. They were two different offences. The fact that a person has been convicted of assaulting a man on Jan. 1 would be no defence to a summons for assaulting the same man on June 1, for the second offence is not the same as the first. The appeal must, therefore, be allowed and the Case remitted to the justices with direction to convict.

AVORY, J.—I am of the same opinion. The mistake of the magistrates was in thinking that the respondent had already been convicted of the same offence. He had not been convicted of the same offence. He had been convicted on Apr. 18 of keeping the dog on Mar. 28 without a licence. On June 6 he was charged with a different offence, namely, keeping the dog on May 30 without a licence, and there was no ground for saying that he had already been convicted of that offence.

SANKEY, J.—I agree. The justices made the mistake of thinking that a conviction is a licence.

Case remitted.

Solicitors: *Sharpe, Pritchard & Co., for J. H. Gould, Chelmsford.*

[Reported by J. F. WALKER, ESQ., Barrister-at-Law.]

WATTS, WATTS & CO., LTD. v. MITSUI & CO., LTD.

[HOUSE OF LORDS (Lord Finlay, L.C., Earl Loreburn, Lord Dunedin, Lord Parker of Waddington and Lord Sumner), February 12, 13, 15, March 16, 1917]

[Reported [1917] A.C. 227; 86 L.J.K.B. 873; 116 L.T. 353; 33 T.L.R. 262; 61 Sol. Jo. 382; 13 Asp. M.L.C. 580; 22 Com. Cas. 242]

Shipping—Charterparty—Exception clause—Restraint of princes—Need for restraint to be existing fact and not mere apprehension—Consideration of facts of each case—Failure to provide ship—Damages—Measure—Value of cargo at destination less cost to charterers and cost of insurance during voyage.

To constitute a restraint of princes within an exceptions clause in a charterparty the restraint must be an existing fact and not a mere apprehension. But it has never been held that a ship must continue her voyage till physical force is actually exercised. The precise imminence of peril which would make the restraint a present fact as contrasted with a future fear cannot be fixed by definition. The circumstances of each particular case must be considered. The reasonable apprehension of a prudent man and the inutilty of doing something which cannot lead to any good result are considerations material in deciding at what distance of time or over what area an existing restraint of princes may be deemed to be operative so as to restrain, but they are not restraints in themselves.

By a charterparty dated June 5, 1914, charterers chartered a vessel from shipowners to proceed to M. in September, 1914, and there to load and carry to Japan a cargo of sulphate of ammonia which the charterers had bought. The charterparty excepted "arrests and restraints of princes." On Aug. 4, 1914, war broke out between Great Britain and Germany and the shipowners refused to provide a ship in accordance with the charterparty on the ground that there was reasonable apprehension that if they did so, the ship would be seized by the King's enemies. The charterers were, therefore, compelled to repudiate their contract with their sellers, and paid them £4,500 for so doing. In an action by the charterers against the shipowners for damages for breach of charter,

Held: (i) the mere apprehension of seizure was insufficient to justify the shipowners' failure to supply a steamer; (ii) as damages for the breach of the charter the charterers were entitled to the value of the cargo at the port of destination at the date on which it would have arrived there if a ship had been supplied, less the price which would have been payable by the charterers to their sellers for the goods and the cost of insuring them against marine and war perils during the voyage, but not to the £4,500 paid to the sellers because of the repudiation of the contract of sale since that transaction was *res inter alios acta* and the damage was too remote.

Decision of Court of Appeal, [1916] 2 K.B. 826, reversed.

Notes. Considered: *The Svorono* (1917), 33 T.L.R. 415; *Widnes Foundry* (1925), *Ltd. v. Cellulose Acetate Silk Co.*, [1931] 2 K.B. 393; *Atlantic Maritime Co., Inc. v. Gibbon*, [1953] 2 All E.R. 1086. Referred to: *Russian Bank for Foreign Trade v. Excess Insurance Co.*, [1918] 2 K.B. 123; *Monte Video Gas and Dry Dock Co. v. Clan Line Steamers, Ltd.* (1921), 37 T.L.R. 866; *Nissho Co. v. Livanos* (1941), 57 T.L.R. 400.

As to the exception of restraints of princes and damages for failure to provide ship under a charterparty, see 30 HALSBURY'S LAWS (2nd Edn.) 319-322, 461, 462, 561-563; and for cases see 41 DIGEST 407 et seq., 450-452, 554-557.

Cases referred to:

- (1) *Rodocanachi v. Milburn* (1886), 18 Q.B.D. 67; 56 L.J.Q.B. 202; 56 L.T. 594; 35 W.R. 241; 3 T.L.R. 115; 6 Asp.M.L.C. 100, C.A.; 41 Digest 555, 3816.

- (2) *Wall v. Rederiakt. Luggude*, [1915] 3 K.B. 66; 84 L.J.K.B. 1663; 114 L.T. 286; 31 T.L.R. 487; 13 Asp.M.L.C. 271; 21 Com. Cas. 132; 41 Digest 348, 1971.
- (3) *Atkinson v. Ritchie* (1809), 10 East, 530; 103 E.R. 877; 41 Digest 464, 2955.
- (4) *Giepel v. Smith* (1872), L.R. 7 Q.B. 404; 41 L.J.Q.B. 153; 26 L.T. 361; 20 W.R. 332; 1 Asp.M.L.C. 268; 41 Digest 411, 2558.
- (5) *Nobel's Explosives Co. v. Jenkins & Co.*, [1896] 2 Q.B. 326; 65 L.J.Q.B. 638; 75 L.T. 163; 12 T.L.R. 522; 8 Asp.M.L.C. 181; 1 Com. Cas. 436; 41 Digest 521, 3501.
- (6) *Robinson v. Harman* (1848), 1 Exch. 850; 18 L.J.Ex. 202; 13 L.T.O.S. 141; 154 E.R. 363; 17 Digest (Repl.) 81, 33.
- (7) *Hadley v. Baxendale* (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 18 Jur. 358; 2 W.R. 302; 2 C.L.R. 517; 156 E.R. 145; 17 Digest (Repl.) 91, 99.
- (8) *Ströms Bruks Aktie Bolag v. Hutchison*, [1905] A.C. 515; 74 L.J.P.C. 130; 93 L.T. 562; 21 T.L.R. 718; 10 Asp.M.L.C. 138; 11 Com. Cas. 13, H.L.; 41 Digest 451, 2826.
- (9) *Embiricos v. Sydney Reid & Co.*, [1914] 3 K.B. 45; 83 L.J.K.B. 1348; 111 L.T. 291; 30 T.L.R. 451; 12 Asp.M.L.C. 513; 19 Com. Cas. 263; 41 Digest 409, 2548.
- (10) *Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co.*, [1915] A.C. 79; 83 L.J.K.B. 1574; 111 L.T. 862; 30 T.L.R. 625, H.L.; 17 Digest (Repl.) 149, 491.

Appeal by the defendants from an order of the Court of Appeal.

The facts and arguments appear from their Lordships' opinions.

Leck, K.C., and *Raeburn* for the appellants.

Greer, K.C., and *R. A. Wright* for the respondents.

The House took time for consideration.

Mar. 16, 1917. The following opinions were read.

LORD FINLAY, L.C.—The appellants are shipowners who entered into a charterparty dated June 5, 1914, with the respondents, the charterers, by which it was provided that a steamer, the name of which was to be declared, should proceed to Mariopol on the Sea of Azov, and having there taken on board a cargo of sulphate of ammonia should carry it to Japan for delivery there. By cl. 7 the charterers had the option of cancelling the charter if the vessel was not ready to load by Sept. 20, 1914. By cl. 12 there was an exception for the arrests and restraints of princes. Clause 13 was as follows:

"Penalty for non-performance of this agreement proved damages not exceeding the estimated amount of freight."

The respondents had, in April, 1914, purchased from the Coppee company in Russia 3,500 tons of sulphate of ammonia, and if the steamship had arrived the goods so purchased would have been shipped by it for Japan. At the beginning of August war broke out between Germany and Great Britain, Russia, and France. Turkey did not enter into the war until November, 1914. On Sept. 1 the respondents through their brokers requested that the name of the steamer should be declared. On the same day the appellants replied that the charterparty must be considered cancelled. The reason given was that the British government had prohibited steamers from going into the Black Sea to load, but in fact there had been no such prohibition. The Dardanelles were closed to navigation after sunset on Sept. 26.

The action was brought by the charterers for damages for not providing a steamer according to the charterparty. The defence was that on the reasonable apprehension of Turkey becoming involved in the European war, and of the Dardanelles being thereupon closed, the shipowners were justified by reason of the exception of arrests and restraints of princes in not sending a vessel to load. The action was

A tried by BAILHACHE, J., in the Commercial Court. He decided: (i) That there was no justification for the breach. (ii) That even if the steamship had arrived by the cancelling date (Sept. 20) she could not have loaded and got to the Dardanelles before they were closed. (iii) That if the steamship had been provided at Mariopol the charterers could have insured the goods for Japan, and that they had lost the chance of doing so owing to the shipowners' default. (iv) That, no other charter-party being procurable, the charterers were entitled to £3,800, being the amount of profit which they would have insured on the voyage to Japan. The learned judge arrived at this amount by taking the difference between the price at which the charterers had purchased the goods under the contract of April, 1914, and the market price in Japan in November, 1914, the date at which the goods might have been expected to arrive, but by a lapse no allowance was made for the premium which the respondents would have had to pay on the insurance. A claim for £4,500 which the charterers had paid to their sellers (the Coppee company) to have their contract of purchase cancelled was disallowed as being too remote. Both sides appealed to the Court of Appeal; the shipowners on the ground that they ought to have been held not liable, and the charterers on the ground that they ought to have been allowed the sum of £4,500 which they had paid to their sellers. The Court of Appeal disallowed the claim for £4,500, agreeing in this with BAILHACHE, J., and, while holding the shipowners liable in damages, varied the order of BAILHACHE, J., by directing a reference to ascertain the amount of the damages, declaring that the measure of damages was the difference between the price which the goods would have realised if they had been sold in Japan at the end of November, 1914, and the cost price of the goods at the port of loading at the current price at the nearest available date to Sept. 10, 1914, in addition to freight, insurance premiums for war risks, and brokerage. The effect of the decision of the Court of Appeal was that while the damages would be reduced by the allowance for the amount of the premium, they might have been largely increased if it proved to be the case that the cost price at Mariopol at the time of the breach was less than the price under the contract of April, 1914. The shipowners appealed to this House; there was no cross-appeal in respect of the £4,500 disallowed by both courts below.

In my opinion, the contention of the appellants that they could justify the failure to provide a steamship on the ground of the exception for restraint of princes was not made good. There was not, in fact, any restraint of princes to prevent the passage of the steamship through the Dardanelles and to Mariopol until the closing of the Dardanelles on the evening of Sept. 26. On Sept. 1, 1914, there was a reasonable apprehension that the Dardanelles might be closed, but such an apprehension does not constitute a restraint of princes. To bring the case within the exception there must be an actual restraint in existence, and in the present case there was nothing to prevent the steamship from passing the Dardanelles and arriving at the port of loading by the cancelling date (Sept. 20). It is quite true that her going there, so far as the actual voyage to Japan was concerned, would have been useless, as the Dardanelles were closed before she could have got out, but if the vessel had arrived at Mariopol the charterers might have insured against war risks. I confess I have some doubt whether the respondents might not have abandoned the adventure instead of having to insure at a heavy premium, but having regard to what passed at the trial, as stated to us by counsel on both sides, I think we must deal with the case on the footing that the insurance against war risks would have been effected. The only controversy between the parties on this point appears to have been whether such an insurance was practicable. It was proved by the one witness called that the insurance could have been effected. There was no contradiction, and I think that the courts below were right in holding that the loss of insurance may be recovered. I do not think that the opportunity of effecting an insurance can be regarded as too remote to constitute an element of damage.

As regards the amount of the damages, the basis adopted by BAILHACHE, J.—correcting, of course, the mistake as to the non-allowance of the premium—was,

in my opinion, correct. It was strenuously argued by the respondents that as the £4,500 paid by the respondents to their sellers had been disallowed as too remote, the contract of April must be disregarded for all purposes, and the loss ascertained on the difference between the market price at the port of loading at the date of the breach, and what would have been the market price in Japan on arrival. It would follow, on the assumption that the cost price at Mariopol had fallen by the time of the breach to a point below the price under the contract of April, that the damages recoverable would be correspondingly increased. In my opinion, the respondents' contention on this point fails. It is quite clear and indeed was not disputed that if the steamship had arrived at Mariopol the sulphate of ammonia which the respondents had contracted to purchase under the contract of April would have been the goods shipped, and this, of course, involved taking delivery of these goods, and paying for them to the seller. If the respondents having so shipped the goods had started the steamship upon a voyage to Japan insuring against war risks the adventure would have been frustrated by the closing of the Dardanelles, and this should have constituted a constructive total loss. The respondents would have recovered on the insurance the value of the goods as at the time of their expected arrival in Japan, but they would ex hypothesi have had to pay the price for the goods under the contract of April, and the difference between these two amounts would have represented their profit after deduction of premium, &c. This seems to me to exclude any inquiry as to a possible lower market value at Mariopol at the time of the breach.

Rodocanachi v. Milburn (1) has, in my opinion, no application. That was a case in which the goods had been lost on the voyage by the fault of the ship, and it was held that the damages could not be reduced by reference to a contract for sale at a price below the market price at the date when they ought to have been delivered. The claim of the respondents to enhance the damages by reference to a supposed fall in the market at Mariopol at the time of the breach appears to me also to fall upon another ground. There was no evidence that there was any market at Mariopol for such goods, or that they could be obtained from any person, other than the Coppee company (the respondents' vendors), and there is no evidence of any fall in the cost price of such goods at the time of the breach. It is indeed probable that the price may have fallen after exit from the Black Sea had been barred by the closing of the Dardanelles on Sept. 26. The Court of Appeal ought not, in my opinion, to have directed an inquiry as to damages on a basis for which no foundation had been laid by the evidence at the trial. I agree with the construction put in the courts below on cl. 13—the penalty clause. If this clause had appeared for the first time, I think it might have been construed as imposing a limitation on the damages to be recovered, but the penalty clause is an old one with a settled meaning, and the intention, if it existed, to make so fundamental a change in its effect as is suggested ought to have been much more clearly shown in order to bind the other party to the contract. In my opinion, the judgments of BAILHACHE, J., in the present and in *Wall v. Rederiaktiebolaget Luggude* (2) on this point were right. In my opinion the respondents are entitled to £3,800, less the cost of insurance, &c. BAILHACHE, J., took the premium to be 6 per cent., and on this basis the amount will be £800. I think that the respondents should have costs in the Commercial Court and in the Court of Appeal, but that there should be no costs of the appeal to this House. I am authorised to say that **LORD PARKER OF WADDINGTON** concurs in the opinion I have just read.

EARL LOREBURN.—I need not recapitulate the facts of this case. In my opinion there was no restraint of princes on Sept. 1 when the shipowners declared their intention of not carrying out their contract. There was an available force at hand in the Dardanelles, and if the situation had been so menacing that a man of sound judgment would think it foolhardiness to proceed with the voyage I should have regarded that as in fact a restraint of princes. It is true that mere apprehension will not suffice, but on the other hand it has never been held that a ship

A must continue her voyage till physical force is actually exercised. I agree, however, with LORD DUNEDIN's expression that

"it would be useless to try and fix by definition the precise imminence of peril which would make the restraint a present fact as contrasted with a future fear."

B No form of words is likely to cover automatically all contingencies. In the present case the lists of ships that went through the Dardanelles to and fro during the material days, which were furnished to us during the argument, though not printed in the book, show that there was no restraint of princes when the voyage was abandoned. I cannot agree with the learned counsel for the appellants that we are to judge merely by the event. The decision must be made at the time by those concerned.

C If this be so, the sole remaining question relates to the measure of damages. What the plaintiffs claim was the sum they had to pay as compensation to the sellers of the cargo which they had bought in order to load it on the ship, but were disabled from loading because the defendants failed to provide the ship. Now this would not be the measure of damage in the absence of any notice to the shipowner. It is unnecessary to quote authority for this familiar rule. After the case had been heard on this footing the learned judge allowed an adjournment to hear evidence on another footing altogether. The plaintiffs then argued that if this ship had entered the Black Sea and reached the port of loading on Sept. 20 (the last day allowable under the contract and the earliest day on which she could have arrived) they could have loaded her with the cargo intended. They also said that they could and would have insured the cargo against war risks, and that, though she would have been captured by the Turks on her way down through the Dardanelles, they would have recovered from the underwriters. The evidence on this case was very meagre, and indeed unsatisfactory, but it was uncontradicted. We are therefore bound to take it that this cargo could and would have been insured against war risks at a premium of 6 per cent. They would have done so, F we must assume, because a sensible man of business would so act, and they were deprived of their opportunity of so doing. In these circumstances I think it is legitimate to recognise this as an element in damages. A man of business in such a position would naturally load the cargo and insure against war risks if he could, even if the premium swallowed up nearly all the profits of his voyage, because he would thereby be free from any liability which might fall upon him for not himself G taking delivery from his sellers, or if he himself had already taken delivery he would not be left with the goods on his hands in a port to which access might soon be made impossible by war. In short, I think the charterers are entitled to say to the shipowners: "You broke your contract in not sending your ship to the port of loading. If you had sent her we could have loaded her with a cargo which we had ready. True, it would never have reached its destination by reason of the H war, but we should have insured against war risks, as any practical man would do, and we could have done so at 6 per cent premium. Pay us what we have lost by your default. It is the avowed value at port of destination, less the actual price we paid at port of loading and the expenses, and less also the premium we had to pay for insuring against war risks." That sum leaves £800 as the damages.

I LORD DUNEDIN.—In terms of the contract contained in the charterparty of June 5, 1914, the appellants were bound to send a steamer to Mariopol, on the Sea of Azov, not to arrive before Sept. 1 and the contract cancellable if it arrived after Sept. 20, 1914, to receive a cargo of 3,500 tons of sulphate of ammonia to be carried to Japan via the Suez Canal. On Sept. 1, 1914, the appellants informed the respondents that they considered the contract as cancelled. On the 2nd the respondents in a letter to the appellants refused to accept that proposition and called on them to proceed with the contract and give the name of the steamer which they proposed to send to Mariopol. The appellants persisted in their attitude, and no

steamer was sent. The present action is to recover damages for this alleged breach of contract.

The first question that arises is whether there was a breach of contract. The non-fulfilment is admitted, but the appellants say that under the circumstances that is excused under one of the exceptions in the charterparty—namely, restraint of princes. On Aug. 1, 1914, Germany had declared war against Russia and had begun hostile action against France, and on the night of the 4th Great Britain declared war against Germany. There was, however, at this time no activity on Germany's part in the Black Sea or in the passage from the Black Sea to the Mediterranean, or in the Levant. Turkey was a neutral. Restraint of princes, to fall within the words of the exception, must be an existing fact and not a mere apprehension. This was held long ago by LORD ELLENBOROUGH in *Atkinson v. Ritchie* (3). The more recent cases cited by the appellants, such as *Giepel v. Smith* (4) and *Nobel's Explosives Co. v. Jenkins & Co.* (5) do not in any way touch that proposition. They only show that it may be possible to invoke the exception when a reasonable man in face of an existing restraint may consider that the restraint, though it does not affect him at the moment, will do so if he continue the adventure. It would be useless to try to fix by definition the precise imminence of peril which would make the restraint a present fact as contrasted with a future fear. The circumstances in each particular case must be considered. In the present case, while there was natural and great apprehension on Sept. 1, and while the decision of the British government immediately after to exclude Black Sea voyages from the benefits of the government insurance scheme might well deter British subjects from sending their ships to the Black Sea, yet it is clearly proved by the production of lists of ships which after that date, and up to Sept. 26, passed inwards and outwards through the Dardanelles that there was no such restraint as would have actually prevented the appellants presenting a ship at Mariopol before or by the appointed date of Sept. 20. I agree on this matter with the conclusion arrived at by the Courts below.

Breach of contract being ascertained, damages are due. What happened subsequently, so far as material, was as follows. The respondents attempted, but without success, to secure another ship at Mariopol. On Sept. 26 the Dardanelles were finally closed and have never been open since. On Nov. 5 Great Britain declared war against Turkey. The respondents had by a contract of date Apr. 23, 1914, secured a cargo of sulphate of ammonia from a company, Coppee Co., Ltd., registered in England but trading in Russia at Mariopol. Under the contract the sulphate was to be accepted by the buyers not later than the end of October, but the respondents asked and obtained a prolongation of the period to the end of November. In November the respondents, who had been sounding the Coppee company as to terms for cancelling the contract, finally intimated that they did not propose to accept delivery. A lengthened correspondence ensued as to what damages were to be paid, and the matter was finally settled in July, 1915, upon the respondents paying the Coppee company £4,500 with certain costs of an inchoate arbitration.

The respondents in the case as raised set forth the breach of contract by the appellants and their own consequent inability to accept delivery of the sulphate, and claimed as damages the said sum of £4,500, together with such a sum as would represent their loss of profit on the venture, said loss to be arrived at by taking the difference between what the sulphate would have fetched if sold in Japan in November, and the sum they would have had to pay for it at Mariopol under the contract. They went to trial, and the respondents contented themselves with proving the charterparty, the failure of the appellants to send a ship, and their own inability to procure another ship, the facts as to the contract and the payment they had made to the Coppee company, and the facts as to the position at the Dardanelles and the Black Sea in August and September. The evidence of the appellants was directed to the sole point of showing that there was such danger as at Sept. 1 as justified them in refusing to send a ship. The evidence

A being closed and counsel having addressed the court, the learned judge seems to have expressed an opinion that the restraint of princes was not, in his view, made out in fact, and that in law the liability of the respondents to the seller under the contract was as regards the appellants *res inter alios acta* and too remote to be taken as the measure of damages as against them. He also seems to have indicated that in his view, the Dardanelles having been finally shut on Sept. 26, B the voyage could not have been made at all, as the ship, even if sent by the due date, could not after loading have re-passed the Dardanelles. At the same time he indicated that it might have been possible for the respondents, if the ship had been at Mariopol, to have insured the cargo for safe arrival, and in so doing to have valued the goods at arrival value in Japan. He, accordingly, without amendment C of the pleadings, allowed a continuation of the cause to a future day for further evidence on that point. This evidence was subsequently led, and thereafter the learned judge gave his judgment. He found first, as already stated, as to the restraint of princes; second, as a fact that, the Dardanelles having been finally closed on Sept. 26, the ship, even if sent, could not have made out the voyage; and third, as a mixed question of fact and law, that the respondents, had the ship D been duly sent to Mariopol, could and would as reasonable men have effected an insurance against loss, including war risks, on the arrived value of the goods in Japan. On this third finding he repeated his view as to the payment under the contract between the respondents and the Russian sellers not being the measure of damages as against the appellants; but he found due as damages the sum of £3,800, being the difference between the proved value of the cargo as it would have sold in Japan, which he assumed covered by insurance, and the sum payable E for the sulphate of ammonia if the respondents had shipped the intended cargo, which would have given them an insurable subject. Both parties appealed to the Court of Appeal. The learned judges there affirmed all the findings of the trial judge in fact and law, but on the third finding they came to a different conclusion. While affirming the view that the damages paid under the contract could not be taken as the measure between the respondents and appellants, they decided that F the proper way of arriving at the damage was to take the arrived value of the goods, which, like the trial judge, they held could be covered by insurance, and then to find the loss which the respondents suffered by comparing that sum with the cost of buying a cargo at Mariopol on or about Sept. 10, 1914, plus freight, insurance premium for war risk, and brokerage. They referred it to the official referee to determine this sum.

G The general rules for assessment of damages for breach of contract have been often stated, but nowhere more succinctly than by PARKE, B., in *Robinson v. Harman* (6) (1 Exch. at p. 855):

H "Where a party sustains a loss by reason of a breach of contract he is so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed."

I The matter was further elucidated in *Hadley v. Baxendale* (7). What would have been the position of the respondents if the ship had been duly sent to Mariopol? They would have been able to ship their cargo. But what then? Once it is found as a fact that the final closing of the Dardanelles on the 26th would have prevented the ship after loading from reaching the Mediterranean it is obvious that the intended voyage could not have been performed. The appellants argued that, that being so, damages should be merely nominal, the true cause of the failure of the adventure being, not their breach of contract, but the facts of war. I agree with the learned judges in the courts below that that does not conclude the matter, but that one must next inquire what would a reasonable man have done in the supposed position. As a matter of ordinary common sense he would have insured his cargo against sea and war risks, and the possibility of so doing was, I think, rightly affirmed by the trial judge upon the evidence led. The result arrived at by him after this seems to me right, subject to correction of what is an obvious

inadvertence—though it must be admitted an inadvertence which makes a great difference in the pecuniary result. I refer to the omission to deduct from the sum receivable under the insurance the amount of the insurance premium. This premium has been proved—not very satisfactorily, but I think sufficiently—to be calculable at 6 per cent.

This method of assessing the damage was, as already stated, altered by the Court of Appeal. I am not satisfied that the view taken by the learned judges of the Court of Appeal is correct. The respondents' counsel sought to support it by citing *Rodocanachi v. Milburn* (1), a case which, although not binding on your Lordships, was, I apprehend, rightly decided, and is indeed in consonance with the case in this House of *Ströms Bruks Aktie Bolag v. Hutchison* (8). In that case the plaintiffs chartered a ship to bring cotton from Alexandria to the United Kingdom. The goods were lost by the fault of the shipowner. It was held that the damages due to the plaintiffs were the value of the goods at market price in the United Kingdom at the date at which the goods ought to have arrived, and that it made no difference that the plaintiffs had sold the goods "to arrive" at a figure less than that market price. It does not appear to me that the present case is in the same position. In that case the plaintiff, owing to the breach of contract, was actually left without his goods, and he was therefore entitled to be presented with the sum which it would have cost him to get other goods of the same quality and quantity. Whether, having the goods, he sold them to someone else at a profit or a loss was a matter with which the shipowner had no concern, and the fact of the sale being antecedent to the possession made no difference. In this case the respondents were not without goods; they had no ship to put them in owing to the breach of contract. But the failure of the venture was due, not to the breach of the contract, but to the war. In order to estimate the damage an ideal situation has to be created—namely, the idea that the respondents having got the ship would have insured the arrival of the goods in Japan against all risks, and the respondents are given credit for the arrived value of the cargo intended to be shipped. But then I think we must take the ideal situation as it would have existed in fact; that they would have shipped the cargo they intended to ship—that is to say, the sulphate of ammonia acquired under the contract; and that, therefore, their only real loss is the difference between the price they would actually have had to pay for the cargo and the arrived value of the cargo under deduction of the insurance premiums. Taking it the other way, and assuming there had been a fall in the market, then, inasmuch as the venture was, in truth, frustrated not by the breach of contract but by the war, you really come to throw on the back of the shipowner the loss in value of the goods which was truly due to the war.

Besides this there is, in my view, something else which ought to prevent judgment passing in terms of the order of the Court of Appeal. The respondents here entered court with a claim based entirely on their own payment to the Russian seller, and they made no other case. After the case was really concluded the learned judge intimated that he could not accept their view, and indicating the point as to insurance he allowed an adjournment for further evidence. The respondents had then the opportunity of making out any case they could as to insurance. They did so by proving the possibility of insuring against war risks at a premium of 6 per cent. up to at least the middle of September, and by proving what would have been the selling value of sulphate of ammonia in Japan in November. They proved nothing as to the state of the market at Mariopol in mid-September, nor indicated in any way that the price would have been less than the price they had agreed to pay under the contract. It is true that there are some references to the market for sulphate of ammonia having fallen, but they are of the most vague description. They are not the subject of direct testimony, but are all, such as they are, contained in the negotiations in correspondence between the respondents and the Coppee company as to the amount of damages to be charged against the respondents for having broken the contract of sale,

correspondence which, strictly speaking, is not evidence at all in regard to statements made in it as against the appellants.

The earliest and, indeed, the only reference which is at all direct is in a letter of Sept. 17 from the Coppee company to the respondents, in which, with reference to a verbal communication made by the respondents that they were not ready to accept delivery of the sulphate, and would like to know what would be the terms for cancellation, the Coppee company point out that the sulphate is all lying ready to be delivered, and that if it is not taken at the stipulated time they will have to arrange either to build or to hire a store in order to prevent deterioration of the sulphate during the cold weather. They add: "In addition the market price has diminished, and we should have to take into consideration the probability whether the price would further diminish during the period the sulphate is in store." That means, of course, till the spring. On Nov. 6 they write again: "We went into the question of the fall of price in sulphate, and so far as we are able to estimate any future loss in this respect and for the storage," &c. Actual figures are not approached till January, 1915, when the fall in price is quoted at £2 3s. 9d. per ton. But by this time the war with Turkey was well established and the Black Sea was absolutely sealed for exit to the Mediterranean. It is obvious that the price at that time reflects no light on the price in mid-September, 1914, at a time when both in fact and ex hypothesi of the present calculation the sea was still open and a voyage from Mariopol to Japan was insurable. This exhausts the references to be found in their correspondence. There is one piece of direct testimony given by the respondents' own manager which, so far as it goes, tends the other way. He says that in July, 1915, it was rumoured that the price of sulphate in Russia was very high. He also says that there is no market price for sulphate of ammonia in Russia, except the prices advertised by Coppee & Co. There is not a shred of evidence that Coppee & Co. would have supplied sulphate in mid-September at a reduced price. This being so, it seems to me that there is no justification for allowing a new and fresh inquiry to make a new case. I am aware that the Commercial Court is not bound by the stricter rules of pleading which obtain in the ordinary courts. But I cannot think it would be right at this time to start a new case as has been done by the Court of Appeal in the order complained of. The respondents have already had two cases adjudicated. It is not right, in my opinion, that they should now be allowed to embark on a third without having proved the fact which forms the foundation of it, basing the hope on the strength of casual references in a correspondence with other parties that something may turn up which will allow of a larger computation of the damages due.

I am, therefore, of opinion that the appeal should be allowed and that the respondent should be found entitled to the sum of £800, being the sum allowed by BAILHACHE, J., minus the premium calculated at 6 per cent. This view makes the discussion as to the limitation of liability under the penalty clause of no practical importance. But I wish to say that, had it been necessary to decide the point, I should have only wished to express my approval of the admirable judgment of BAILHACHE, J., in *Wall v. Rederiaktiebolaget Luggude* (2).

LORD SUMNER.—Restraint of princes is, I think, no excuse for the appellants' breach of charterparty in not sending a steamer to load at Mariopol. No such restraint even existed, still less operated to restrain them, when they intimated their intention of not sending any steamer, or at any time thereafter till the Dardanelles were closed on Sept. 26, 1914. They do not so contend, nor that the ambiguous and arbitrary conduct of the Porte before that date amounted to restraint. The words "restraint of princes" do not, in my opinion, extend to the apprehension of restraint. Such is neither the meaning of the words nor the sense of the clause. No decided case has gone so far, and the language of LORD ELLENBOROUGH in *Atkinson v. Ritchie* (3) is authority to the contrary, though, as the ship there could have loaded a full cargo before any embargo was imposed, the

case on the facts is distinguishable. The exceptions clause contemplates matters which cause a breach or prevent performance of the charter. The reasonable apprehension of a prudent man and the inutility of doing something which cannot lead to any good result are considerations material in deciding at what distance of time or over what area an existing restraint of princes may be deemed to be operative so as to restrain, but restraints in themselves they are not. The appellants admit that apprehension alone will not suffice, and say that the shipowner must take the risk of his fears being justified by the event. This argument converts a provision stipulating the effects of the operation of certain clauses into a speculation upon the chances of their coming into operation. To some of the excepted matters—for example, fire, explosions, or collisions—such a contention is obviously unfitted. In any case its application would lead to the interpolation of a period of suspense during which neither party could be certain of his rights until the course of events determined the speculation in one way or the other. As SCRUTTON, J., well observes in *Embiricos v. Sidney Reid & Co.* (9) ([1914] 3 K.B. at p. 54):

“Commercial men must not be asked to wait till the end of a long delay to find out from what in fact happens whether they are bound by a contract or not.”

Such a construction would unsettle the foundation of the contract as a matter of business, which is that the ship shall proceed upon a named voyage, unless prevented by named causes. Here, as the facts stood, the shipowners, by refusing to send a ship to Mariopol, evinced such an intention not to perform their bargain as justified the charterers in treating it as an offer of repudiation and in accepting it as such.

I have no doubt that cl. 13 is a penalty clause and immaterial in the present case. To read it otherwise is to ignore the first word “penalty”. True the use of that word is not decisive; but it is not impossible to read the residue of the clause as defining a mode of calculating a mere penal sum, and to read it as a limitation of the right to recover proved damages seems to me to produce an absurd result in business. Whatever the value of the cargo or the extent of the injury to it, the shipowner's liability in respect of it would be limited to the estimated amount of the freight, however that estimate is to be made. If the cargo owner is uninsured, he stands to lose large sums for the ship's default. If he is insured he upsets the ordinary course of insurance business by depriving his underwriter of a valuable right of recourse and must suffer for this in one way or another. Nothing could be less like a “genuine covenanted pre-estimate of damage”: *Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co.* (10) [1915] A.C. at p. 86, per LORD DUNEDIN. The whole matter has been fully and, if I may say so, admirably discussed by BAILHACHE, J., in the recent case of *Wall v. Rederiaktiebolaget Luggude* (2). Your Lordships decided the point in *Ströms Bruks Aktie Bolag v. Hutchison* (8) upon a somewhat similar clause, and I think that the present case cannot really be distinguished. My only difficulty is to understand why such a provision should be inserted at all.

I should be loth to hold that, if insurance of the war risk was feasible, proof that the charterers would have insured it was really needed. As is admitted, to insure the cargo against marine risks would be the ordinary thing to do, and it would have been obviously imprudent in a merchant to stand his own insurer of the war risk of such an adventure. I should have thought it would be within the legitimate inferences of fact to be drawn from the known circumstances of this case to find that a war-risk policy would be effected, but, as it is, the point need not be decided. What passed between the solicitors to the parties before the adjourned hearing in effect dispensed the plaintiffs from calling any witness on the point, almost formal as that witness would have been. The evidence called was very brief, but it sufficiently supports a finding that the whole line would have been covered. If so, no further inquiry on the point is needed. In effect, the breach of

charterparty caused the plaintiffs to lose the chance of shipping and dispatching an insured cargo and of recovering on the policy when the cargo was lost, as it would have been actually and constructively, in consequence of the outbreak of war with Turkey. The legal presumption must be that the amount to be insured would be such as would indemnify the plaintiffs for their actual loss and pecuniary damage. This will accordingly eliminate the factor of war and bring the case within the ordinary rules as to damages for breach of contracts of carriage by sea.

On the measure of damages a point of considerable nicety was discussed, but, in my opinion, it is not really raised by the evidence. The principle of measuring damages for breach of a contract for the sale of merchandise by a ruling market price at a given date is not always equally applicable to contracts of charterparty. Nor do I think that the canon expressed by LORD DAVEY in *Ströms Bruks Aktie Bolag v. Hutchison* (8) is in point in the present case. There the charterers were themselves producers of the intended cargo, and could have loaded the ship from their own factory if she had arrived to load. Their claim arose because the ship-owner's breach of contract prevented them from delivering the cargo at the port of discharge as they had contracted to do. Naturally, in measuring their loss, the cost of replacing it was a factor to be compared with the value of an equivalent quantity never shipped at all. In the present case there is no evidence that there was any market or even any market price for sulphate of ammonia at Mariopol about Sept. 10, 1914. There is no evidence that the charterers could have bought a cargo of it there or then, so as to load it on the arrival of the defendants' ship. Such evidence as there is shows that, if there was any sulphate of ammonia except the cargo in question, it all belonged to the firm from whom the charterers had contracted to buy it. If so, the charterers would have held to their bargain if the price had risen, and the vendors if it had not. A good deal can be said for the argument that, if this bargain is to be disregarded as too remote (which is admitted) so far as the plaintiffs claimed to recover the damages paid for its non-fulfilment, then, too, it should be disregarded for all purposes connected with the present case, and that the position is truly an inversion of that in *Rodocanachi v. Milburn* (1), "The value is to be taken independently of any circumstances peculiar to the plaintiff." This argument, however, is based on a supposition of fact as to the existence of a market price at Mariopol, which on the evidence fails. I think that in the main the appeal succeeds, and I concur in the motion proposed by my noble and learned friend on the Woolsack.

Solicitors: Holman, Fenwick & Willan; Waltons & Co.

[Reported by W. E. REID, ESQ., Barrister-at-Law.]

RICHARDS v. JOHN PAYNE & CO.

[KING'S BENCH DIVISION (Rowlatt, J.), June 21, 1916]

[Reported 86 L.J.K.B. 937; 115 L.T. 225; 13 Asp.M.L.C. 446]

Arbitration—Submission—Disputes “as to meaning and intentions of the charter” to be referred to arbitration—Jurisdiction of arbitrator—Power to determine facts and apply provisions of contract to them—Power to award damages for breach of contract.

The plaintiff let to the defendants a tug under a charterparty which provided that the hire was to be paid in advance, and in default of payment the plaintiff was to be at liberty to withdraw the tug. The charter also provided that any disputes as to “the meaning and intentions of the charter” should be referred to arbitration. A dispute having arisen in which the plaintiff alleged that the defendants were in arrears with payments of hire, recourse was had to arbitration. The arbitrator found that the defendants were in arrear as alleged, and ordered them to deliver up the tug to the plaintiff. The defendants contested the jurisdiction of the arbitrator to determine whether payment of hire was in arrears or not so as to give rise to the clause for re-delivery.

Held: the words “meaning and intentions of the charter” did not mean that only questions of construction as to the rights of the parties arising under the charterparty should be referred to arbitration; they gave the arbitrator power to determine the facts which had arisen and to apply the provisions of the charter to those facts; but they did not entitle him to award damages.

Notes. As to meaning and effect of particular terms, see 2 HALSBURY'S LAWS (3rd Edn.) 13, 14; and for cases see 2 DIGEST (Repl.) 456 et seq.

Action tried by ROWLATT, J., in the Commercial Court.

A charterparty under which the plaintiff let a tug to the defendants provided that the hire was to be paid in advance with punctuality and regularity, and that, in default of payment, the plaintiff was to be at liberty to withdraw the tug. The charterparty also provided that

“should any differences arise between the owner and the charterers as to the meaning and intentions of the charter, the same should be referred to arbitration.”

Disputes having arisen in which (inter alia) the plaintiff alleged that the defendants were in arrear with payments of hire, recourse was had to arbitration. The arbitrators in due course published an award in which they found that the defendants were in arrear as regarded the payment of hire and ordered the delivery up by them of the tug. The plaintiff subsequently brought this action on the award. The defendants contended that under the agreement to refer the arbitrators had no power to make the award which they had made. They argued that the reference of disputes as to the meanings and intentions of the charter “meant a submission to the arbitrators of questions as to the construction of the charter involving the rights of the parties under that document,” and nothing more.

R. A. Wright for the plaintiff.

C. R. Dunlop for the defendants.

ROWLATT, J.—In this case the plaintiff sues for the delivery up of a tug and for damages for its detention, founding his claim for delivery up upon an award made under a clause in the charterparty. He claimed before the arbitrators that the charter had come to an end. The award determined that the plaintiff had a right to withdraw the tug from the service of the charterers on Feb. 4, 1916, and that it is made under the submission which provides that, should any difference arise between the owner and the charterers as to the meaning and intentions of the charter, the same should be referred to arbitration. The phrase “meanings and

intentions" is a very curious one, but it falls to be construed in these proceedings. What the owner said was that there had been default in payment of the hire, and that by the charterparty he was thereby entitled to withdraw the tug. It is said that this arbitration clause referring to the meanings and intentions of the charter only submits to arbitration the question of construction as to the rights of the parties arising upon the words of the charterparty, and does not include any application of the conditions of the charterparty to the facts which have arisen and given rise to the dispute. In other words, that the arbitrators had no jurisdiction to determine whether the hire was in arrear or not, so as to give rise to the clause for re-delivery. I do not think the words are clear or satisfactory, but upon the whole I think that that is too narrow a construction. I think that "meanings and intentions of the charter" include the application of it to the facts which have arisen, and not merely the construction of it as a piece of paper, and that, of course, involves the determination of what facts have arisen. It has not been treated, and I do not think it can be treated, as entitling the arbitrators to go on and give damages. That really is enough to determine the main point in the case.

I think the plaintiff has two other points on which he can win. When you come to the letters I think it is clear that the parties interpreted this clause in the way I have interpreted it, and appointed their arbitrators to proceed upon it in the sense which I have given to it. The matter appears in a few letters as follows. In December the plaintiff, thinking he had a right, altogether apart from the question of non-payment of hire, to determine the charter by fourteen days' notice, gave fourteen days' notice. That was not accepted by the charterers, who said the charterparty was not so determinable at the owner's instance. But when it came to Feb. 4 the owner, then alleging that hire was in arrear, telegraphed demanding immediate re-delivery of the tug by reason of the breach of cl. 7 by non-payment of hire. He wrote confirming on the same day, saying that he should proceed under the arbitration clause if re-delivery was refused, and would claim damages. On the next day he writes returning the cheque which had been sent to him, and re-affirming his intention to submit the matter in dispute to arbitration, saying he would let the other side know his arbitrator in due course, and suggesting that it would be better to have one arbitrator than two, as provided in the charter. The matter he is speaking of there seems to me quite clearly the matter last raised—namely, the claim for re-delivery on the ground of non-payment of hire. On Feb. 7 there is an answer from the charterers' solicitor, saying: "We see no reason why the terms of the charterparty should be deviated from." That refers to the only proposal to deviate from the terms of the arbitration clause—namely, the proposal to substitute one arbitrator for two. On Feb. 18 the plaintiff's solicitors write back declining, and saying they will proceed to arbitration, and will claim damages as from Jan. 11—meaning damages as from the date applicable to the fourteen days' notice given in December—and in the alternative Feb. 4, when re-delivery of the tug was claimed. Thus there were being put forward two cases of non-delivery and two claims for damages. In these circumstances it seems to me that the parties have construed the matter and have referred both these claims to the arbitrators. They have not agreed, of course, to the arbitrators assessing damages for them, for they have no jurisdiction, but it seems to me that they have agreed that both the claims for re-delivery shall be arbitrated upon with such consequences as shall properly follow. Therefore, it seems to me that on that ground also the award can be supported.

Then it is said that the award is not good because it is silent as to the claim for non-delivery upon the fourteen days' notice given in December. It is true that arbitrators must decide all matters submitted to them, but I think counsel for the plaintiff's answer to that argument is correct when he says they really have decided it. If you ask for re-delivery and for damages based on an early date and also on a later date, and as here the award is made on the later date, I think that is sufficient. Therefore, I think the award is good, and that the plaintiff succeeds.

With regard to the hire, that might be paid at the option of the owner monthly or weekly in advance. Nothing seems to have been said about that particularly, but something had to be paid in advance, and accounts were stated and money paid up to Jan. 18, 1916. On Jan. 10 a cheque was sent on by defendants for £90, four weeks' hire, and that took matters up to Jan. 29. Therefore, on Jan. 29, something more had to be paid, but nothing at all was paid, and there seems to be no answer to the claim that unless the money was paid on Jan. 29 the owner was entitled to re-delivery of the tug. These clauses must be strictly applied. The owners of a tug have no sort of security for their money. They cannot distrain like the lessor of a house, and the only security they have, if money is not paid when due, is to have the tug back again. It is also argued that after all the money was not really due till Feb. 4, but I do not think that will do. There was said to be a question of some 2½ per cent. commission on the charterparty, but the fact was they were treating the hire as a separate matter, and if there was going to be an account between the parties, that should have been put to the plaintiff. But the parties have gone on treating the hire as becoming due on Jan. 29, and therefore I think the arbitrators have taken a reasonable and business-like view when they said there was default made on the part of the defendants on Jan. 29. Therefore I hold that plaintiff must recover.

In regard to the question of damages counsel for the defendants said he was ignorant as to the value of tugs. I do not know if he really meant that, but he was right when he said the matter of the value of the tug had not been brought strictly to his notice in the case. I think the plaintiff is entitled to the value of the tug as from Feb. 4, always allowing for the fact that this tug seems to have been "out of health" now and then, and was for some days off running. That must be allowed for, but I cannot possibly decide the question of figures, and I cannot adjourn the case, which would not be fair to others. In the same way, I cannot try the amount of repairs and commission claimed by defendants against the plaintiff. What I think is that if the parties cannot agree as to the figures they ought to find someone to settle it for them, and in default of that there will be liberty to apply. I shall therefore give judgment for the plaintiff with costs, with a reference as to damages and for an account of all claims between the parties.

Judgment for plaintiff.

Solicitors: *Botterell & Roche*, for *W. Cox*, Swansea; *Holman, Birdwood & Co.*, for *Edward Gerrish, Harris & Co.*, Bristol.

[*Reported by L. C. THOMAS, Esq., Barrister-at-Law.*]

GORDON HOTELS, LTD. v. LONDON COUNTY COUNCIL LONDON COUNTY COUNCIL v. GORDON HOTELS, LTD.

[KING'S BENCH DIVISION (Ridley, Bray and Avory, JJ.), April 4, 1916]

[Reported [1916] 2 K.B. 27; 85 L.J.K.B. 1042; 114 L.T. 1126;

80 J.P. 266; 32 T.L.R. 423; 14 L.G.R. 647; 25 Cox, C.C. 402]

Shop—"Shop"—*Hotel*—*Primary business to provide residence and board*—*Restaurant or grill-room*—*Provision of meals for non-residents*—"Shop assistant"—*Waiter*—*Cook*—*Kitchen cleaner*.

An hotel, the primary business of which is to provide residence and board for visitors, is not a "shop" within the Shops Acts, and waiters employed therein are not "shop assistants."

So held by RIDLEY and BRAY, JJ., AVORY, J., dubitante.

Held, by all the members of the court: a restaurant or grill-room which caters entirely or mainly for persons non-resident in the building in which the restaurant or grill-room is situated is a "shop" within the meaning of the Shops Acts, and persons employed in connection therewith, e.g., cooks and persons employed to clean the kitchen and departments immediately connected with it and to clean and maintain culinary implements, are "shop assistants" within the Acts, but not a kitchen clerk who merely orders supplies required for the kitchen and checks them on delivery.

Notes. Distinguished: *Rutherford v. Trust Houses* (1925), J.P.Jo. 682. Followed: *George Hotel (Colchester), Ltd. v. Ball*, [1938] 3 All E.R. 790. Referred to: *Simmonds Aerocessories (Western), Ltd. v. Pontypridd Area Assessment Committee*, [1944] 1 All E.R. 264.

As to the law relating to shop hours, see 17 HALSBURY'S LAWS (3rd Edn.) 194 et seq.; and for cases see 24 DIGEST (Repl.) 1107 et seq. For Shops Act, 1950, see 29 HALSBURY'S STATUTES (2nd Edn.) 186.

Cases referred to:

- (1) *Savoy Hotel Co. v. L.C.C.*, [1900] 1 Q.B. 665; 69 L.J.Q.B. 274; 82 L.T. 56; 64 J.P. 262; 48 W.R. 351; 16 T.L.R. 148; 44 Sol. Jo. 212; 19 Cox, C.C. 437, D.C.; 24 Digest (Repl.) 1107, 518.
- (2) *Melluish v. L.C.C.*, [1914] 3 K.B. 325; 83 L.J.K.B. 1165; 111 L.T. 539; 78 J.P. 441; 30 T.L.R. 527; 12 L.G.R. 1086; 24 Cox, C.C. 353, D.C.; 24 Digest (Repl.) 1107, 521.
- (3) *Prance v. L.C.C.*, [1915] 1 K.B. 688; 84 L.J.K.B. 623; 112 L.T. 820; 79 J.P. 242; 31 T.L.R. 128; 13 L.G.R. 382; sub nom. *France v. L.C.C.*, 24 Cox, C.C. 684, D.C.; 24 Digest (Repl.) 1108, 532.

Cases Stated by a metropolitan magistrate.

In the first case five informations were preferred on behalf of the respondents, the London County Council, against the appellants, the Gordon Hotels, Ltd., for that they, the appellants, had failed to comply with the provisions of s. 1 (1) of the Shops Act, 1912 [see now s. 1 (1) of the Shops Act, 1950], in respect of five persons named Groves, Chippett, Kendall, Gedge, and Perham, in that each of the said persons did not during the week ending April 24, 1915, on one weekday in such week cease to be employed about the business of a shop after half-past one o'clock in the afternoon.

Upon the hearing of the informations it was proved or admitted that the appellants were at all times material the proprietors and occupiers of the First Avenue Hotel, High Holborn, a fully licensed hotel. The business of the hotel consisted practically of two parts—that is, that of receiving guests for longer or shorter periods, for whose accommodation the usual public rooms found in a first-class hotel were provided, including a large dining-room. The dining-room was used almost entirely by visitors resident in the hotel, but was open to non-resident visitors as well, and was so advertised by circulars and pamphlets issued to the

public by the appellants. There was also attached to the hotel and carried on under the same licence, so far as the supply of intoxicating liquors was concerned, a grill-room, which was open to and used by visitors, both resident and non-resident, as a dining-room, luncheon-room, and grill-room, together with luncheon buffets. Part of the premises was used as a kitchen, which, with the departments immediately connected therewith, was situated in the basement. This kitchen was used for the purposes of the hotel as a whole, and in it was prepared and cooked food for all parts of the licensed premises in bulk and without reference to the particular portion of the premises in which the viands were to be consumed by visitors to the premises. The hotel dining-room, grill-room, luncheon-room, and buffets were situated on the ground floor and entirely unconnected with the kitchen, except by ways to which the visitors had no access or by food lifts. Groves was a clerk in the kitchen, who acted under the instructions of the chef, and he had the general control of obtaining and preparing provisions for the hotel at large. It was his duty to order supplies required, and to check them on delivery at the premises, and occasionally to leave the premises to procure any particular article. None of his duties required him to be in any of the rooms used by the visitors to the hotel. Chippett was what was known as a larder cook, and he chopped up meat of various kinds for use in the hotel generally. Kendall was a working cook, who cooked for all departments of the hotel. Gedge was a kitchen porter, whose duties consisted in sweeping the kitchen, looking after some fires, obtaining provisions from the larder, cleaning fish, and occasionally taking cooked food to the food lifts connected with either the hotel dining-rooms or the other dining-room, luncheon-room, or buffets. Perham was a knifeman, and he was employed in cleaning knives for use in any part of the premises. None of the four men, Chippett, Kendall, Gedge, and Perham, had any duties in or attended in any of the public rooms of the hotel. During the week ending April 24, 1915, these five men were employed in their ordinary duties each weekday after 1.30 p.m.; but they, in common with all other servants of the hotel, were given hours off duty suitable to the necessities of carrying on the hotel, and whole holidays from time to time. They were all adults and were entirely satisfied with the conditions of their employment.

On behalf of the appellants it was contended (a) that the duties of each of the five persons did not bring them into contact with and were not directly connected with the visitors to the hotel; (b) that their duties were in relation to the whole business of the hotel; (c) that persons resident in the hotel, in connection with whose requirements part of the duties of the five persons was performed, were not customers in the shop, and that the hotel portion of the premises in which persons resided was not a "shop" within the meaning of the Shops Act, 1912; (d) that in so far as the duties of the five persons were performed in relation to persons not resident in the hotel they were engaged in such duties in the portion of the hotel which was not a part of a "shop" within the meaning of the statute; and (e) that there was no evidence upon which in law the magistrate could hold that the five persons were "shop assistants" within the meaning of the statute. The learned magistrate before whom the informations were heard was of opinion that the kitchen, without which the business of the restaurant could not be carried on, was a part of the restaurant, and, therefore, a part of the shop, and that the five persons named were wholly or mainly employed in a shop in connection with the serving of customers. He, therefore, convicted the appellants in respect of each of the five informations subject to the stated case.

In the second case, on May 21, 1915, the appellants, the London County Council, preferred four informations against the respondents, the Gordon Hotels, Ltd., for that they, the respondents, did unlawfully fail to comply with the provisions of s. 1 (1) of the Shops Act, 1912, in respect of four of their employees—namely, Eaton, Clark, Bunyan, and Chidwick. Eaton was employed by the respondents as a waiter in the smoking-room lounge. Clark, Bunyan, and Chidwick were employed by the respondents as waiters in the dining-room. The learned magistrate stated

that whether a residential hotel was or was not a "shop" within the meaning of the Shops Act, 1912, he was not satisfied that the four men were wholly or mainly engaged in serving non-residents. He held, therefore, that they were not "shop assistants" within the meaning of the Act and dismissed the informations.

By the Shops Act, 1912 [see now Shops Act, 1950, s. 1 (1)], it was provided:

"Section 1 (1). On at least one weekday in each week a shop assistant shall not be employed about the business of a shop after half-past one o'clock in the afternoon. Provided that this provision shall not apply to the week preceding a bank holiday if the shop assistant is not employed on the bank holiday, and if on one weekday in the following week in addition to the bank holiday the employment of the shop assistant ceases not later than half-past one o'clock in the afternoon. . . . Section 19 (1) [see s. 74 of Act of 1950].

In this Act the expression "shop" includes any premises where any retail trade or business is carried on . . . the expression "shop assistant" means any person wholly or mainly employed in a shop in connection with the serving of customers or the receipt of orders or the dispatch of goods."

Macmorran, K.C., and Bodkin for the Gordon Hotels, Ltd.

Travers Humphreys for the London County Council.

RIDLEY, J.—In these two cases informations were preferred by the London County Council against the Gordon Hotels, Ltd., the proprietors and occupiers of the First Avenue Hotel, Holborn, under the Shops Act, 1912, for failing to arrange for nine of their employees to have a half-holiday in a certain week in accordance with the provisions of that Act. In the result the learned magistrate before whom the informations came found that five of the persons in question were shop assistants within the meaning of the Act and convicted the Gordon Hotels, Ltd., while as to the other four persons he found that they were not shop assistants, and, therefore, dismissed the summonses in respect of them. Two Cases have now been stated for the opinion of the court, and the question which has to be decided in each of them is whether these employees are or are not shop assistants within the meaning of the Act of 1912.

The whole of these nine persons were employed in various capacities about the hotel. It appears that the hotel possesses a grill-room which is used by both residents and non-residents, to which there is access from the hotel, but which is, so far as its use is concerned, distinct from the rest of the hotel, the latter being an hotel in the ordinary sense of the word, and providing the usual lodging accommodation. In that portion of the premises which may be called the hotel proper there is a dining-room and there is also a smoking-room, and one of the questions raised here is whether the waiters who are engaged to serve in these rooms are shop assistants. With regard to the dining-room and the smoking-room the learned magistrate has found that they were almost entirely used by the residents of the hotel—although open to non-residents—and that, therefore, the four waiters who were employed in these rooms were not "wholly or mainly employed in a shop in connection with the serving of customers," and so were not shop assistants. The learned magistrate did not decide whether the residential part of an hotel could properly be called a shop within the Act in respect of the sale therein of refreshments to non-residents. It was, however, unnecessary for him to do so in the face of his other findings. But it is necessary to consider this point as it has been referred to in the course of the argument.

Speaking for myself, I cannot think that an hotel, the primary business of which is to provide residence for visitors, can be regarded in any sense as a shop within the meaning of the Shops Act, 1912. There can be no doubt that it was the intention of the legislature to deal in the Act with retail establishments, and an hotel cannot be regarded as a retail establishment. The Act does undoubtedly refer to places where intoxicating liquors are sold, but only where their sale is the only business done. It can never have been intended that the term should apply

to a place where the main business was not the sale of intoxicating liquors, but the carrying on of a legitimate hotel business. We have been referred to *Savoy Hotel Co. v. L.C.C.* (1), in which it was held that the Savoy Hotel came within the definition of a "shop" in the Shop Hours Act, 1892. It is to be noticed, however, that the language of the definition section of the Act of 1892 is different from that of the definition section of the Act of 1912, and I do not think that there is anything in the decision of the case to compel us to hold that an hotel is a shop merely because it is a licensed house. As regards the four waiters, therefore, I think that the learned magistrate was right in his decision that these men were not shop assistants, and the appeal of the London County Council, as far as they are concerned, will be dismissed.

As to the other five servants, who were employed in the hotel kitchen, where food was prepared for consumption in the grill-room as well as in the hotel, the learned magistrate has held that these men were shop assistants, although they were not directly employed in serving customers. There is a finding that they were mainly employed in serving customers, within the principles laid down in *Melluish v. L.C.C.* (2) and *Prance v. L.C.C.* (3), and as the restaurant or grill-room is undoubtedly a shop, I think that the learned magistrate was right in convicting the Gordon Hotels, Ltd., as regards all these five men, with the exception of Groves. I think that it is for the tribunal of fact to say whether anything is done in connection with the serving of customers, and, if there is any evidence to permit of such a finding, we ought not to interfere with it. It is not possible to state exactly in what "serving of customers" consists. When considering these words in *Prance v. L.C.C.* (3), ROWLATT, J., said ([1915] 1 K.B. at p. 695):

"I incline to the opinion that it is a matter of degree, on which one has to be guided by common sense, and not really a question of law. Someone has to decide the question of degree, and I think that the tribunal of fact really ought to decide that, provided it does not go hopelessly wrong in the sense of deciding without any evidence in support of the decision."

There was evidence that four of the five were engaged in the preparation of food, but in the case of Groves there was no such evidence. The nature of his work is set out in the Case Stated. It was his business to obtain supplies, but he had nothing whatever to do with the preparation of the food which was served to the customers. In his case, therefore, I do not think that there was evidence upon which the learned magistrate could arrive at his decision. That being so, the conviction as far as Groves is concerned must be reversed, but as far as the other four are concerned I am not prepared to differ from the decision of the learned magistrate. I only desire to add that I fully appreciate the difficulty which exists when the court is confronted with the problem of deciding whether a particular person is or is not engaged in connection with the serving of customers within the meaning of the Act, and so does or does not fall within the definition of a shop assistant.

BRAY, J.—I agree. The first of these two appeals, that of the Gordon Hotels, Ltd., relates to five persons employed by the company at the First Avenue Hotel, and, with the exception of the man Groves, I think that the case is entirely covered by the decisions in *Melluish v. L.C.C.* (2) and *Prance v. L.C.C.* (3). I should not be prepared without further consideration to say that I agreed with everything that was said in the judgments in those two cases, but when it is borne in mind that judgments were delivered by five judges I think that we ought to follow them.

The four persons in addition to Groves were Chippett, Kendall, Gedge, and Perham. As to the first three of these four I think that they are covered by the decision in *Melluish v. L.C.C.* (2). I cannot distinguish them from the case of the kitchen-maid which was dealt with in that decision. They were all engaged in preparing the food which was to be supplied to the customers, and with regard to them I am of opinion that the decision of the learned magistrate was right. As

regards the fourth man, Perham, we are equally bound by the decision in *Prance v. L.C.C.* (3). In that case five operations were performed by a potman who was employed in a public-house, namely, putting up tables, cleaning knives, polishing measures, collecting glasses, and cleaning and tidying the premises. The court came to the conclusion that all these operations were the ordinary work of shop assistants, and, therefore, we are bound to say that Perham was a shop assistant. The case of Groves is, however, distinguishable. In *Melluish v. L.C.C.* (2) AVORY, J., said ([1914] 3 K.B. at p. 327):

"I agree that it would not be possible to hold that every person employed in any capacity on premises where a retail business is carried on is employed in connection with the serving of customers. I think there must be a direct connection with the serving of customers and not a remote and indirect connection."

I think that the work of Groves was something entirely apart from the serving of customers. He did nothing towards preparing the rooms, the food, or the utensils. He only ordered supplies and checked them on delivery. The first appeal therefore succeeds with regard to Groves and fails with regard to the four others. As to the second appeal, it is true that the dining-room and the smoking-room were places where non-residents might be served, but the learned magistrate has found that those rooms were part of the hotel proper. It was contended on behalf of the London County Council that the hotel is a shop within the meaning of the Act. In my opinion, it is not. The Act of 1912 deals with shop assistants who are employed in connection with the serving of customers. The people who stay in an hotel are not customers; they are guests or visitors. And since the residents or visitors at an hotel are not customers, there is no "serving of customers" in the sense in which that phrase is used in the Act. The four waiters, therefore, were not shop assistants, and the second appeal must be dismissed.

AVORY, J.—I agree with the judgments which have been delivered, though I must confess that I have had some doubt as to two points. In the case of the first appeal I think that we are bound by the decisions in *Melluish v. L.C.C.* (2) and *Prance v. L.C.C.* (3), as far as four of the five men are concerned, and therefore that the appeal must be dismissed as to them, except in the case of Groves. One of the doubts which I have felt is in respect of Perham, and, if it had not been for the judgment in *Prance v. L.C.C.* (3), I should have been prepared to hold that Perham was not a shop assistant within the Act. If I had been at liberty to do so, I should have said that Perham's employment was in remote and indirect connection with the serving of customers, but, in view of the decision in the case I have just mentioned, it is clear that Perham is just as much within the Act as the potman was in *Prance's Case* (3). I need not go into details as to Groves' employment. I think that it was of a character too remote to make him a person employed in connection with the serving of customers. I do not see how his position can be distinguished from that of a manager of an establishment whose business is to bring in food.

The second appeal has reference to the employment of waiters in a portion of the premises used almost exclusively by residents in the hotel, and the question for our determination is whether these waiters are shop assistants within the meaning of the Act. And here it is that my second doubt arises, a doubt which is much greater than the former. I confess that I find it exceedingly difficult for me to agree with that part of the judgments which have been delivered as to whether an hotel is a shop. We have been pressed by counsel for the London County Council with the decision in *Savoy Hotel Co. v. L.C.C.* (1) in which it was held that the Savoy Hotel, which is very far from being a public-house in the popular sense of that word, was a "shop" in accordance with the definition of a shop contained in s. 9 of the Shop Hours Act, 1892. If one applies the decision in that case to the present one, it seems to me to be by no means easy to hold

that some part of the First Avenue Hotel is not a shop within the meaning of the Act of 1912, and I can foresee great difficulties in the administration of the provisions of the Shops Act if it is left to the magistrate in each case to ascertain and to determine which part of an hotel is a shop and which part is not. But I am not disposed to differ from the result at which the rest of the court has arrived—namely, that the appeal in this case should be dismissed, especially, as has been pointed out, because the learned magistrate, without coming to any final decision whether the First Avenue Hotel was or was not a shop, was of opinion that there was no evidence which satisfied him that these four waiters were wholly or mainly employed in serving non-residents. I am prepared to assent to the statement that residents in an hotel are not customers in a shop. That is sufficient for my holding that the waiters were not shop assistants within s. 19 of the Act of 1912, and on that ground I am of opinion that this second appeal should be dismissed.

Solicitors: *Stanley, Woodhouse & Hedderwick; E. Tanner.*

[*Reported by J. A. SLATER, ESQ., Barrister-at-Law.*]

NYE v. NIBLETT AND OTHERS

[KING'S BENCH DIVISION (Darling, Avory and Sankey, JJ.), October 26, 1917]

[Reported [1918] 1 K.B. 23; 87 L.J.K.B. 590; 82 J.P. 57;
16 L.G.R. 57; 26 Cox, C.C. 113]

Animal—Malicious killing or wounding—Proof that animal “ordinarily kept for any domestic purpose”—Need of evidence of ownership—Malicious Damage Act, 1861 (24 & 25 Vict., c. 97), s. 41.

By s. 41 of the Malicious Damage Act, 1861, any person who unlawfully and maliciously kills, maims or wounds any animal “ordinarily kept in a state of confinement or for any domestic purpose” is liable to a penalty. In a prosecution under this section it is not necessary to prove that any particular animal is kept for such a purpose. It is sufficient to prove that the class of animal is ordinarily so kept, e.g., a cat, and evidence of ownership is not required to obtain a conviction.

Notes. As to killing or maiming animals, see 1 HALSBURY'S LAWS (3rd Edn.) 660; and for cases see 2 DIGEST (Repl.) 396 et seq. For the Malicious Damage Act, 1861, see 5 HALSBURY'S STATUTES (2nd Edn.) 750.

Cases referred to:

- (1) *Miles v. Hutchings*, [1903] 2 K.B. 714; 72 L.J.K.B. 775; 89 L.T. 420; 52 W.R. 284; 20 Cox, C.C. 555; 2 Digest (Repl.) 398, 687.
- (2) *Smith v. Williams* (1892), 56 J.P. 840; 9 T.L.R. 9; 37 Sol. Jo. 11; 2 Digest (Repl.) 399, 690.

Also referred to in argument:

R. v. Parry (1900), 35 L.Jo. 456; 2 Digest (Repl.) 397, 668.

Case Stated by justices for the county of Wilts sitting at Malmesbury.

An information was prepared on May 23, 1917, by the appellant, Henry Nye, an inspector in the employ of the Royal Society for the Prevention of Cruelty to Animals, under the Malicious Damage Act, 1861, s. 41, against the respondents, Godfrey Niblett, Alec Neal, and Victor Neal, for that they, the respondents, on May 11, 1917, at Sherston, in the said county, did unlawfully and maliciously kill certain animals, to wit two cats, the property of William Smith and Charles Curtis respectively, the same not being cattle, but being either the subject of larceny at common law or ordinarily kept for a domestic purpose.

Upon the hearing of the information evidence was given of a statement made to the police by the respondent Alec Neale. The statement was as follows :

"Between seven and eight o'clock on Friday evening last, May 11, 1917, I and my brother Victor Neal and Godfrey Niblett went to Vancellettes Farm, Willesley, and there saw a white cat in a hedge. All three of us threw stones at it, which made it run into the barn sixty or seventy yards away. We then all went into the barn. Niblett and myself followed into the barn, leaving my brother outside, and instead of seeing a white cat we saw a black one. My brother then came into the barn and said, 'I've been and killed the white cat.' The black cat then came towards us and we chased it out and round the barn and through the other door of the barn, when it went among some sacks of wheat. It came out from there and went into some straw, and Niblett went after it with a hurdle rail and tried to strike the cat, but couldn't. I picked up the prong and stuck it into the cat; one time entered the animal's neck. The cat lay down on the straw, and I picked it up with the prong and gave the cat to Niblett. While on the prong it was screaming, and my brother struck it on the head with the rail that Niblett first had, and killed the cat with it."

The justices asked the appellant if he had evidence of ownership to which he replied that his instructions were that it was not necessary for the owner to take proceedings and anyone could do so. No evidence was called on behalf of the prosecution to prove the ownership of the cats or to show that they were being kept for domestic purposes. The justices were of opinion that upon the true construction of s. 41 of the Malicious Damage Act, 1861, they were not entitled to convict the respondents without evidence as to the ownership of the cats at the time of the alleged offence and without evidence that the cats in question were at the time being kept for domestic purposes, and they were of opinion that there was in law no evidence before them either as to such ownership or as to the said cats being so kept, and they therefore dismissed the information.

By the Malicious Damage Act, 1861, s. 41 :

"Whoever shall unlawfully and maliciously kill, maim, or wound any dog, bird, beast, or other animal, not being cattle, but being either the subject of larceny at common law, or being ordinarily kept in a state of confinement or for any domestic purpose, shall, on conviction thereof before a justice of the peace,"

be liable to a penalty.

Stuart Bevan for the appellant.

The respondents did not appear.

DARLING, J.—In this case I think that the appeal should be allowed. The respondents were charged with killing two cats in circumstances of great cruelty, the charge being brought under s. 41 of the Malicious Damage Act, 1861. The magistrates declined to convict because they were of opinion that they were not entitled to convict without evidence of the ownership of the cats and without evidence that they were being kept for domestic purposes. In that the magistrates were wrong. I construe the section as meaning that a person commits the offence if he unlawfully and maliciously kills an animal, not being cattle, and not being the subject of larceny at common law, provided that it is an animal ordinarily kept in confinement or for a domestic purpose. If a person kills such an animal unlawfully and maliciously and the animal belongs to a class which is ordinarily kept in confinement or for a domestic purpose, the offence is committed. It need not be proved who owned the particular animal nor that the particular animal was kept in confinement or used for a domestic purpose. There was no evidence that these cats were individually wild cats or that they belonged to the class of wild cats. I think therefore that these cats were animals of the class ordinarily kept in confinement or for a domestic purpose, and the section applies. In the case of

such an animal as a cat it is not necessary to prove that it is ordinarily kept in confinement or for a domestic purpose. But the section seems to me to have a further meaning. It protects an animal which does not belong to a class ordinarily kept in confinement or for a domestic purpose, provided that the particular animal was ordinarily so kept. That view is confirmed by s. 21 of the Larceny Act, 1861, which provides that

"Whosoever shall steal any bird, beast, or other animal ordinarily kept in a state of confinement or for any domestic purpose, not being the subject of larceny at common law, or shall wilfully kill any such bird, beast, or animal, with intent to steal the same or any part thereof,"

shall be liable to a penalty. If someone had partridges or pheasants, which are not the subject of larceny at common law and are not ordinarily kept in confinement or for a domestic purpose, and if a person stole one of them which was actually kept in confinement or for a domestic purpose, the case would come within the Larceny Act, 1861, and by parity of reasoning the animal would be entitled to the protection given by s. 41 of the Malicious Damage Act, 1861. Anyone who stole that animal would clearly be guilty of larceny, and anyone who maliciously killed it would commit an offence against the Malicious Damage Act, 1861, and as it was always kept in confinement or for a domestic purpose it would be no defence that it did not belong to a class ordinarily so kept. If the animal belongs to a class ordinarily so kept, there is an offence. If it belongs to a class not ordinarily so kept, but is in the specific instance ordinarily so kept, there is likewise an offence. A case which has some bearing on this is *Miles v. Hutchings* (1). The headnote of that case is as follows ([1903] 2 K.B. 714):

"An information under the Malicious Damage Act, 1861, was laid against the appellant, a gamekeeper, for unlawfully and maliciously killing a dog; the dog was at the time near an aviary in which pheasants, the property of the appellant's master, were confined for breeding purposes. Held, that the test of the appellant's liability under the section was whether he acted under the bona fide belief that what he was doing was necessary for the protection of his master's property, and that it was the only way in which the property could be protected."

That decision gives an answer to a case that might be put. Suppose one were dealing with an animal which belonged to a class ordinarily kept in confinement or for a domestic purpose, but which was itself not so kept, as, for example, a wild cat, not a cat of the genus that has never been tamed, but a cat which had a domestic parentage and had relapsed into savagery, a person who killed it would be protected by the qualifying words "unlawfully and maliciously" if the killing of it was necessary for the protection of property or because it was trespassing, for in that case he would not kill it unlawfully. That view is confirmed by *Smith v. Williams* (2), of which the headnote is as follows (56 J.P. 840):

"S., the occupier of land sown with seed, shot two domestic fowls of W. which were trespassing, having got through the fence. S. had previously warned W. that unless the fowls were kept off he should kill them. Held, that S. could not be convicted under the Malicious Damage Act, 1861, s. 41, of unlawfully killing the fowl."

The application of that case plainly appears from the argument. Counsel for the appellant argued that the appellant was exercising his rights as occupier of the land in getting rid of the trespasses of animals, and that, whatever other remedies the owner of the animals trespassing might have, this proceeding for maliciously killing was not one of them. The court upheld that argument, though they did so with regret. There is therefore really no inconvenience in deciding this case as we are doing. A person may still kill animals such as those in question providing that he does not do so unlawfully and maliciously. It is not unlawful and malicious to kill them if they are trespassing, even though they are animals

ordinarily kept in confinement or for a domestic purpose, whether because they belong to a class ordinarily so kept or because individually they are ordinarily so kept.

AVORY, J.—I agree that the justices took a wrong view, but I confine my judgment to the facts of this case, although I do not dissent as to the general purview of the statute. The justices refused to convict on the ground that there was no evidence as to ownership and no evidence that the animals were being ordinarily kept in a state of confinement or for a domestic purpose. Neither of those conditions is necessary to satisfy the statute. As to these particular animals I prefer to base my judgment on this, that cats belong to a genus or class ordinarily kept for a domestic purpose. That is the usual description of cats. "Domestic cat" is a well-known expression. It is not necessary to prove that the particular cats were at the time being kept for a domestic purpose, although, in my opinion, there was in this case evidence from which the justices might have inferred that these particular cats were being kept for a domestic purpose. I agree that there was no need for evidence of ownership, and I think that probably the justices only meant that if there had been evidence of ownership it would have been evidence that these particular cats were being kept for a domestic purpose. The case will be remitted to the justices to determine whether the respondents unlawfully and maliciously killed these particular cats.

SANKEY, J.—I agree that the case must be sent back to the justices.

Appeal allowed and Case remitted.

Solicitor: *S. G. Polhill.*

[*Reported by J. F. WALKER, Esq., Barrister-at-Law.*]

R. v. HOME SECRETARY. Ex Parte DUC DE CHATEAU THIERRY

[COURT OF APPEAL (Swinfen Eady, Pickford and Bankes, L.JJ.), February 28, March 16, 1917]

[*Reported* [1917] 1 K.B. 922; 86 L.J.K.B. 923; 116 L.T. 226; 81 J.P. 125; 33 T.L.R. 264; 61 Sol. Jo. 367; 15 L.G.R. 351]

Alien—Deportation—Power of Home Secretary to make order—Absolute discretion—Power to order deportation to particular country.

A Secretary of State is not required to justify in a court of law his reasons for making an order for the deportation of an alien. The power given to the Secretary of State is quite unqualified. His discretion is absolute. The only ground on which, it would appear, a deportation order could be quashed by the court would be if it were disputed that the person sought to be deported was an alien and it was not proved that he was.

Per PICKFORD, L.J.: Even if an attempt were made to carry out a deportation order by illegal means the order would not be invalidated, though the person the subject of the order might have some other remedy.

The Secretary of State has no power to order the deportation of an alien to a particular country, but he may, if, in his judgment, it is proper to do so, on making a deportation order cause the alien to be placed on board a ship and detained on board that ship until the ship finally leaves the United Kingdom. By the selection of a ship the destination of the alien can be effectively controlled and he may be compelled to disembark in the country to which the government wish him to go.

Notes. The Aliens Orders mentioned in the judgments have been replaced by the Aliens Order, 1953, for which see 2 HALSBURY'S STATUTORY INSTRUMENTS.

Considered: *R. v. Chiswick Police Station Superintendent*, [1918] 1 K.B. 578. Applied: *R. v. Governor of Brixton Prison, and Secretary of State for Home Affairs, Ex parte Pawel Sliwa*, [1952] 1 All E.R. 187. Referred to: *R. v. Secretary of State for Foreign Affairs and Secretary of State for the Colonies, Ex parte Greenberg*, [1947] 2 All E.R. 550.

As to deportation of aliens, see 1 HALSBURY'S LAWS (3rd Edn.) 520-523; and for cases see 2 DIGEST 190-195. For Aliens Restriction Acts, 1914 and 1919, see 1 HALSBURY'S STATUTES (2nd Edn.) 691, 693.

Case referred to:

- (1) *A.-G. for Canada v. Cain*, [1906] A.C. 542; 75 L.J.P.C. 81; 95 L.T. 314; 22 T.L.R. 757, P.C.; 2 Digest (Repl.) 180, 99.

Also referred to in argument:

- Re Adam* (1837), 1 Moo.P.C.C. 460; 12 E.R. 889, P.C.; 2 Digest (Repl.) 196, 170. *R. v. Governor of Brixton Prison, Ex parte Sarno*, [1916] 2 K.B. 742; 86 L.J.K.B. 62; 115 L.T. 608; 80 J.P. 389; 32 T.L.R. 717; 14 L.G.R. 1060; 2 Digest (Repl.) 191, 143.

Appeal by the Home Secretary from an order of the Divisional Court making absolute a rule nisi for the quashing of an order for the deportation of the Duc de Chateau Thierry, the respondent to the present appeal.

The facts appear in the judgment of SWINFEN EADY, L.J.

The Attorney-General (Sir Frederick Smith, K.C.), Roche, K.C., and Branson for the Home Secretary.

Rawlinson, K.C., and Barrington-Ward for the respondent.

Cur. adv. vult.

Mar. 16, 1917. The following judgments were read.

SWINFEN EADY, L.J.—This is the appeal of the Home Secretary against an order of the King's Bench Division, which made absolute a rule for a certiorari to quash a deportation order. This deportation order is dated Nov. 3, 1916, and thereby in pursuance of the powers conferred by the Aliens Restriction Act, 1914, and art. 12 of the Aliens Restriction (Consolidation) Order, 1916 [see now art. 20 of Aliens Order, 1953], the Home Secretary ordered that Leon Joseph Armand Derais, alias Leon Armand Joseph de Rois-Bouillon, alias Duke of Chateau Thierry, an alien, should be deported from the United Kingdom.

The alien in question, the respondent to this appeal, was born at Havre, in the Republic of France, in 1875. About February, 1905, he left France and proceeded to Belgium, and early in 1907 he came to England, where he has since resided. That he is an alien is not disputed. In July last inquiry was made at the request of the French government as to the failure of the respondent (who is a Frenchman, within military age whether reckoned according to the French or the British standard) to discharge his military duties. The respondent claimed to be a political refugee, and inquiry was made of the French authorities to ascertain whether his claim was justified. These authorities dispute that he is a political refugee; they state that his return to France is sought in connection with his "irregular military situation," and for no other cause, and that he is not known to the French police for any other offence. An assurance has been given by the French government that the respondent, if returned to France, would be treated as a military absentee and not as liable to prosecution for any other offence. The respondent also alleges that he is medically unfit for military service. Two opportunities have been afforded him to satisfy the French authorities here in this respect, but he has declined to do so. Although he may be unfit for combatant service, he has made several attempts to obtain a commission in the British army,

A and, moreover, states in his affidavit that he is about to be appointed managing director of a new company; it is quite consistent with the evidence that he may be fit, not for a combatant position, but for certain kinds of military service, and may be able to render valuable assistance to the military authorities of his country. I am of opinion that the respondent has failed to establish that he is a political refugee, or that he is medically unfit to render to his native country any military service whatever.

B But, whether this be so or not, these considerations ought not to affect the judgment in the present case. These are matters to be brought before the Home Secretary when he is considering whether or not to make a deportation order, and they are matters which may properly affect his discretion, but his power to make a deportation order is not dependent in any way upon the absence of these or any similar circumstances. By art. 12 (1) of the Aliens Restriction Order, 1916, a Secretary of State may order the deportation of any alien. The respondent is an alien, and a Secretary of State has made an order for his deportation. It should, however, be stated that the Attorney-General on behalf of the government expressly stated that the executive had no intention whatever of taking advantage of their powers over aliens to deport. It will be remembered that under the Aliens Act, 1905 [repealed by Aliens Restriction (Amendment) Act, 1919], which confers power to prevent the landing in this country of undesirable immigrants, an exception is made in favour of an immigrant who proves that he is seeking admission to this country to avoid prosecution on political grounds or for an offence of a political character. Again, with regard to the expulsion of undesirable aliens, the same statute confers power on the Secretary of State to make (under certain specified circumstances) an expulsion order requiring an alien to leave the United Kingdom within a time fixed by the order. Such order may be made upon the happening of the events respectively mentioned in s. 3 of the Act, but s. 3 (1) (b) (ii) excludes from liability to expulsion such an alien as is there mentioned, who has been sentenced in a foreign country for a crime which is an offence of a political character. This statute gives effect to the policy of this country in affording shelter and protection to political refugees. The language of this statute is in marked contrast with the language of the Aliens Restriction Act, 1914. The latter Act contains none of the safeguards of the former Act, but in a time of great national danger confers wide powers upon a Secretary of State, leaving the exercise of those powers to his discretion, and for the proper exercise of which he is responsible to Parliament and the country.

G It is urged by the respondent that the executive government claims and intends to exercise over him, by virtue of the Act and order, an authority not thereby conferred. The government claim, not merely a right to deport the alien, but to select the country or place to which he is to be deported. The Divisional Court held that there was not any power under the statute or in the regulations to order the deportation of an alien to any particular country; that they must look behind the order; and, if the object and intention of the executive in making the order was to deport the alien to a particular foreign country, they must treat this matter as if the order did in effect state that the alien was to be deported to France. So regarding it, the court made absolute the rule for a certiorari to quash it. I am unable to follow this reasoning. If it were intended to do something illegal under a valid order, that would be good ground for restraining and preventing the illegal act, but not for quashing a valid order. A Secretary of State is not required to justify in a court of law his reasons for making a deportation order in the case of an alien. In the event of it being disputed that the subject of a deportation order is an alien, the matter must be determined by the court, and, unless it be proved that the person is an alien, the order must be quashed as made without jurisdiction, but I am not aware of any other ground upon which such an order can be quashed. Under these circumstances, the respondent being an alien, I am of opinion that the order of the King's Bench Division for the quashing of the deportation order was erroneous.

In strictness, this is sufficient to dispose of the appeal, but the Attorney-General stated that it was intended to convey the respondent to France, but that, before doing so, the government wished to give him every opportunity of testing in a court of law whether they had that power or not, and that they were holding their hands in the meantime. Whether a Secretary of State has this authority or not depends upon the true construction of the Aliens Restriction Act, 1914, and the Orders in Council made thereunder. This statute was passed the day after the commencement of the war between this country and Germany. It empowers His Majesty, by Order in Council, to impose restrictions on aliens at any time when a state of war exists between His Majesty and any foreign Power, or when it appears that an occasion of imminent national danger or great emergency has arisen. It enacts that provision may be made by the Order in Council for various specified matters. [His LORDSHIP read s. 1 (1) (b), (c), (h), (i) and (k), and continued:] I am of opinion that para. (c) alone does not extend to authorise an Order in Council for the deportation of aliens to any particular place, but merely to provide for their deportation from the United Kingdom, and the form of order adopted in the present case was the proper form of order—namely, that the respondent, “an alien, shall be deported from the United Kingdom.” The deportation order, however, compels the alien to leave the United Kingdom, which he can only do by embarking on a vessel, and paras. (b), (h), (i) and (k) of s. 1 (1) of the Act of 1914 authorise provisions in the Order in Council, whereby restrictions, conditions, and obligations may be imposed which effectively control the deported alien’s subsequent movements. The Aliens Restriction (Consolidation) Order, 1916, embodies the various Orders in Council made under the Aliens Restriction Act, 1914. Article 12 regulates the deportation of aliens. In my opinion, cl. 1 and cl. 2 of art. 12 are independent of each other, and the contention is not well founded that cl. 2 only becomes operative if and when an alien, ordered to be deported, omits to leave the United Kingdom after being allowed a reasonable time to do so. Where a Secretary of State makes a deportation order, he may (if, in his judgment, it is a proper case so to do) leave the alien at large, and free to leave the kingdom, upon complying with the other provisions of the order. If the alien fails to do so, he incurs the penalties provided by s. 1 (2) of the Act. On the other hand, a Secretary of State may (if, in his judgment, it is proper so to do), immediately upon making a deportation order, cause the alien to be detained and placed on board a ship, and detained on board that ship until the ship finally leaves the United Kingdom, when his right to detain the alien any longer ceases [see art. 21 of Aliens Order, 1953]. It is essential to give due effect to this provision that the Secretary of State should select and determine the ship upon which the alien is to be placed, and by thus selecting the ship the destination of the alien can be effectively controlled.

The conclusion at which I arrive is, that although the executive government has no power to order a deported alien to go to any particular place, yet by the authority given it to detain the alien and place him on board a ship, which I construe as meaning a ship which the government select, and detain him there until the ship finally leaves the United Kingdom, the result will be that the alien will be deported to the country to which that ship shall directly sail. After the ship finally leaves the United Kingdom the government cannot any longer detain him, but in most cases there would be practical difficulty in the alien leaving the ship before she makes the port to which she is bound. The appeal should be allowed and the order of the Divisional Court reversed, and the rule for a certiorari should be discharged.

PICKFORD, L.J.—The respondent in this appeal obtained a rule nisi to remove into the High Court of Justice, for the purpose of being quashed, an order made by the Secretary of State for the Home Department. The rule was made absolute by the King’s Bench Division, and the Secretary of State now appeals against that

decision. The respondent is a French subject of military age, who has been resident in this country for several years. He alleges that he left France in circumstances which constitute him a political refugee, and that he is medically unfit for military service. We were informed that there exists an agreement between this country and France by which this country undertakes to return to France subjects of that country who are of military age and liable to military service, and that it was by reason of that agreement that the Secretary of State made this order. It was also stated to us by the Attorney-General that it was the intention of the executive to return the respondent to France, and to require him not only to leave this country, but to return to his own.

The order on the face of it, however, is only an order that the respondent be deported, and if that be a valid order it cannot be quashed. Even if an attempt were made to carry it out by illegal means, the order would not be invalidated, though I do not say that in such a case there would be no remedy. The question, therefore, is whether the order is validly made under the Aliens Restriction Act, 1914, and the regulations made under that Act. The principal clauses relating to this matter are s. 1 (1) (c) of the Act and art. 12 of the regulations. I think the order is a perfectly good order. The power given to the Secretary of State is quite unqualified. If the person ordered to be deported be in fact an alien, the Secretary of State has an absolute discretion to order him to be deported, and I do not think that discretion can be questioned in a court of law. Assuming, therefore, that the respondent proved that he was a political refugee and unfit for military service, such facts would not affect the validity of the order, but would only be matters to be considered by the Secretary of State as affecting the exercise of his discretion.

It may be noticed that the Aliens Restriction Act, 1914, contains no provisions as to political refugees similar to those in the Aliens Act, 1905, but it was stated by the Attorney-General that the British government has no intention of enforcing the provisions of this Act of 1914 against such refugees. The order was, therefore, in my opinion, made by the Secretary of State in due exercise of his powers under the Act and regulations and cannot be quashed.

But the Attorney-General asked us to decide whether the Act and regulations give the Secretary of State power to order the deportation of an alien to a destination specified by him. If that means whether an order could be made under the powers of s. 1 (1) (c) and the regulations made under it to deport the alien to a specified place, I do not think it could. The power is merely to order deportation, and I do not agree that the meaning of the word "deport" involves carrying to a destination. It is, I think, quite satisfied by obliging the alien to go out of this country, leaving the destination to which he goes undetermined. I think the Divisional Court took the Attorney-General's submission as an agreement to treat the order as though for the purposes of this case it contained a direction to deport to a particular place, and, therefore, treated it as made in that form and so quashed it, but I cannot find any agreement that it should be so treated, and, therefore, I think it should not be quashed. The order is made under art. 12 which contains two subsections which I think are independent—that is, I do not think that sub-s. (2) only comes into force in case of failure to comply with sub-s. (1). The Secretary of State has two courses open to him. If he considers it safe to leave the alien at large, he may rest himself only on sub-s. (1), and then, it seems to me, the alien is at liberty to choose his ship and his destination. If, on the other hand, he considers it right that the alien should not be left at large, he may act under sub-s. (2) and detain him as therein provided. I think the wording of that subsection requires that the Secretary of State should have the choice of the ship upon which the alien is placed. When on board he remains in legal custody until the ship finally leaves the United Kingdom, and then the custody of and right to detain the alien ceases. It is quite possible that the result

of action under this provision may be that the deportee from the force of circumstances may be compelled to disembark in the country to which the government wish him to go. This question does not, however, arise upon the facts now before us, nor do the other points raised as to the practical effect of other of these regulations, and those made under the Defence of the Realm Act.

BANKES, L.J.—The Aliens Restriction Act, 1914, was passed, as its title implies, to enable His Majesty in time of war or imminent national danger or great emergency by Order in Council to impose restrictions on aliens, and to make such provisions as appear necessary or expedient for carrying such restrictions into effect. It received the Royal Assent on Aug. 5 of that year. [His LORDSHIP read s. 1 (1) and (2) of the Act, and continued:] The first Aliens Restriction Order made under the statute is dated Aug. 5, 1914. This order was subsequently revoked and the order of Sept. 9, 1914, was substituted for it. In each of these orders art. 12 is the one which deals with the deportation of aliens. The change of language in sub-s. (2) is significant. The first order ran:

“Where an alien is ordered to be deported under this order, he may, whilst awaiting the departure of the ship, be detained.”

The substituted order runs:

“Where an alien is ordered to be deported under this order, he may, until he can in the opinion of the Secretary of State be conveniently conveyed to and placed on board a ship about to leave the United Kingdom,”

be detained. The order of Sept. 9 has in its turn been revoked, and the order now in force is that of November, 1916, in which the language of art. 12 of the order of Sept. 9 is reproduced without any alteration material for consideration in this appeal. Article 12 (1) is quite general in its language, and it appears to me to offer no difficulties of construction. It applies to all aliens, whether alien enemies or alien friends. It confers upon the Secretary of State an unlimited discretion. He may order the deportation of any alien. It is impossible for any court of law to interfere with the exercise of that discretion, whether he exercises it because he considers the presence of an alien in this country undesirable on account of his character or antecedents, or because he considers it undesirable that he should remain in this country when his services are required in time of war by an allied country of which he is either a subject or a citizen. On Nov. 3, 1916, an order was made for the deportation of the respondent. It purports to be made by the then Secretary of State for the Home Department, under the powers of the Act of 1914 and art. 12 of the order of 1916. It orders that the respondent, under the name therein given, “an alien,” shall be deported from the United Kingdom. It is plain from the terms of the order that the Secretary of State in making the order was purporting to act under the powers conferred upon him by the Act and order mentioned in it, and under those powers only. It is immaterial, therefore, in my opinion, to consider what the inherent prerogative of the Crown may be in reference to the deportation of any person from the realm, or to consider whether the particular point which was discussed in the argument before this court is covered either by the passage from BLACKSTONE which was cited, or by the judgment in *A.-G. for Canada v. Cain* (1).

The only question recently raised by this appeal is whether the order of the Divisional Court quashing the order of deportation can be supported. In my opinion, it cannot. The respondent does not dispute that he is an alien—an alien friend, it is true, but none the less within the meaning of art. 12 of the order of 1916 an alien. The respondent has filed a long affidavit in which he sets up matters which may be material for the consideration of the Secretary of State in exercising his discretion, but which are wholly immaterial for our consideration when considering his jurisdiction. Upon the contents of the affidavit I will only

A make this one observation—namely, that the respondent appears to treat a fitness for military service and a fitness for combatant service as being the same thing, which they obviously are not. I see no ground whatever for saying that the deportation order was not properly and validly made.

B Strictly speaking, that ought to be an end of the case, but the court below was asked and this court is asked to express an opinion upon the contention put forward by the Attorney-General, that under art. 12 of the Aliens Restriction Order a Secretary of State has the right and the power not only to deport a person from this country, but to deport such person to some particular place or country. This proposition is stated in very wide terms, and covers not only the end to be attained, but the means of attaining it. In my opinion, that proposition is too widely stated, and the Divisional Court were quite right in refusing to accept it. The powers of the Secretary of State are clearly defined by the article, and they do not, in my opinion, justify the contention put forward by the Attorney-General in the very wide terms in which he formulated it. The first subsection of art. 12 deals with the making of the deportation order and with that alone. If the deportee leaves the country upon the making of the order, and before the Secretary of State takes further action, there is an end of the matter. What is to happen if the order is not complied with must be found elsewhere than in the first subsection. If it is intended to punish the individual for not complying with the order, the necessary machinery is to be found in s. 1 (2) of the Aliens Restriction Act, 1914. If it is intended to compel the individual to comply with the order, the necessary machinery is to be found in sub-s. (2) of art. 12. This subsection enables the Secretary of State to direct the detention of any person against whom an order of detention has been made from the moment the order is made until the ship upon which the deportee is placed "finally leaves the United Kingdom." Whenever that moment arrives the legal custody of the deportee ceases, and he is free to make such use of his liberty as he can. In the present case no information is given to the court as to the precise terms of any direction given by the Secretary of State under sub-s. (2) of art. 12. All we are told is that on Dec. 29, 1916, a letter was written from the Home Office to the respondent's solicitor informing him that the Secretary of State had instructed the Commissioner of Police to enforce the deportation order on Jan. 3 then next, and that at the request of the respondent's solicitor any proceedings under such direction were suspended pending these proceedings. Under these circumstances I am not prepared to express any opinion as to the legality or otherwise of the next step which the Secretary of State may be proposing to take, and I think it extremely undesirable that the court should be asked in questions of this importance to express an opinion upon a hypothetical state of facts. Having regard, however, to the fact that the Divisional Court dealt with this case in the way they did, I give it as my opinion that, having regard to the passport and permit regulations contained in reg. 14c of the Regulations for the Defence of the Realm and in art. 8 of the Aliens Restriction Order, 1916, and to the power of imposing restrictions and conditions upon aliens about to embark conferred by the Act of 1914, under which sub-s. (2) of art. 12 may be said to fall [see Aliens Order, 1953, arts. 1 to 12], the Secretary of State has the power to select the vessel on which the deportee is to be placed; but sub-s. (2) of art. 12 in terms provides that, assuming he has that power, the legal custody of the deportee comes to an end directly that vessel finally leaves the United Kingdom.

I It may well be that the deportee will be unable to leave the vessel until it arrives at its destination, and the result of the action of the Secretary of State may consequently be that the deportee will, from the necessities of the case, be obliged to disembark in the country to which it was desired that he should go, but this is not an absolute necessary consequence of the deportation order and the consequent direction of the Secretary of State made under sub-s. (2) of art. 12. The Divisional Court were apparently asked to give a decision upon the contention of the Attorney-General, and, as I have already stated, I think that they were right in refusing to accept it in its entirety, but I cannot agree with the reasons for their decision or

with their conclusion that, because they could not accept the Attorney-General's contention to the full, the deportation order should be quashed. In my opinion, the appeal succeeds.

Appeal allowed.

Solicitors: *Treasury Solicitor; H. Percy Becher.*

[Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.]

ROBERTS v. ROBERTS AND TEMPLE

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hill, J.), April 20, 30, 1917]

[Reported 117 L.T. 157; 33 T.L.R. 333; 61 Sol. Jo. 492]

Divorce—Adultery—Condonation—Intercourse by husband with wife with knowledge of her adultery—Intercourse induced by wife's false representation.

The fact that a husband has intercourse with his wife with knowledge that she has committed adultery is not conclusive, although it is very strong, evidence of condonation of the adultery. Where the husband is induced to have intercourse by the wife's fraudulent misrepresentation there is no condonation of the adultery.

On August 10, 1916, the husband to whom the wife had confessed committing adultery expressed his willingness to forgive the wife provided that she was not pregnant by reason of the adultery. On the same day the wife falsely assured the husband that she was not so pregnant and in consequence the husband expressed forgiveness and that night had intercourse with the wife. On a petition by the husband for divorce on the ground of the wife's adultery,

Held: on the facts there was no condonation by the husband of the wife's adultery and the husband was entitled to a decree nisi of divorce.

Notes. As to the duty of the court on the presentation of a petition for divorce, see now s. 4 of the Matrimonial Causes Act, 1950, which contains similar provisions to those in ss. 29, 30, 31 of the Matrimonial Causes Act, 1857.

Considered: *Cramp v. Cramp and Freeman*, [1920] All E.R. Rep. 164. Referred to: *Mummery v. Mummery*, [1942] 1 All E.R. 553; *Henderson v. Henderson and Crellin*, [1944] 1 All E.R. 44; *Tilley v. Tilley*, [1948] 2 All E.R. 1113; *Maslin v. Maslin*, [1952] 1 All E.R. 477; *Perry v. Perry*, [1952] 1 All E.R. 1076; *Benton v. Benton*, [1957] 3 All E.R. 544.

As to condonation, see 12 HALSBURY'S LAWS (3rd Edn.) 302 et seq.; and for cases see 27 DIGEST (Repl.) 396 et seq. For the Matrimonial Causes Act, 1950, s. 4, see 29 HALSBURY'S STATUTES (2nd Edn.) 394.

Cases referred to:

- (1) *Beeby v. Beeby* (1799), 1 Hag. Ecc. 789; 1 Hag. Con. 142, n.; 162 E.R. 755; 27 Digest (Repl.) 399, 3280.
- (2) *Bernstein v. Bernstein*, [1893] P. 292; 69 L.T. 513; sub nom. *Bernstein v. Bernstein, Turner and Sampson*, 63 L.J.P. 3; 9 T.L.R. 639; 37 Sol. Jo. 730; 6 R. 609, C.A.; 27 Digest (Repl.) 403, 3320.

Also referred to in argument:

- Moss v. Moss*, [1897] P. 263; 66 L.J.P. 154; 77 L.T. 220; 45 W.R. 635; 13 T.L.R. 459; 27 Digest (Repl.) 36, 131.
- Ellis v. Ellis and Smith* (1865), 4 Sw. & Tr. 154; 34 L.J.P.M. & A. 100; 13 L.T. 211; 11 Jur.N.S. 610; 13 W.R. 964; 164 E.R. 1475; 27 Digest (Repl.) 402, 3315.

A *R. v. Clarence* (1888), 22 Q.B.D. 23; 58 L.J.M.C. 10; 59 L.T. 780; 53 J.P. 149; 37 W.R. 166; 5 T.L.R. 61; 16 Cox, C.C. 511, C.C.R.; 15 Digest (Repl.) 986, 9646.

Petition by the husband for divorce, dated Oct. 28, 1916, on the ground of the wife's adultery with the co-respondent. The facts appear in the judgment.

B *Bayford* for the husband.

D. Cotes-Freedy (with him *B. O'Malley*) for the wife.

The co-respondent did not appear.

Cur. adv. vult.

C April 30, 1917. **HILL, J.**—The husband petitions for divorce on the ground of the wife's adultery in June, 1916, with the co-respondent, a man named Temple, said to be a soldier in the Australian Expeditionary Force. The co-respondent did not enter an appearance. The wife put in an answer denying the adultery and pleading condonation. At the hearing the adultery was not denied. The evidence for the husband established beyond all doubt that the wife and the co-respondent stayed together as man and wife, occupying the same bedroom, from a Sunday till the following Saturday in June, 1916, in lodgings which the co-respondent had taken at a house in Sheerness. According to the wife's confession there had been adultery before this, during one night in a London hotel. I find the adultery alleged in the petition proved. Was it condoned?

D Counsel who appeared for the wife did not put her into the box, but relied upon the admitted facts of the husband's case, and submitted that there was such condonation of the adultery charged as was an absolute bar to the husband's right
E of a dissolution of the marriage on the ground of that adultery. Now, there is no question that, after the adultery charged and after a confession by the wife of adultery with the co-respondent, the husband did tell his wife he forgave her and had intercourse with her at the Charing Cross Hotel. Counsel for the wife says that is conclusive; the husband, with knowledge of adultery with the co-respondent, forgave his wife and slept with her. Counsel for the husband says that in the
F circumstances of this case there was no real forgiveness, but only the appearance of forgiveness, and that the husband, having been tricked into forgiveness and cohabitation for one night by lies told to him by the wife in order to induce him to forgive her and spend the night with her, cannot properly be held to have condoned the adultery.

G The parties were married in 1913 and at the outbreak of war were living at Caversham. There was one child born in 1914. In August, 1914, the husband left for France on service as an officer in the Army Service Corps; and except for occasional leaves which he spent in England, and for the occasions in July and August, 1916, hereafter mentioned, was absent on service until September, 1916, when he returned home invalided. The wife in the spring of 1915 went to live at
H Weston-super-Mare; early in June, 1916, she left there and after spending a night with the co-respondent at an hotel in London, went to Sheerness and lived with the co-respondent as man and wife, in lodgings at a house in Invicta Road, from a Sunday till the following Saturday. Three weeks later the wife went back to Sheerness and lived for a time at a house in Unity Street. While at Weston the wife wrote to the husband a letter undated, but with the postmark of June 22, in which, after saying she "had heard a whisper that father is writing to you," she said: "I went to Sheerness to stay for a week with an old girl pal of mine, who is just married recently and expecting to become a mother." Except for the words "I went to Sheerness," that was a lie. When the wife left Weston the
I second time, the husband, in order to learn where she was, stopped payment through his bankers of her allowance, and that produced a letter from the wife, written from No. 11, Unity Street, Sheerness, which was followed by another letter, dated July 19, 1916, in which the wife says:

"I have thought long past of the unhappy relations existing between us, and which are quite the reverse of what they should be as between man and wife. I have therefore very definitely arrived at the conclusion that it will be the best for us both if you arrange to divorce me at once. I must be free, as I cannot possibly continue in this false position. I have met a man of whom I am certain I love him and he does me, and, moreover, intends to marry me as soon as it can be legally arranged."

The husband says the marriage had been a happy one, and that there is no truth in the allegation of unhappy relations. I have no reason to doubt his word. On receiving this letter the husband wrote on July 22 saying it was a great shock and asking specific questions: "Are you living with this man now?" "Have you lived with him at all?" "Are you expecting a baby?" "What is his name?" The husband then got leave, returned to England on July 26, went to Sheerness, did not find his wife, but, from information he received, traced her to London to No. 27, St. George's Square. There was a man named Valency there, also a soldier. The wife and Valency said that Valency was the man referred to in the letter, but said no misconduct had taken place between them. The wife agreed to have no further communication with Valency, and the husband took her away. The husband and wife spent two nights in London. The husband then went to Weston, and the wife went to Woolwich, where she had obtained a place in the canteen. There is no charge in the petition of adultery with Valency. The husband being ill got an extension of leave, and was due to leave for France on Aug. 11. While he was at Weston he received information which led him on Aug. 10 to advertise as to where Mr. and Mrs. Temple stayed in June at Sheerness, and to write to the wife saying he had heard her name coupled with a man named Temple. He also received letters from the wife. In one of Aug. 4 she said, "I am coming to London to see you off, and I wish to spend the evening and night of the last day you are on leave with you." The husband arranged to meet the wife, and on Aug. 10 they met at Charing Cross Station. The wife said she had something very important to say. They went to Hampstead Heath. The wife said that she had misconducted herself with Temple, that it was more or less under compulsion, that at an hotel in London it arose from her missing a train and Temple taking a room for her, and taking it in their names as man and wife; and that at Sheerness it had happened once only at her girl friend's house, when Temple called, and the girl friend was upstairs. Pressed by the husband on the question whether she was pregnant as the result of the adultery, the wife positively denied it, and said Temple had taken precautions against such a result. I find the following facts: (i) The wife was in fact on Aug. 10, 1916, pregnant of a child which was born on Mar. 14, 1917. (ii) The husband was not the father of that child, which was a nine months' child and was conceived in June, 1916, when the husband was in France, and was not the result of the intercourse of the husband and wife either at the end of July or on Aug. 10, 1916. (iii) On and for some weeks before Aug. 10, 1916, the wife knew she was pregnant. (iv) The husband was willing to forgive the wife the adultery to which she had confessed, provided the wife was not by reason of the adultery with child, and was not willing to forgive her if she was with child. (v) The husband asked the wife whether she was, by reason of her adultery, with child, and asked in such a way as to make it clear to the wife that his willingness to forgive depended upon her not being with child. (vi) The wife asserted positively that she was not with child, knowing that such assertion was false. (vii) The wife so lied in order to induce the husband to forgive her. (viii) The husband, believing the wife's assertion, and in consequence of that belief, expressed his forgiveness and slept with his wife the same night. (ix) The husband left for France on Aug. 11, 1916, and first heard of his wife's pregnancy after his return invalided in September, 1916. (x) The husband filed his petition on Oct. 28, 1916.

A In these circumstances it is said that there is an absolute bar to the dissolution of the marriage on the ground of the wife's adultery; that the adultery had been condoned by forgiveness, made complete by the resumption of marital intercourse; and that, the adultery complained of having been condoned, it is immaterial how the forgiveness was induced. I do not agree that I am driven to that result in the present case. The first observation I desire to make is that, in my view, the fact that the husband has had intercourse with a delinquent wife is not absolutely conclusive and does not entirely shut out the inquiry whether there has been that forgiveness and blotting out of the offence which amounts to condonation. Condonation is a question of fact. It may be express; it may be implied. The fact that a husband has had intercourse with a wife known to be delinquent is very strong evidence of complete forgiveness of the known offence, for, as LORD STOWELL said in *Beeby v. Beeby* (1) (1 Hag. Ecc. at p. 793), "it is to be presumed he would not take her to his bed again unless he had forgiven her." But if to an express forgiveness it be an answer to say that it was obtained by fraud of one of the parties, that answer must equally be open to a forgiveness implied from the fact of cohabitation. If fraud inducing the forgiveness is irrelevant in the one case, it must be irrelevant in the other. I hold, therefore, that the question I have to ask myself is this: To the apparent forgiveness proved—apparent both by words and the act of intercourse—is it an answer to say that the whole of that forgiveness was obtained by the fraudulent misrepresentations made by the wife for the purpose of obtaining that forgiveness? It was so obtained—without the fraud it never would have been obtained. The fraud was in reference to matters which the husband had shown to the wife to be material to the question whether he should blot out her offence. The wife knowing that, and knowing that she was lying, lied in order to induce him to blot out her offence. I have been referred to a number of cases and especially to the judgment of the Court of Appeal in *Bernstein v. Bernstein* (2). Counsel could not refer me to any authority in which the point before me had been directly decided. The conclusion of law at which I have arrived is that, upon the facts as I have found them, there was no real condonation —there was an appearance but not the reality of forgiveness. The offence appeared to be, but was not in fact blotted out. The husband was cheated by the wife into his words and acts of Aug. 10, 1916. To permit the wife to rely upon these words and acts in answer to this petition would be to enable her to escape from the consequences of her own misconduct by means of her own fraud. I therefore hold that the answer is not made out, and I pronounce a decree nisi for the dissolution of the marriage, with the custody to the husband of the child of the marriage.

Solicitors: *Darley, Cumberland & Co.*; *T. Duerdin Dutton & Co.*

[Reported by D. COTES-PREEDY, Esq., Barrister-at-Law.]

Re SAILLARD. PRATT v. GAMBLE

[COURT OF APPEAL (Swinfen Eady, Bankes and Warrington, L.J.J.), July 18, 19, 1917]

[Reported [1917] 2 Ch. 401; 86 L.J.Ch. 749; 117 L.T. 545]

Income Tax—Annuity “free of all duties”—Liability to deduction of tax.

By his will the testator directed that £200 per annum “free of all duties” should be paid out of the income of his trust estate to any trustee who should be a solicitor for his trouble in acting as trustee.

Held: income tax was not covered by the words “free of all duties,” and, therefore, the annuity was payable subject to the deduction of tax.

Decision of NEVILLE, J., [1917] 2 Ch. 140, affirmed.

Notes. Applied: *Re Loveless, Farrer v. Loveless*, [1918-19] All E.R. Rep. 403. Considered: *Re Shrewsbury Estate Acts, Countess of Shrewsbury v. Earl of Shrewsbury*, [1923] All E.R. Rep. 666. Referred to: *Re Crosse, Oldham v. Crosse*, [1920] 1 Ch. 240; *Re Wells' Will Trusts, Public Trustee v. Wells*, [1940] 2 All E.R. 68; *Re Hirst, Public Trustee v. Hirst*, [1941] 3 All E.R. 466; *Re Skinner, Milbourne v. Skinner*, [1942] 1 All E.R. 32.

As to the effect of particular expressions as indicating that an annuity is free of tax, see 32 HALSBURY'S LAWS (3rd Edn.) 573, para. 987; and for cases see 39 DIGEST 166 et seq.

Cases referred to:

(1) *Re Bannerman's Estate, Bannerman v. Young* (1882), 21 Ch.D. 105; 51 L.J.Ch. 449; 39 Digest 167, 583.

(2) *Turner v. Mullineux* (1861), 1 John. & H. 334; 70 E.R. 775; 39 Digest 167, 579.

Also referred to in argument:

Wall v. Wall (1847), 15 Sim. 513; 16 L.J.Ch. 305; 11 Jur. 403; 60 E.R. 718; 39 Digest 166, 574.

Appeal from a decision of NEVILLE, J. ([1917] 2 Ch. 140).

By his will, dated Dec. 2, 1915, the testator, Philip F. R. Saillard, appointed his wife, Emily, his daughter Emily Pratt, Algernon Edward Sydney, solicitor, and his partner, Henry Gilbert Cubitt, executors and trustees, and, after bequeathing certain specific legacies and numerous annuities “free of all duties,” directed his trustees to hold his real and personal estate on the trusts therein declared. Clause 25 of the will provided as follows:

“In addition to the ordinary power of indemnity and right to reimbursement given by law to trustees I direct that there shall be paid a sum of two hundred pounds per annum free of all duties to the said Algernon Edward Sydney or any other trustee of this my will who shall be a solicitor as from my death out of the income for the time being of the trust premises for and in respect of his trouble in acting as a trustee of this my will so long as he shall continue to act as such trustee. And also in addition that the said Algernon Edward Sydney and every other trustee of this my will who shall be a solicitor may act as solicitor to my estate and shall be entitled to charge and shall be paid all usual professional or other charges for any business done by him or his firm in the premises whether in the ordinary course of his profession or not and although not of a nature requiring the employment of a solicitor in the same manner as if he had not been an executor or trustee of this my will or any codicil hereto and for the time which he shall necessarily or properly employ in the execution of his duties as an executor or trustee.”

By a codicil made on Dec. 21, 1915, to his will, the testator provided that if Algernon Edward Sydney should die in his lifetime, or renounce probate, or decline

A to act as trustee, John Gamble, solicitor, should be appointed an executor or trustee in his place.

The testator died on Feb. 15, 1916, and his will with the codicil thereto was proved on May 2, 1916, by the plaintiffs Emily Pratt and Henry Gilbert Cubitt and the defendant John Gamble, the executors. Algernon Edward Sydney survived the testator, and by an instrument dated Mar. 1, 1916, renounced probate of the will and codicil, and by an instrument dated Mar. 6, 1916, Emily Saillard, the widow of the testator, also renounced probate. On Feb. 15, 1917, the plaintiffs, as two of the trustees of the will, signed a cheque for £150 in favour of the defendant, John Gamble, purporting to be the amount payable to him under the direction contained in cl. 25 of the will for the year which ended on that day, being £200 less income tax. John Gamble objected to the deduction made for income tax, and it was then arranged that he should accept the £150 as a payment on account of the £200, and be paid the balance if and when it was ascertained that such deduction for income tax ought not to have been made. The plaintiffs took out a summons on Mar. 16, 1917, to determine whether any and if so what income tax should be deducted on payment of the sum of £200, payable on Feb. 15, 1917, to John Gamble out of the income for the time being of the trust estate for and in respect of his trouble in acting as a trustee of the will during the year which ended on that day. The summons was adjourned into court, and came on to be heard on June 5, 1917, before NEVILLE, J., who held that the £200 a year was given subject to income tax. John Gamble now appealed from that decision.

J. F. Carr for the defendant, John Gamble.

R. Wright Taylor for the infants entitled to the residuary estate.

E Owen Thompson for the trustees other than John Gamble.

SWINFEN EADY, L.J., read cl. 25 of the will, referred to the codicil and the citation of probate, and continued: The question raised by this appeal is whether Mr. Gamble takes the annual sum of £200 free of income tax. In other words, whether the gift comprised in the will is a gift not only of the sum of £200 per annum, but of a sum equal to the income tax on the amount, so that he may receive £200 per annum, the income tax in respect of that annuity being paid out of the estate. NEVILLE, J., has decided that Mr. Gamble must bear his own income tax, and it is against that decision that the present appeal is brought. It was no doubt at one time thought that a testator could not by will give interests that would be free of income tax, and it was thought that a disposition of that sort would be contrary to the provisions of the Income Tax Acts. That notion has now been held to be entirely erroneous, and it is simply a matter of construction of the will whether the testator has given the annuity together with a sum equal to the income tax to the annuitant so that the annuitant may receive the annuity free of income tax, or whether he has simply given an annuity and left the annuitant to bear his own income tax. That is entirely a question of construction. In *Re Bannerman's Estate*, *Bannerman v. Young* (1), HALL, V.-C., said (21 Ch.D. at p. 108):

I "The rule was after all this [and he deduces this rule as the result of the authorities to which he refers]—Whether or not an annuity should be free from any deduction for income tax must depend upon the meaning of the words used by the testator, i.e., if upon the true construction of the words the court considered that it was intended by the testator that the annuitant should have the specified annuity without the tax being first deducted, there was no rule of law to prevent effect being given to that intention. The question, therefore, in every case is one of construction of the language of the will."

Numerous cases have been decided upon words in wills as to what and what is not sufficient to pass an annuity free of income tax. It has been decided that if the annuity is directed to be payable without any deduction whatever, or if the words were a clear yearly sum free from all deductions and abatement whatsoever, such a gift in those terms is not sufficient to give to the legatee also the income tax, but

he must bear his own income tax. On the other hand, it has been determined more than once that if a testator uses language in his will which shows that when he uses the word "deductions" he intends to include income tax as a deduction, then the gift will be free of income tax. For example, in *Turner v. Mullineux* (2), where there was a gift to a widow of an annuity out of rents and profits free from income tax or any other deduction, so that the testator showed that he treated, for the purpose of his will, income tax as a deduction, and in the latter part of the will there were gifts to daughters of other annuities free from all deductions, and it was held that all the annuities were free from income tax. That was because the testator had shown on the face of the will that the meaning he attached to the word "deductions" in his will extended to and included income tax.

In the present case we have the words "free of all duties." In my opinion, that expression does not extend to and include income tax. What the testator gives to the annuitant is this annual sum free of all duties in the sense and meaning of all death duties—that is to say, all duties that are payable by reason of this beneficial disposition that he makes of some part of his property. But the annuitant taking an annuity free of all duties is not entitled to claim also the income tax upon it. He must pay his own income tax. For these reasons, I am of opinion that the judgment of the court below was right and the appeal fails and must be dismissed with costs.

BANKES, L.J.—I agree.

WARRINGTON, L.J.—I also agree. The question is purely one of construction as to what is meant in this will of the testator by the gift of an annuity "free of all duties." That is all we have to determine. The testator uses the same expression wherever he desires to make a bequest of whatsoever nature free from duties. He gives in the early part of his will many legacies, all of which are given "free of all duties." There can be no question as to what is meant there. But in cl. 5, for example, he gives a number of annuities "free of all duties." If the present appellant is right, all those annuities are payable free of income tax. It does not rest there, because in the trusts of the proceeds of sale and conversion of his residuary estate he directs that the trustees are to pay his funeral and testamentary expenses and debts—"and the legacies bequeathed by this my will or any codicil hereto, and make provision for the payment of any annuity so bequeathed, and pay the debts on any legacies or annuities bequeathed by this my will or by any codicil free of duties"—how can the trustees out of the proceeds of sale and conversion pay the income tax on these annuities? It is quite impossible. I need not read the many places in which he uses the same expression. I only point out that in dealing with the proceeds of the residue he directs annuities to be paid to his wife and to his children, in every case using the same expression—"free of all duties." We have to construe this expression as used in this will; and, when a testator, sitting down to make his will, gives a legacy, whether it is a legacy of a capital sum or an annual sum, and says it is to be "free of all duties," what does he mean? He only means those duties which, if he did not use that expression, would be payable because it is a gift by will. With all respect, it seems to me idle to point out that in the Income Tax Acts it is described as a "duty." Of course, it is a duty in a sense; so is the customs duty and taxes imposed on imports. The question which we have to determine is what the ordinary testator means by "duties." Can it be supposed for a moment that an ordinary person ever speaks of income tax as income duty? For these reasons, it seems to me that, on the construction of this will, it is perfectly plain that what the testator meant by the word "duties" is what I have said—namely, those duties that would otherwise be payable because the gift is one by will.

Appeal dismissed.

Solicitors: *J. Gamble; Nye, Morcton & Clowes.*

[Reported by *E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

MAINE SPINNING CO. v. SUTCLIFFE & CO.

[KING'S BENCH DIVISION (Bailhache, J.), December 18, 1917]

[Reported 87 L.J.K.B. 382; 118 L.T. 351; 34 T.L.R. 154]

Sale of Goods—Contract—F.o.b. contract—Place of delivery—Condition that delivery to be made on board ship for benefit of both parties to contract—One party to contract not entitled to waive condition without consent of other party.

By a contract made in January, 1915, sellers in England sold to buyers, a company in America, 100,000 pounds of wool subject to removal of the war-time embargo on the export of wool then existing, and on the term "delivery Liverpool." The embargo having been lifted, the sellers, though not obliged to do so, agreed to get the licences then necessary to export wool to America, but, although they did their best to obtain the licences for the whole amount of wool, they succeeded in getting an export licence for only 25,000 pounds. To meet this difficulty the buyers offered to take delivery of the goods at the railhead at Liverpool before the goods were put on board ship, but the sellers insisted on making delivery on board, and in consequence they were able to deliver only the 25,000 pounds for which there was an export licence. In an action by the buyers for damages for breach of contract to deliver 100,000 pounds of wool, the trial judge found that, on the true construction of the contract, "delivery Liverpool" meant delivery f.o.b. Liverpool.

Held: the condition in an f.o.b. contract that the place of delivery is on board ship was included for the benefit of both parties to the contract and not solely for the benefit of the buyer, and so the condition could not be waived by one party without the consent of the other; in the present case, therefore, the sellers were entitled to insist on making delivery on board ship and the buyers were bound to accept delivery there; and since the sellers were excused from delivering the 75,000 pounds by the failure to get a licence, the action failed.

Notes. Referred to: *Wilson v. Wright*, [1937] 4 All E.R. 371; *Fibrosa Société Anonyme v. Fairbairn Lawson Combe Barbour, Ltd.*, [1941] 2 All E.R. 300.

As to shipment under an f.o.b. contract, see 34 HALSBURY'S LAWS (3rd Edn.) 177, para. 304. For cases on the place of delivery, see 39 DIGEST 546.

Cases referred to:

(1) *Sailing Ship Blairmore Co., Ltd. v. Macredie*, [1898] A.C. 593; 79 L.T. 217; 14 T.L.R. 513; 8 Asp.M.L.C. 429; 3 Com. Cas. 241; 24 R. 893; sub nom.

The Blairmore, 67 L.J.P.C. 96, H.L.; 12 Digest (Repl.) 340, 2636.

(2) *Wackerbath v. Masson* (1812), 3 Camp. 270; 170 F.R. 1378, N.P.; 39 Digest 555, 1631.

Action in the Commercial List tried by BAILHACHE, J.

The plaintiffs claimed damages for breach of contract to deliver 100,000 lb. of merino wool sold by the defendants, who were wool merchants in Halifax, England. The plaintiffs, the Maine Spinning Co., were manufacturers carrying on business in Boston, Massachusetts, U.S.A. Of the 100,000 lb. of wool sold, 25,000 lb. and no more were delivered. The plaintiffs sued in respect of the balance of 75,000 lb. The sale note was in these terms:

"Sold to Messrs. the Maine Spinning Co., 185, Summer Street, Boston, Mass., 100,000 lb. of merino wool at 27½d. per lb. This order is taken subject to the embargo being removed and your affidavits being accepted. Terms: Sixty days, London bank credit Bradford. Conditioning house certificate. Duty unpaid. Delivery Liverpool, England, 15,000 lb. weekly, commencing March."

The plaintiffs appointed the defendants their agents for getting licences for the export of wool to America. At the time the contract was made there was a general prohibition of the export of wool in existence, and this was known to both parties. But the British Government had so far removed the embargo as to allow shipments to approved persons under licences. The defendants proposed to take steps to get licences, and they got a licence for 25,000 lb., but failed to get any further licence. The plaintiffs, in consequence of the difficulty with regard to licences, undertook to accept delivery at Liverpool before the goods were put on board ship.

Schwabe, K.C., and F. T. Barrington-Ward for the plaintiffs.

Le Quesne (R. A. Wright, K.C., with him) for the defendants.

BAILHACHE, J., referred to the terms of the contract and continued: The contract, it is to be observed, is subject to the embargo being removed, and that requires a little explanation, although not very much turns upon it in this particular case. There was existing at this time an embargo against the exportation of wool from this country, which at first had been absolute; but by the beginning of 1915, according to the evidence of an experienced gentleman in the trade, Mr. Francis Willey, the embargo had been lifted in that licences were being freely given to exporters in this country to export, particularly to the United States of America. Under the contract, inasmuch as the wool was for export, and delivery was at Liverpool, it clearly lay upon the plaintiffs to procure the licences required for the export of their wool, but by some arrangement, not appearing clearly in the letters which no doubt was due to business convenience rather than to any agreement between the parties inasmuch as the defendants were in this country and the plaintiffs were in America, the defendants in fact took steps to get these licences although they were under no obligation to do so. At first I was under the impression that one part of the case was that the defendants, in having undertaken this duty, were slack in the matter of getting these licences, and have not done their best to procure them. But it appears that this is not a point which is relied upon; it is a point which could not be relied upon by reason of certain admissions which were made upon an interlocutory application during the course of the proceedings. It being the fact, therefore, according to Mr. Willey, that licences were still necessary, and it not being now contended that the defendants did not do their best to obtain the licences, the fact that they failed to obtain licences is a sufficient answer to their failure to make deliveries under this contract subject to one point, which is the point on which counsel for the plaintiffs has fought the case.

Counsel for the plaintiffs calls attention to the fact that the contract provides for, "delivery Liverpool," and he says that his clients, the plaintiffs, were always ready and willing to take delivery in Liverpool, and, inasmuch as they were ready and willing to take delivery in Liverpool, whether they could get the goods to the United States or not was a matter for them and did not concern the defendants who were bound to hand over the goods in Liverpool. Delivery in Liverpool is to some extent ambiguous. When one considers that the wool was being bought for export to the plaintiffs it is easy to come to the conclusion that "delivery Liverpool" did not mean "delivery on rail Liverpool," but meant delivery in the way in which goods are delivered in Liverpool when they are delivered for export at Liverpool, that is to say, "delivery f.o.b. Liverpool," and if there is any ambiguity in "delivery Liverpool" I think I am fully entitled to look at the cables and letters which passed between the parties at the time the arrangement was made. Without those cables and letters I should have come to the conclusion that the true construction of the words "delivery Liverpool" meant "delivery f.o.b. Liverpool." If I look at the cables and letters leading up to and immediately after this contract,

A they state in the most express terms that the price was 27½d. a pound, and that the contract was f.o.b. Liverpool. Counsel for the plaintiffs, although he contests that, says, even if that be so, it is open to one of the parties to the contract—the plaintiffs in this case—to waive “f.o.b. Liverpool” and to take delivery of these goods short of Liverpool, or at Liverpool off rail instead of on board ship. He might have taken delivery at Bradford, the place where the goods were being prepared and combed for fulfilment of this contract, but in my opinion that is a mistaken view of the law. It is quite true, of course, that where a condition in a contract is wholly for the benefit of, and entirely for the benefit of, one of the parties to the contract, such a condition may be waived by the person for whose benefit, entirely and solely, it was inserted in the contract; but where one of the terms of the contract is the mode of delivery, it is not a condition which the other party may waive, but it is a part of the contract which has to be fulfilled by the seller making delivery at that particular place and the buyer receiving delivery there, and it is not a condition which is entirely for the benefit of either party to the contract, and neither party can waive it without the consent of the other. Of course, if they both agreed to waive it there is an end of the matter, but either party is entitled to insist upon making or receiving delivery in strict accordance with the terms of the contract.

D The best statement I know of the law in this respect is contained in a very short sentence in a judgment of LORD WATSON in his speech in the House of Lords in *Sailing Ship Blairmore Co., Ltd. v. Macredie* (1) ([1898] A.C. at p. 607). That case was a different case from this. The sailing ship *Blairmore* had gone to the bottom of the sea, and she was insured against a total loss. It would have cost a great deal more than she was worth to bring her up to the surface and repair her, but if she had been brought to the surface she was not so far damaged but that the repairs would have come to considerably less than she was worth. If, therefore, she could have been got up to the surface without expense to the owner, she could have been repaired at a sum which would not have left her a constructive total loss, and in that case the underwriters would not be liable. The underwriters therefore subscribed between themselves a sufficient sum of money to raise the ship, and, having got her to the surface, said to the owners: “There is the ship. Go and repair her. We have got her to the surface, and she can be repaired at an expense very much less than her value when repaired. She is no longer a constructive total loss, and we are no longer liable to pay on our policy.” It was held that the underwriters were not entitled to defeat their contract by spending a considerable sum of money in raising the *Blairmore* from the bottom of the sea, and what LORD WATSON says is this:

“The rule of law applicable to contracts is that neither of the parties can by his own act or default defeat the obligations which he has undertaken to fulfil.”

H That is the rule of law which I must apply in this case. I have instanced *Sailing Ship Blairmore Co., Ltd. v. Macredie* (1), which is a case not at all analogous to this; but counsel for the defendants has referred me to *Wackerbath v. Masson* (2). The headnote is this:

I “Where, in a contract for the sale of sugar, there is the following term, ‘free on board a foreign ship,’ the seller is not bound to deliver it into the hands of the purchaser, or to transfer it into his name in the books of the warehouse where it lies, but only to put it on board a foreign ship, which it is the duty of the purchaser to name.”

That is a decision of LORD ELLENBOROUGH as long ago as 1812. I was not aware of that decision; but I was quite prepared without it, applying the rule laid down by LORD WATSON, to say that in this case the plaintiffs were not entitled to demand delivery of this wool anywhere but on board ship at Liverpool. This being my

view of the law, and that being the only point left in this case, my judgment is for the defendants with costs.

Judgment for defendants.

Solicitors: *Paines, Blythe & Huxtable; Whitfield, Byrne & Dean, for Hirst, Whitley & Akeroyd, Halifax.*

[*Reported by T. W. MORGAN, Esq., Barrister-at-Law.*]

HARRISONS AND CROSSFIELD, LTD. v. LONDON AND NORTH-WESTERN RAILWAY CO.

[KING'S BENCH DIVISION (Rowlatt, J.), July 6, 9, 12, 1917]

[Reported [1917] 2 K.B. 755; 86 L.J.K.B. 1461; 33 T.L.R. 517;
61 Sol. Jo. 647]

Carriage of Goods—Contract—Ratification—Goods obtained dishonestly by employee—Conviction of employee for larceny—Possession of goods laid in employer.

The plaintiffs, tea merchants, had notified the defendants that they wished them to call for a parcel of tea which they wished conveyed to consignees. The defendants had in their employment a carman, B., who called at the plaintiffs' premises, wearing the defendants' uniform and with one of the defendants' vans, and obtained possession of the tea, which he then converted to his own use and disposed of. Subsequently, the defendants prosecuted B. to conviction for stealing the tea, and in that prosecution the defendants laid the property in the tea in themselves. On a claim by the plaintiffs against the defendants for the value of the tea,

Held: in prosecuting B. and laying the possession of the tea in themselves the defendants affirmed their possession, but only to the minimum extent required to satisfy the law of larceny, and in so doing they ratified, not the possession which B. obtained, namely, possession under a contract of carriage, but a bare bailment; on that footing they could not be made liable for non-delivery of the tea, but only for negligence or default on the part of a servant acting in the course of his employment, of which there was no evidence; and, therefore, the plaintiffs' claim failed.

Notes. As to ratification of a contract of agency, see 1 HALSBURY'S LAWS (3rd Edn.) 173-181; and for cases see 1 DIGEST (Repl.) 453 et seq.

Case referred to:

(1) *Scarj v. Jardine* (1882), 7 App. Cas. 345; 51 L.J.Q.B. 612; 47 L.T. 258; 30 W.R. 893, H.L.; 12 Digest (Repl.) 669, 5178.

Also referred to in argument:

Brook v. Hook (1871), L.R. 6 Exch. 89; 40 L.J.Ex. 50; 24 L.T. 34; 19 W.R. 508; 1 Digest (Repl.) 454, 1056.

M'Kenzie v. British Linen Co. (1881), 6 App. Cas. 82; 44 L.T. 431; 29 W.R. 477, H.L.; 1 Digest (Repl.) 454, 1057.

Action in the Commercial List tried by ROWLATT, J., without a jury.
The facts appear in the judgments.

George Wallace, K.C., and A. F. Wootten for the plaintiffs.
Eustace Hills and St. John Hutchinson for the defendants.

Cur. adv. vult.

July 12, 1917. **ROWLATT, J.**, read the following judgment. The plaintiffs claim from the defendants the value of a parcel of tea on the footing that the tea was delivered by Messrs. Buchanan, the plaintiffs' agents, to the defendants for carriage and has been lost by them. The tea was, in fact, obtained from Messrs. Buchanan by one Bailey by fraud without the authority of the defendants. Bailey on Dec. 21, 1915, took a horse and van belonging to the defendants, put on the defendants' uniform, and collected the tea from Messrs. Buchanan's warehouse. Messrs. Buchanan gave the tea to Bailey for carriage (as they believed) by the defendants. The plaintiffs, some ten days or so previously, had sent to the defendants a consignment note including these goods, and Bailey called in pretended pursuance of this note. His action was, however, wholly fraudulent, his intention, which he succeeded in carrying out, always being to convert the tea to his own use.

In those circumstances, apart from anything else, there could be no liability on the part of the defendants. It is said, however, that the defendants have made themselves liable by what they afterwards did. After the goods had been disposed of by Bailey the defendants prosecuted him for larceny of the goods, and in that prosecution the property in the goods was laid in the defendants. This, it is said, is an adoption of the possession by the defendants while the goods were in fact in Bailey's hands, and constitutes a ratification of his action in obtaining the goods from the plaintiffs. This is the point in the case.

It was contended by counsel for the defendants that no one can ratify a criminal act, but I do not think that in this case we are involved in the discussion of that question. It may be that a person cannot ratify an act when the ratification involves the adoption of a criminal element in it, but here it is not argued that the defendants adopted the fraud, only the possession. Supposing that the defendants had found Bailey in the possession of the goods and had taken them from him and carried them towards their destination as desired by the plaintiffs, they would have ratified his action in obtaining them and carried out honestly the mandate which he intended dishonestly to disregard. Would there have been any reason why they should not? I am at a loss to see any. Therefore, I am of opinion that there is no ground for the argument that the defendants could not ratify the action of Bailey in obtaining these goods. The question is whether they did.

Ratification does not rest upon estoppel. It need not be communicated to the party alleging it. Ratification is a unilateral act of the will—namely, the approval after the event of the assumption of an authority which did not exist at the time. It may be expressed in words or implied from or involved in acts. It is implied from or involved in acts when you cannot logically analyse the act without imputing such approval to the party, whether his mind in fact approved or disapproved or wholly disregarded the question. In the present case it cannot be suggested that the defendants after the goods were disposed of in fact approved of the assumption by Bailey of authority to collect them from the plaintiffs. What is contended is that their action in his prosecution necessarily involved such approval. Counsel for the defendants contended that nothing that they did was relevant in any sense, that the barest possession is sufficient to sustain a charge of larceny, and that all that they did was to affirm that the goods were in their van. I think that they did affirm that the goods were in their possession—in what character I will consider in a moment—but it seems to me they did affirm their possession, and this in a very unequivocal way, for they called upon the criminal law to punish Bailey on the footing of such possession for a crime which was different from his crime in fraudulently taking the goods from the plaintiffs' possession. Whether Bailey could have objected in the prosecution that they could not change the form of his guilt by an election *ex post facto* I do not pause to inquire, but for the purpose of determining whether they adopted the possession I think their action is as conclusive against them as the civil action taken by parties put to an election of a different kind referred to by LORD BLACKBURN in *Scarfe v. Jardine* (1) (7 App. Cas. at p. 361).

But now arises the vital question: In what character did they adopt the possession? Counsel for the plaintiffs treated it as necessarily following that they adopted the possession which Bailey obtained, namely, possession under a contract of carriage. But this, I think, is not so. It is essential to note with complete accuracy exactly what they did, and this was to take up the position that Bailey's possession after he obtained the goods and immediately before he disposed of them was their possession—no more. Supposing that they had actually found Bailey in possession of these goods, they might have called upon him as their servant or as purporting to act as such to give them up to them. In doing this they might have adopted his possession, but not necessarily the contract for carriage which he had purported to make. They might merely have taken them in order to send them back to the owners, repudiating the contract. Again, finding Bailey in possession, they might have ordered him to take the goods back to the owners. They would have made his possession their own, but would not have made themselves carriers of the goods. These considerations suffice, in my judgment, to show that the position taken in the prosecution does not involve the ratification of the contract of carriage. The argument is in the last degree technical, and must be conclusive in every stage. It fails because possession in the circumstances can be affirmed without affirming possession as carriers. All that the defendants necessarily ratified was a bare bailment. On this footing they cannot be made liable merely for non-delivery, but only for negligence or for some default on the part of a servant acting in the course of his employment. There is nothing of this sort. It must depend on the facts. Ratification has no bearing here. Its operation is exhausted when it is determined that Bailey's possession is to be regarded in law as the defendants' possession to the minimum extent required to satisfy the law of larceny. It does not put Bailey in the position of acting in the course of his employment when he feloniously made away with the goods, nor does it create for legal purposes a fictitious state of facts revealing negligence where there was none. These considerations may seem subtle, but the argument itself is unreal. There might be a shorter answer to it, but, taking it as put forward, I think it fails on analysis. The action must be dismissed, with costs.

Solicitors: *E. F. Turner & Sons; M. C. Tait.*

[*Reported by T. W. MORGAN, Esq., Barrister-at-Law.*]

MUNICIPAL MUTUAL INSURANCE, LTD. v. PONTEFRAC T CORPORATION

[KING'S BENCH DIVISION (Sankey, J.), February 8, 9, 12, 28, 1917]

[Reported 116 L.T. 671; 33 T.L.R. 234; 15 L.G.R. 299]

Corporation—Powers—Insurance of public buildings insured by local authority—Duration of policy—Reasonableness—Actuarial position of insurers—Onus on corporation to prove unsoundness—Obligation of insured to renew.

An agreement made by a public corporation is not to be judged by the event, if, on the face of it, it is not entirely improvident or unreasonable, or foreign and unnecessary for the express or implied purpose of the corporation, or detrimental to the public welfare. It will not be held to be ultra vires merely because the bargain contained in it turns out to be a bad one for the corporation.

New Windsor Corpn. v. Stovell (1) (1886), 27 Ch.D. 665, applied.

The plaintiff company was started in 1902 with the primary object of affording a cheaper rate of insurance for public buildings than the rate then in force. The system of insurance was largely carried out by re-insurance treaties. When they accepted a risk the plaintiffs never retained more than a certain amount on their own account, but distributed the remainder of the risk with a group of underwriters at Lloyd's, and still further with another group of underwriters at Lloyd's they insured against the aggregate of losses exceeding a certain amount. From time to time the plaintiffs altered the companies with whom they re-insured their risks, and their scheme met with considerable success. By an agreement dated Dec. 2, 1904, the defendant corporation effected an insurance with the plaintiffs. The agreement contained schedules in which property insured could from time to time be entered, and there was a provision that it should last for five years. On June 24, 1908, a continuation agreement was entered into under which the defendants agreed to insure all the properties mentioned in the first agreement for a period of five years from the expiration of the fifth year after the last entry of any insurance in any of the schedules. In other words, the contract between the plaintiffs and the defendants might last ten years, because if, when the end of the fifth year was approaching, further property was entered in a schedule, the whole of the properties were insurable for five years thereafter.

Held: (i) the agreement was not ultra vires the corporation as being for an unreasonable period or otherwise; (ii) inasmuch as the plaintiffs, the re-insuring companies and Lloyd's underwriters had never failed to meet their obligations, and for thirteen years the defendants and hundreds of other corporations in a like position had insured with the plaintiffs, the onus was on the defendants to show that the plaintiffs' scheme and the re-insurance companies were actuarially unsound, and this they had failed to do.

Notes. As to limitation of powers of corporations, see 9 HALSBURY'S LAWS (3rd Edn.) 62 et seq.; and for cases see 13 DIGEST (Repl.) 269 et seq. As to duration of a policy and conditions obliging the assured to renew, see 22 HALSBURY'S LAWS (3rd Edn.) 242, 248; and for cases see 29 DIGEST 410.

Case referred to:

(1) *New Windsor Corpn. v. Stovell* (1884), 27 Ch.D. 665; 54 L.J.Ch. 113; 51 L.T. 626; 33 W.R. 223; 13 Digest (Repl.) 272, 963.

Action in the Commercial List tried before SANKEY, J., without a jury.

The plaintiffs claimed from the defendant corporation a sum of £77 16s. 1d.,

being premiums due from the defendants under certain policies of insurance whereby the defendants insured certain of the public buildings in their area.

The facts of the case appear in the headnote and judgment.

A. Adair Roche, K.C., and R. A. Kyffin for the plaintiffs.

A. Macmorran, K.C., and E. H. Tindal Atkinson for the defendants.

Cur. adv. vult.

Feb. 28, 1917. **SANKEY, J.**, read the following judgment. In this case the Municipal Mutual Insurance, Ltd., are the plaintiffs, and the mayor, aldermen, and burgesses of the borough of Pontefract are the defendants. The plaintiffs' claim is for premiums due from the defendants under certain policies of insurance whereby the defendants insured certain of the public buildings in their area. The defendants resist the claim upon a number of technical grounds which I will deal with later, but their main contentions are two: (i) that the agreement between them and the plaintiffs was so unreasonable as to be ultra vires the corporation; and (ii) that it was an implied term that the plaintiff company should be and should continue sound from an actuarial point of view, and that this implied condition has not been fulfilled. The plaintiffs in their reply, while denying these allegations, contend that they disclose no defence in law to their claim.

The history of the plaintiff company is as follows. As far back as 1902 certain gentlemen in the municipal and insurance world considered that the rates under which some large insurance companies were willing to cover public buildings were too high. They conducted inquiries and went into statistics covering a period of twenty years, and found, so they allege, that the ordinary rate of insurance was 1s. 6d. per cent., but that the loss ratio was only 5d. per cent. The reason was said to be that public buildings in themselves were not a hazardous risk, and that what was called the moral element, namely, the risk of such premises being fraudulently set on fire, was probably entirely absent. The Municipal Mutual Insurance, Ltd., was, therefore, started in the year 1902 with the primary object of giving a cheaper rate of insurance for public buildings. The company was limited by guarantee, but the policy-holders were to elect managers and managing trustees; they were to pay substantially what was called the tariff rate, i.e., the rate of 1s. 6d. per cent., charged by a number of large companies, but were to get periodical distributions which could be set off against premiums and so reduce the latter. To attain this end it was necessary to have five-yearly contracts with the assured. The system of insurance was largely carried out by re-insurance treaties and may be described briefly as follows: The plaintiffs themselves when they accepted a risk never retained more than a certain amount on their own account, and they distributed the remainder up to a certain maximum in each case over a number of re-insurance companies. In this particular case some nine re-insurance companies were referred to who had re-insurance treaties with the plaintiffs. Over and above these re-insurance treaties the plaintiffs re-insured the greater portion of the risk which they themselves retained with a group of underwriters at Lloyd's, and still further with another group of underwriters at Lloyd's they insured against the aggregate of losses exceeding a certain amount. No criticism was passed by the defendants upon the underwriters who subscribed the Lloyd's policies, but it was said that the policies themselves were not satisfactory because of the small amount insured by them and because of the fact that they are terminable on a somewhat short notice. With regard to the re-insuring companies the plaintiffs from time to time considered and altered the companies with whom they re-insured their risks. It is not necessary to go fully either into the names of these companies or their resources for the purposes of my judgment. The scheme of the plaintiffs met with considerable success. There are now 500 public authorities who are insured in the plaintiff company, including eleven metropolitan councils, fifteen county boroughs, ten county councils, eight cities, six rural councils, eighty-five urban councils, forty-five non-county boroughs, twenty-six Scottish boroughs,

and a very large number of guardian and education authorities. The defendants effected their first insurance with the plaintiffs on Dec. 2, 1904, by an agreement of that date. The agreement contained schedules in which property insured could from time to time be entered, and there was a provision that it should last five years. Later on, on June 24, 1908, a continuation agreement was entered into under which the defendants agreed to insure all the properties mentioned in the first agreement for a period of five years from the expiration of the fifth year after the last entry of any insurance in any of the schedules. In other words, the contract between the plaintiffs and the defendants might last ten years, because if, when the end of the fifth year was approaching, further property was entered in a schedule the whole of the properties were insurable for five years thereafter. The defendants were quite content, as were many hundreds of other public bodies, to continue this method of insurance for a period of eleven or twelve years, but in August, 1916, they refused to pay any further premiums, with the consequence that a writ was issued against them claiming the sum of £77 16s. 1d., to which they have set up the defences above indicated. Before dealing with them it is necessary to consider how the law stands. I was referred to *BRICE ON ULTRA VIRES* (3rd Edn.), pp. 170, 599, where such cases as bear on the subject are collected, and in my opinion the law is as follows: An agreement made by a public corporation is not to be judged by the event. If on the face of it it is not entirely improvident or unreasonable, or foreign to and unnecessary for the express or implied purposes of the corporation, or detrimental to the public welfare, it will not be held to be ultra vires merely because the bargain contained in it turns out to be a bad one for the corporation: *New Windsor Corpn. v. Stowell* (1). At the same time, I conceive that a court would not declare the contract to be ultra vires unless satisfied beyond all reasonable doubt by those who desire to impeach it that it was a contract into which the corporation could not or ought not to have entered. It would be impossible for business to be conducted if, as a consequence of there being elected on a public body new members whose views honestly and decidedly differed from those of their predecessors, contracts made by those predecessors were disregarded and sought to be set aside on some ground of personal, and possibly prejudiced, opinion.

I will now deal with the points in order. The first is that the contract was ultra vires. This point is to a great measure covered by the next one, but counsel for the defendants drew especial attention under the heading to the term of the agreement, which, he argued, was so long as to bind the defendants for an unreasonable period. I think this is a fallacy. If the effect of the agreement were to compel the defendants to insure their property for all time it would be ultra vires, but there is no obligation upon the defendants to insure new property with the plaintiffs, and if they do not insure new property the agreement cannot last for more than five years from the date of the last entry. Further, if the defendants desire to insure new property with the plaintiffs, there is no obligation upon them to do so by placing such property in a schedule of the present agreements so as to extend it for five years longer. They can place it in an entirely new policy. In my opinion, this agreement cannot be said to be ultra vires on the score of time.

I now pass to the second point, which is the real defence to the action. The chief points made for the defence were four in number. It is said (i) that certain of the figures in the plaintiffs' balance-sheet were open to criticism; (ii) that the position of the re-insuring companies was unsound; (iii) that it was bad finance to distribute profits in reduction of premiums; and (iv) that although the system of the plaintiffs was quite right in taking into account the small character of the risk involved, it failed to appreciate the fact that a loss when it did occur might be a very heavy one, and, if such a loss did occur, the plaintiffs might not be in a position to meet it. A number of experts were called by the defendants upon these questions. Mr. Keen, their leading witness, went so far as to commit himself to the following statement, after criticising the plaintiffs' scheme:

"I have no hesitation in saying that a local authority with knowledge of the facts to which I have referred would be acting absolutely contrary to its duty to its ratepayers if it took out a policy with the plaintiff company. I would go further and say that when the facts as to the company's financial stability came to its knowledge, it would be acting contrary to its duty if it allowed the insurance to rest simply upon such a policy."

This looks to me equivalent to asserting that the defendants have either not taken the trouble to consider whether they have got a proper insurance society behind them, or, if they have done so, have neglected their duty in insuring with the plaintiffs. I am not surprised under those circumstances to find that nobody from Pontefract was called on behalf of the defence. A number of Mr. Keen's other statements appear to me to be made without hesitation, and I cannot accept any such sweeping accusation as that made by him when I recollect the large number of public authorities who are insured in the plaintiff company, including many of the largest cities and towns both in England and Scotland, and some of the most important English county boroughs and councils. In fact, if I may be allowed to criticise the evidence given by the defendants as a whole, it seems to me that, with the exception of Mr. Schooling, it was somewhat of a partisan character. Mr. Schooling, who gave his evidence with great moderation, said that, so far as the plaintiffs were concerned, he had no fault to find with their own accounts or with the way they managed their business. He said that the plaintiffs, so far as their own accounts were concerned, had done very well, that in proportion to their premium income they were distinctly strong, and that the managers had looked after their own company's financial stability in quite a satisfactory fashion. The conclusion of the whole matter, according to Mr. Schooling, was that the position of the plaintiffs might be all right, but it might not, and that the plaintiffs were a small society who left too much to chance. He admitted that the plaintiffs always paid their losses, had increased their true funds, and that the result was a striking one.

In the chaos of calculations with which the defence gradually became involved, one sought for some test of stability in the plaintiff company itself. Figures were given as to such a test, and it appeared to be agreed that the plaintiffs' own accounts satisfied it. For example, it was admitted by Mr. Schooling that the claim ratio of the plaintiff company was low and the reserves good. The reserve funds for the last year were 235 per cent. of the net premium income. In the nine average British companies the claim ratio is 53.1 per cent., and in the plaintiff company it is only 24.4 per cent. So far, therefore, as the plaintiffs' own share is concerned, nothing can be said against their finance except that the funds are small. Mr. Keen said that the stability of the plaintiffs depended upon the stability of its re-insuring companies and those companies were unsound. They were nine in number, all non-tariff ones, and a great deal of evidence was directed to a discussion of their balance-sheets. It is to be remarked that these criticisms were founded upon the balance-sheets for one year only, namely, 1913. The amount they put by to reserve, the ratio of their premium losses, and a number of other matters were discussed, and, so far as Mr. Keen was concerned, with very few exceptions he had no good word to say for any of them. On the other hand, I had the evidence of a Mr. Swains, who has been an insurance broker for thirty-three years, and who knew all of the plaintiffs' re-insuring companies. He said that they were entirely solvent and quite good for their liabilities. Many of them have considerable funds, some of them uncalled capital, although it is true that parts of these funds may have to be allocated to risks other than fire. I do not think it would be right of me to pass judgment on all these re-insurance companies in this action, nor is this a fitting occasion for fighting the battle of tariff and non-tariff companies, who are not parties to this action and have had no adequate opportunity of replying to the criticisms levelled against them. All I know is (i) that the plaintiffs have never failed to meet their obligations; (ii) that

the plaintiffs' re-insuring companies have never failed to meet their obligations; and (iii) that Lloyd's underwriters have never failed to meet their obligations. Further than that, year in and year out for thirteen years the defendants and hundreds of other corporations in a like position have insured with the plaintiffs. The onus is on the defendants to satisfy me that the plaintiffs' scheme and the re-insuring companies are actuarially unsound, and they have entirely failed to do so. I do not propose to express any opinion upon tariff and non-tariff companies, or to discuss further the comments made by the defendants' witnesses on the point of distributions made to reduce premiums. As at present advised, I am of opinion that the difference between them and the plaintiffs is a matter of opinion. The one thing that did impress me in the defendants' evidence was the allegation that the plaintiffs might not be able, not that they would not be able, to meet the event of a very heavy loss. I do not, however, think that the omission in the scheme, if it is an omission, to provide for a contingency so remote and so opposed to the twenty years' experience which was collected before the plaintiff company started, and the thirteen years' experience which has accumulated since, is such as to oblige me to say that an insurance with the plaintiffs is *ultra vires* a public body.

I have not to give an opinion whether it is desirable for a corporation to insure with the plaintiffs. If I had, it would be necessary to devote more anxious and careful consideration to the weighty words of Mr. Schooling. What I have got to decide is whether an insurance with the plaintiff company effected and continued by certain members of the defendant corporation is so improvident and unreasonable as to entitle their successors to say that they will no longer be bound by the bargain. The evidence given by the defendants falls far short of the standard necessary to satisfy me of so serious an accusation. With regard to the technical points, three remain: It was said that, having regard to the terms of the policy, there is no consideration for the insurance. I think that is quite wrong. The consideration for the insurance was the entering into the agreement and the mutual promises to pay premiums and indemnity against loss. Then it was said that certain property in Love Lane contained in the fourteenth schedule was not included in the policy, because it had not been entered in the schedule with the consent of the defendants. There are two copies of this policy; one is kept by the plaintiffs and another by the defendants. In my view, having regard to the correspondence between the parties, Love Lane, which was included in the schedule kept by the plaintiffs, was so included with the consent of the defendants, and is therefore insured. The last point was that certain properties in parts 2, 3, 4, and 5 of the first schedule were not insured, because they were not initialled in the copy of the policy kept by the defendants. They were, in fact, so initialled in the copy kept by the plaintiffs, and this, I think, satisfies the contract. In the result the defence fails. Under the circumstances it is not necessary to decide the point whether the topics I have just been considering are relevant to this inquiry. It seemed to me to be more satisfactory, as the names of the re-insuring companies had been referred to in the defence, to hear the matter out, but the fact of my having done so must not be taken to indicate that the defences raised were good in law. I am glad to be able to express a clear opinion that the defendants did not insure with the plaintiffs without knowing what they were about, or in neglect or in excess of their public duty, but my judgment must be against them, and with costs.

Judgment for plaintiffs.

Solicitors: *H. S. Holt; Baker & Sons.*

[*Reported by T. W. MORGAN, Esq., Barrister-at-Law.*]

MOODY v. COX AND ANOTHER

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Warrington and Scrutton, L.JJ.),
March 14, 15, 16, 1917]

[Reported [1917] 2 Ch. 71; 86 L.J.Ch. 424; 116 L.T. 740;
61 Sol. Jo. 398]

Solicitor—Duty to client—Sale of property by solicitor to client—Duty to disclose to client all material facts—Solicitor selling as trustee.

A solicitor who sells his own property to a client must deal with the client with the utmost good faith and must give the client all that reasonable advice and information which he would have given him if the sale had been by a third person and he (the solicitor) had not been personally interested. He must so act that no industry on his part could have got the client a better bargain. He must make the most ample disclosure to the client of all the facts known to him relating to the matter of the sale. A solicitor selling to or buying from a client is bound to disclose everything which is material or may be material to the judgment of his client before the transaction is completed.

This duty does not depend on undue influence. The existence of the duty to disclose is quite consistent with the absence of undue influence.

A solicitor who sells to a client property, not on his own behalf, but as a trustee, is under the same duty. He cannot be excused on the ground that the purchaser, being aware that he was selling as a trustee, would know that he was under an obligation to get the best price for his *cestuis que trust* and that his duty to the beneficiaries would prevent him disclosing material facts which had come to his knowledge in the capacity of trustee.

Equity—Principles affecting equitable relief—"Clean hands"—Denial of relief—Need for improper conduct to have necessary and essential relation to relief sought.

For a plaintiff to be denied equitable relief—e.g., rescission of a contract—on the ground that he has not "clean hands" the defendant must show that the plaintiff's improper conduct had a necessary and essential relation to the contract in question.

Accordingly, where the plaintiff sought rescission of a contract for the purchase of property by him on the ground of the non-disclosure to him by the vendor of facts which the vendor was under a fiduciary duty to disclose, and it appeared that during the negotiations for the contract the plaintiff had given the defendant bribes to facilitate the progress of the negotiations,

Held: as the bribes had no immediate relation to the rescission of the contract, which was sought on a ground not affected by them, the improper conduct of the plaintiff did not disentitle him to an order for rescission.

Notes. Considered: *Goody v. Baring*, [1956] 2 All E.R. 11.

As to transactions between solicitor and client, see 31 HALSBURY'S LAWS (2nd Edn.) 116 et seq.; and for cases see 42 DIGEST 57, 58, 76 et seq. As to principles affecting relief in equity, see *ibid.*, 3rd Edn., vol. 14, p. 523 et seq.; and for cases see 20 DIGEST 235 et seq.

Cases referred to:

- (1) *Gibson v. Jeyes* (1801), 6 Ves. 266; 31 E.R. 1044, L.C.; 42 Digest 80, 724.
- (2) *Davies v. London and Provincial Marine Insurance Co.* (1878), 8 Ch.D. 469; 38 L.T. 478; 26 W.R. 794; sub nom. *London and Provincial Marine Insurance Co. v. Davies*, *Davies v. London and Provincial Marine Insurance Co.*, 47 L.J.Ch. 511; 42 Digest 76, 675.
- (3) *Holman v. Loynes* (1854), 4 De G.M. & G. 270; 2 Eq. Rep. 715; 23 L.J.Ch. 529; 22 L.T.O.S. 296; 18 Jur. 839; 2 W.R. 205; 43 E.R. 510, L.C. & L.J.; 42 Digest 83, 745.

- (4) *Dering v. Earl of Winchelsea* (1787), 1 Cox, Eq. Cas. 318; 29 E.R. 1184; sub nom. *Deering v. Earl of Winchelsea*, 2 Bos. & P. 270; 20 Digest 249, 136.
- (5) *Tate v. Williamson* (1866), 2 Ch. App. 55; 15 L.T. 549; 15 W.R. 321, L.C.; 40 Digest (Repl.) 393, 3135.
- (6) *Wood v. Downes* (1811), 18 Ves. 120; 34 E.R. 263, L.C.; 12 Digest (Repl.) 125, 777.

Appeal by the defendants from an order made by YOUNGER, J., in an action for the rescission of a contract for the sale of land.

The facts are stated in the judgments.

Hohler, K.C., and *Copping* (for *C. A. Bennett*, serving with His Majesty's forces) for the defendant Cox.

J. B. Matthews, K.C., and *F. K. Archer* for the defendant Hatt.

Henry Terrell, K.C., and *J. E. Harmer* for the plaintiff.

LORD COZENS-HARDY, M.R.—This case at first sight struck me as one of great difficulty and considerable nicety. But, having listened to the very full and able arguments of counsel in the case, I have now satisfied myself that the decision of the learned judge in the court below was perfectly right, and that this appeal ought to be dismissed.

The defendants in this case are a solicitor, Mr. Hatt, and his managing clerk, Mr. Cox. Mr. Cox has been managing clerk in a very responsible position, because he has had the de facto management of the business at Reading. Mr. Hatt, I gather, confined himself to Oxford. The plaintiff, Mr. Moody, was a man of some experience of the world. He had been a sailor, and then he engaged in speculations in connection with a patent, which proved very successful. He was anxious to do something with regard to picture palaces, and I assume in favour of the defendants what I believe to be the truth, that Mr. Moody is a man of the world and of very considerable business capacity. Mr. Moody was minded to acquire a public-house at Reading called the Marquis of Granby. That was a house tied to Messrs. Wethered. The tenant held under a lease containing the tie, and the freeholders were the trustees of one Lee's estate, those trustees being at all material dates Mr. Hatt and Mr. Cox. Negotiations started early in January, 1915. There were two transactions into which I do not propose to go in detail. The first proposal was a lease of the Marquis of Granby and yard. That was modified shortly afterwards—on Feb. 8—by a contract by which, instead of taking a lease, the plaintiff should buy a part of the property, but not all the cottage property going with the Marquis of Granby. There was a third proposal, which resulted in a contract dated April 17, under which Mr. Moody agreed to buy the whole of the property for a considerable sum of money.

When I speak of the defendants I am not drawing any distinction between Mr. Hatt and Mr. Cox. In all these transactions the defendants, or if you like to say the defendant Mr. Hatt, the solicitor, acting mainly through his managing clerk, Mr. Cox, acted as solicitor for Mr. Moody. They accepted that position; they made charges against him in respect of that position. They have attempted in reference to the second contract to make charges according to the statutory scale of charges which could only be justified on the footing that Mr. Hatt was entitled to a negotiating fee for both the vendors and the purchaser. It seems to me to require a great deal of courage to argue that the relation of solicitor and client did not exist, at least up till the abandonment of the No. 2 contract on April 17. After the entries which we have seen in Mr. Hatt's own books, it seems to me impossible to doubt that from some time in January—I care not what precise date it was—until April 17, the relation of solicitor and client existed between the parties. Then it is said with regard to the contract to which this action relates, the contract of April 17, although the defendants stood in a fiduciary position towards Mr. Moody up to the morning of April 17, it may be ten o'clock or it may

be twelve o'clock, but a moment of time came on that day when a new relation was entered into in respect of which the defendants were not in a fiduciary relation. That, again, seems to me to be an absolutely impossible contention. A relation such as that of solicitor and client continues unless and until it is proved definitely and distinctly that it has been put an end to. Is that proof existing here? The evidence of Mr. Cox is quite plain. There is a passage in the notes of the evidence where he said :

"After the contract of Feb. 8 was signed we acted as his solicitors. He said, 'You know all about it; I want you to act for me.' "

I do not accept every statement that Mr. Cox made in the witness-box, but I do accept that statement, because I think that it is consistent, and only consistent, with documents prepared at the time and the entries in the ledger and private books, and I have no hesitation in saying that the relationship was carried on and extended in respect of the third contract as well as the first and second contracts, and the matter must be considered precisely as it would be if the relation of solicitor and client had been admitted to exist.

What is the duty of a solicitor standing in this fiduciary relation towards his client? If he, the solicitor, desires to buy or sell the property—I care not which way it is, for the obligations would be just the same in their nature if it were a sale to the client or a sale to the solicitor—I know of no better authority to settle the principles applicable to the case than LORD ELDON's judgment in *Gibson v. Jeyes* (1), where he said this (6 Ves. at p. 278) :

"If [the solicitor] will mix up with the character of attorney that of vendor he shall if the propriety of the contract comes in question, manifest that he has given [the client] all that reasonable advice against himself that he would have given her against a third person."

There are more passages to the same effect in that judgment than the one that I have read. Thus, there is another passage (*ibid.* at p. 271) :

"But, from the general danger, the court must hold that, if the attorney does mix himself with the character of vendor, he must show to demonstration, for that must not be left in doubt, that no industry he was bound to exert would have got a better bargain."

The relief in a case of this kind does not depend upon undue influence. That is not the ground on which I base my present judgment. There may be cases in which undue influence is proved as a fact, but the principle to decide this case upon in my view is this. An attorney selling to a client or buying from a client is bound to disclose everything that is material or may be material to the judgment of his client before the transaction is completed. The duty to disclose is quite consistent with the absence of undue influence, and that is all that seems to me to be involved here. Counsel for Mr. Cox said that the solicitor here had not any undue influence over the client, who was an independent man of business and would not have looked to him for advice on the propriety of the transaction, and, therefore, there is no liability. The answer is I expect that the liability does not depend upon undue influence. I adopt the judgment of FRY, J., in *Davies v. London and Provincial Marine Insurance Co.* (2) (8 Ch.D. at p. 474) :

"If there be a pre-existing relationship between the parties, such as that of . . . solicitor and client . . . , then if the parties can contract at all they can only contract after the most ample disclosure of everything by . . . the solicitor" [to the client].

That being the principle, it is quite apparent to my mind that that disclosure never was made in the present case. The third contract included more property than the contracts before. As to that fresh property which was brought in there was no disclosure of the fact that valuations had been made and obtained by the vendors, showing that the value of this property was in the opinion of the valuer

much less than the plaintiff was contracting to give for it. One of those valuations was very shortly before this transaction. The defendants had a valuation on Feb. 15, 1915. They were then advised that the value of the house and cottage property was much less than the plaintiff had agreed to give for it. That valuation was not disclosed until the defendant, Mr. Cox, was in the box at the trial, and this seems to me to be exactly and precisely a case in which the solicitor cannot uphold the transaction without showing that he has given full disclosure of every fact which could be material.

But I do not like to leave it there. Mr. Cox's own evidence is that he told the plaintiff at the interview on April 17 that the cottages were worth the figure mentioned in the contract. He had in his possession the valuation taken about six weeks before, and he said in the box that he knew that the cottages were not worth the figure which he stated they were. That which I can call nothing else but a lie being mentioned to the purchaser as it was on the very day when this third contract was entered into, it seems to me to be quite hopeless to contend that there was a disclosure of that which, having regard to the relationship between the parties, was bound to be disclosed. There was an earlier valuation—a valuation taken for the purposes of probate, and probate valuations, one knows as a matter of common knowledge, are not apt to be too high; they generally are too low. But Mr. Cox knew, he said, that the property was not even of the value for the probate valuation.

In these circumstances, unless there be a difference established on the ground which I will not mention, it seems to me that the case is, when one gets to the bottom of it, almost unarguable in favour of the plaintiff. But it is said that this is not a case to which the doctrine of *Gibson v. Jeyes* (1) or *Holman v. Loynes* (3) or any of those cases ought to be applied, because the solicitors here were not dealing with their own property. It is contended that it was not a case in which their interest was one way and their duty pointed in another, but that they owed a duty to the beneficiaries, and that their duty to the beneficiaries was to get as much as they could for the property. Their duty to the purchaser, it is argued, who knew that they were selling as trustees, could not involve any obligation to disclose to him the valuations which they had obtained in their character of trustees for the beneficiaries. I think that that is quite a mistaken view of the matter. A person may have a duty on one side and an interest on another. A solicitor who puts himself in that position takes upon himself a grievous responsibility. A solicitor may have a duty on one side and a duty on the other—namely, a duty to his client as solicitor on the one side, and a duty to his beneficiaries on the other. But if he chooses to put himself in that position it does not lie in his mouth to say to the client that he has not discharged that which the law says it is his duty towards his client, because he owes a duty to the beneficiaries on the other side. The answer is that if a solicitor gets himself into that position it is his own fault. He ought to make it quite clear and inform his client of his conflicting duties, and either obtain from that client an agreement that he shall not perform his duty as to disclosure, or say—which would be much better—that he cannot accept the business. I think that it would be the worst thing to say that a solicitor can escape from the obligations imposed upon him as solicitor of full disclosure to his client if he can prove that it was not a case of duty on one side and interest on the other, but a case of duties on both sides, and, therefore, impossible to perform. I do not desire to draw any distinction between the simple case where the solicitor has a client and is selling his own property to him and a case like the present where he has a client and as trustee is selling trust property to that client. I think, therefore, on this ground the arguments adduced on behalf of the defendants will not prevail.

There is only one other matter to which I need refer. It is a painful aspect of this case. Mr. Cox, who was managing clerk for Mr. Hatt and who, I am surprised to hear, is still in that position, accepted two bribes from the plaintiff of £100 each. His counsel admitted that they were bribes and called them bribes. It cannot

be disputed that Mr. Cox is accountable for those bribes to the beneficiaries of whose estate he was trustee. The duty as to those two sums of £100 has not been discharged yet by Mr. Cox according to the evidence. I trust and hope that that omission may soon be rectified. What was the consequence of those bribes? The beneficiaries might have declined to stand by the contract, and might have said that the bribes vitiate the whole transaction. But they are not bound to say that. They may say that the contract which was obtained by reason of these bribes is such an advantageous contract for them that they will waive their right to object to the transaction, and, accordingly, that they do not object to it. Then it is said that, that being so, the plaintiff, Mr. Moody, who himself gave the bribes—though I think he was not the more guilty party of the two—cannot obtain any equitable relief in respect of the contract, and in equitable relief is included rescission of the contract. I ask myself what principle is there that can compel the court to say that it will not rescind the contract which has been obtained quite apart from the objection of bribes, which objection has been waived by the other party who does not desire to raise it. It strikes me as a little short of shocking that we should be in this position. The beneficiaries do not repudiate the contract. They have a considerable deposit in respect of the property, and they seriously suggest that, even assuming that the plaintiff has a good right to rescind the contract on the ground of non-disclosure to him by the solicitor, or would have but for the bribes, we ought to allow this deposit to remain in the pockets of the trustees, and to refuse to give any relief to the plaintiff in respect of it. The relief which is sought for is in no way owing to the bribes. It is something quite independent thereof, and that is in a certain sense an irrelevant circumstance to consider in this connection. For these reasons, without attempting to go through the numerous authorities which have been called to our attention, I hold, both upon the facts and upon the law, that the decision of the learned judge in the court below was perfectly right, and that these two appeals must be dismissed with costs.

WARRINGTON, L.J.—I am of the same opinion. The action is brought by the plaintiff for the purpose of obtaining a declaration that a certain agreement of April 17, 1915, for the purchase by him from the defendants Cox and Hatt of certain freehold property at Reading is not binding on the plaintiff, and to have that agreement rescinded and the deposit paid under it returned. The learned judge in the court below has determined the question involved in favour of the plaintiff, and has ordered the contract to be rescinded on the ground that the defendant Hatt, for whom the defendant Cox was acting as managing clerk, was at the time when the agreement was entered into the solicitor for the plaintiff, and being his solicitor, was under an obligation to disclose all material facts in his knowledge relating to the matters in question, and that he failed to make that disclosure, and so failed to do his duty to the plaintiff.

With regard to the law, I think that there can be no doubt that if, as LORD ELDON said in *Gibson v. Jeyes* (1) (6 Ves. at p. 278), a solicitor will mix his character of vendor with that of solicitor to the purchaser, he must be bound to do towards the purchaser what he would have done towards any other client, and use as much diligence and as much care and be under the same obligation as to disclosure as he would have been towards any other client. In fact there exists, owing to the position of the solicitor towards his client, a fiduciary relationship which imposes upon him the obligation, not only of observing the utmost good faith in dealing with his client, but of giving to the client such advice and such information as he would have given if he had not been personally, in his other capacity, interested in the matters arising between them.

I turn to the facts. The defendants Cox and Hatt were the two trustees of the will of one Lee. Hatt was a solicitor practising at Reading and Oxford. Cox was his managing clerk at Reading, and had practically the entire control of the Reading office, and when I speak of Hatt and his relationship to his client, the plaintiff Moody, I mean and include the personal relationship of Cox, because Cox

was acting on Hatt's behalf, and Hatt had very little personally to do with the matter. As trustees of the will of Lee the defendants were entitled to a freehold public-house called the Marquis of Granby, a yard and an outbuilding adjoining it, and four cottages also adjoining—all at Reading. The Marquis of Granby, the yard, and the outbuilding were at the time in lease to Messrs. Wethered, the brewers, of Marlow, and the tenant there was a man named Harvey, the house being, as between Wethereds and Harvey, a "tied" house. The plaintiff, Moody, had been living at Reading for some years, and he was minded in 1914, or the early part of 1915, to start a cinema theatre there, and he was struck with the admirable situation, from his point of view, of the Marquis of Granby and the land and cottages adjoining. Accordingly, he approached Messrs. Wethered, and he was told by them that the freeholders were Hatt and Cox as trustees of Lee's will. He went to Hatt, and in the first instance he arranged that he would take a building lease of the yard and the site of the outbuilding belonging to the Marquis of Granby, and would on that ground build a cinema theatre. Of course, it was necessary to arrange with Wethereds and with Harvey, the lessee, who was the actual tenant. Accordingly arrangements were opened with them and it was ultimately decided that their rent should be reduced by £65, that Messrs. Wethereds and Harvey would surrender the yard and outbuilding, and that Moody would take a lease of that ground from the trustees. That was carried out to the extent that an agreement was prepared, to which Wethereds, Harvey, the two trustees, and Moody were all parties, and plans were prepared also by Moody for the erection of the theatre. So far as the preparation of the agreement was concerned and the other matters connected with it, I am satisfied that Hatt acted as solicitor for Moody. One of the difficulties that arose in connection with this matter was that the licensing justices had to be applied to, and in that matter there is no doubt that Hatt acted as solicitor for Moody. Of course, Hatt could not make an application to the licensing justices in his own name. He would have to make it in the name of Harvey or Wethereds or the trustees. However that may be, he acted unquestionably as solicitor for Moody.

It was found that the licensing justices would not give their permission to do what was desired. Then Moody suggested that he should purchase the yard and the site of the outbuilding and two of the cottages, and an agreement was made between Moody and the two trustees for that purpose. Under that agreement Moody agreed to purchase the yard and outbuilding and the two cottages for £2,000. That was on Feb. 8, 1915. I think that there can be no doubt whatever that Hatt was asked to act and did act as solicitor for Moody in that transaction. That is a loose way of stating it, because one must define to some extent what the transaction was. The books which we have seen to-day enable me to do it. In Hatt's books Moody is charged in March with costs "Re sale to you"—which at that time meant the sale of Feb. 8, 1915—"£90." The only possible way of explaining that charge is that Hatt treated himself as acting for the vendors in the negotiations and in deducing the title and completing the conveyance—the scale fees for which on a purchase price of £2,000 would amount to £45—and that he also treated himself as acting for the purchaser in the same transaction, the scale fees for deducing the title and for conveyance and for negotiation amounting together to £45. There is no other explanation possible. It is perfectly true that, acting both for the vendors and the purchaser, Hatt had no right to charge so much, because he ought to have charged only half the fee in one of the two cases. But that is quite immaterial for the present discussion. The point is that he treated himself as acting as solicitor for Moody not only in carrying the sale into effect, but in negotiating the sale. So far, then, he acted, in my opinion, quite clearly as a solicitor for Moody.

The business connected with that transaction went on until April 17, 1915, on which day it had been expected that the sale would be completed. But by then Moody had found that the site was not a satisfactory site; he wanted more ground, and, accordingly, he proposed to buy two more cottages. On April 17 the final

bargain, which is the one with which we have to deal, what one may call the culminating point in the transaction, was made. That was a bargain that Moody should purchase the whole property, the public-house, the yard and outbuilding, and the four cottages, for £8,400. That being concluded, Moody asked Hatt to continue, and he did continue, to act as Moody's solicitor, as he had acted before. It being quite plain that the relationship of solicitor and client operated up to April 17, I ask myself this: Has the solicitor established, as in such a case it is essential for him to establish, if he wishes to be excused the liability attaching to him as a solicitor, that that relationship had determined? It is perfectly ridiculous to assert any such claim. When Moody went to the office that morning Hatt was his solicitor. When he left the office after the business was concluded Hatt was his solicitor. It is suggested that the relationship determined at some time while he was there in the office negotiating about this further purchase. No such case can be made out.

On those facts, then, I come to the conclusion that at the time when this contract was made the relationship of solicitor and client subsisted as between Hatt and Moody, and that as a matter of law there was an obligation upon Hatt to disclose to Moody all material facts in his knowledge. Did he perform that duty? Unquestionably not. Cox told us this with regard to the cottages: "I said the cottages were worth £225 each; I knew they were not worth it because I had been advised that they were worth a great deal less." With regard to the Marquis of Granby, he said that he did not disclose a probate valuation, which, it is hardly necessary to say, was much less than the price to be given by Moody; that he knew that since the valuation had been made the property had much depreciated in value; and that, nevertheless, he told Moody that they were insisting on £7,500, because the property was worth it. The valuation which showed that the cottages were worth far less than the £225 which he asserted they were worth in his negotiations with the plaintiff, had only been made on Feb. 15. The matter does not rest there. There was a certain sum of £61, which, I think, was the contribution to the fund for compensating brewers and publicans for houses shut up by the justices, and there was a question whether that sum was payable by the brewers or by the freeholders. It has been decided, I think in the Court of Appeal, that it was payable by the brewers. Accordingly Wethereds' rent had been paid in full. But that decision was pending in the House of Lords, and Cox knew that unless that decision should result in affirming the decision of the Court of Appeal, the rent would be reduced by the £61. Notwithstanding that he led Moody to remain under the impression that the full rent payable in respect of this house would be £300, and in fact on his own showing the purchase price eventually agreed to be given by Moody was calculated on that footing. Under those circumstances how can it possibly be said that he, the solicitor acting for Moody, had made that disclosure of material facts which it was necessary for him to make or that he had given to Moody such benefit as he would have had if he had been advised by an independent solicitor knowing the facts which were known to Hatt? The case seems to me to be so far unarguable.

But it is said that on the facts of this particular case, Hatt is not under the obligation which would be imposed upon him in an ordinary case, because Moody knew that Hatt was trustee for other persons and knew, therefore, that he had a duty to perform to those other persons, which I suppose was to obtain the best price that could be reasonably obtained, and that he knew, therefore, that he would not disclose anything material which he knew, if it might be disadvantageous to his *cestuis que trust*, the other persons for whom he was acting. In my opinion, that is wholly irrelevant. It offers no answer at all. I will assume that Moody knew that it was Hatt's duty to do his best for his *cestuis que trust*, but he did not know that there were any facts, the disclosure of which would reduce or tend to reduce the purchase price to be required. How could he possibly know that he was not to expect that Hatt would do his duty to him? It seems to me that Hatt has placed himself in a position in which he may possibly or he might possibly

have been open to attack by his cestuis que trust if he had done his duty to Moody. But that is no answer when Moody comes and says: "You have not done your duty to me."

I will say but very few words indeed about the point with regard to the two bribes. On Feb. 8, on the occasion of the making of the £2,000 contract, and on April 17, on the occasion of the larger contract, Moody paid Cox the sum of £100; what for it is somewhat difficult to see. It is called "emolument," But I think it is more properly called "a bribe." It was, I suppose, really to grease the wheels and induce Cox to get the matter through with ease and expedition. With regard to the second of the two transactions it seems to have had some connection with the obtaining of a mortgage for the unpaid part of the purchase money. But whatever it was it was a bribe. The result of that was, it is argued, that Moody could not have insisted on the performance of that contract because it would have been obtained by improper payment made to the trustees who were acting on behalf of the cestuis que trust. He might also have had to account for this money, and to pay it over again to the cestuis que trust, and so also Cox, who received it, would have to account for it, and the cestuis que trust could, if they had pleased, have rescinded the contract. But the vendors, who were acting for their beneficiaries, do not choose to repudiate the contract; they claim specific performance of it by counterclaim, and it seems to me that when they withdrew that right to repudiate the contract they placed the parties in the same position as they would have been if the matter had not been tainted with this giving and taking of a bribe. To use, not the exact words, but the substance of what was said in *Dering v. Earl of Winchelsea* (4) (1 Cox, Eq. Cas. at pp. 319, 320), in order to prevent a man coming for relief in connection with a transaction so tainted, he must show that the taint has a necessary and essential relation to the contract which is sued upon, and it is not enough to say in general that the man is not coming with clean hands when the relief he seeks is not on the contract which was obtained by fraud, but is to get rid of the contract on a ground which exists quite independently of the fact that a bribe has been given and received. In my opinion, that point also fails, and the judgment of the learned judge in the court below was right, and these two appeals must be dismissed.

SCRUTTON, L.J.—I should have contented myself with agreeing with the judgment which has just been delivered, but for the circumstance that I think the principles that have been discussed go very much further than the facts of this particular case, and are of considerable importance to the public and to the profession of solicitors.

Before I consider that which is the material part of the case, I will mention, in order to put that matter on one side, the question of the two bribes. Mr. Moody gave and Mr. Cox took two sums of £100. Those sums are described by Mr. Moody on his counterfoil as "emolument." They were given by Mr. Moody to Mr. Cox, as the managing clerk of the solicitor that he was negotiating with and a trustee from whom he was buying the property, for the purpose of influencing his performance of the contract. Counsel have, as their duty was, endeavoured to argue as to the morality or justifiableness of those payments. I think that there should be no mistake about it that the court considers them bribes of the most objectionable character. It was said and argued with great vigour, and to the extent of reducing it into a formal proposition in writing, which was read to the court, that the fact that Mr. Moody had given those bribes prevents him from getting any relief in a court of equity. The first consequence of his having offered those bribes is that the other side might have rescinded the contract. But they were not bound to rescind the contract. They had the right to say that they were very satisfied with the contract, that it was a very good one for them, and that they affirmed it. The proposition put forward by counsel for Mr. Hatt is this: "It is no matter that the contract has been affirmed by the vendors. The purchaser

still can claim no relief of any equitable character in regard to that contract because he gave bribes in respect of it. If there is a mistake in the contract he cannot rectify it, and if he desires to rescind the contract he cannot rescind it, for that is equitable relief." With some doubt the vendors' counsel said: "We do not think the purchaser can get an injunction to have the contract performed, though the other side have affirmed it, because an injunction may be an equitable remedy." When one asks on what principle this is supposed to be based, one receives in answer the somewhat poetical maxim that anyone coming to ask for equity must come with clean hands. I think the expression "clean hands" is used more often in the text-books than it is in the judgments in the reported cases, though it is occasionally used in the judgments. But I was very much surprised to hear that once a contract had been affirmed by the person who had a primary right to do so, and once it was established that it was not an illegal contract, the courts of equity would be so scrupulous that they would refuse any relief not connected at all with the bribes. I am glad to find that that is not the case, because I think it is quite clear that the passage in *Dering v. Earl of Winchelsea* (4) (1 Cox, Eq. Cas. at pp. 319, 320), which has been referred to, shows that equity will not apply the principle about "clean hands" unless the depravity, the dirt in question on the hands, has an immediate and necessary relation to the equity sued for. In the present case the bribes have no immediate relation to rescission of the contract on a ground not in any way affected by the bribes. Therefore, that point appears to me to fail, and one comes to the merits of the case.

First of all, as to the law. Generally when you have made a legal contract and correctly expressed it in writing, and it has not been obtained by any misstatement of fact, innocent or fraudulent, the contract stands, and the fact that one party or the other knows facts about which he says nothing, which make the contract an unprofitable one to the other party, is of no legal importance. But there are certain relations and certain contracts in which a higher duty is imposed upon the parties, and they must not only tell the truth, but they must tell the whole truth so far as it is material, and they must not only not misrepresent by words, but they must not misrepresent by silence if they know of something that is material. Some of those cases depend on the relationship between the parties, and, generally speaking, are cases where the relation is such that there is confidence reposed by one party and influence exercised by the other. In that class of relation of parties you may get the duty, first of all, that the party who has influence must make a full disclosure of everything that he knows material to the contract; and, secondly, that the party who has the influence must not make a contract with the party over whom he has the influence unless he can satisfy the court that that contract is an advantageous one to the other party. The second class of case is one not depending on the relation of the parties, but depending on the nature of the contract, and a typical case of that kind is the contract of insurance where, to an underwriter who knows nothing, comes a man who wants to be insured and knows everything. On the latter is imposed the duty of telling the underwriter all that he knows, so that the underwriter may fix the premium.

In the first class of the relation of the parties, that of solicitor and client is one of the obviously and constantly recognised examples. If a man who is in the position of solicitor to a client, so that the client has presumably confidence in him and the solicitor has presumably influence over the client, desires to contract with his client, he must make a full disclosure of every material fact that he knows, and must take upon himself the burden of satisfying the court that the contract is one of full advantage to his client. LORD ELDON, in the passage which has been referred to in *Gibson v. Jeyes* (1), said (6 Ves. at p. 278):

"This clear duty results from the rule of this court, and throws upon him the whole onus of the case; that, if he will mix with the character of attorney that of vendor, he shall if the propriety of the contract comes into question, manifest that he has given [the client] all that reasonable advice against

A himself that he would have given her against a third person. It is asked, Where is the rule to be found? I answer, in that great rule of the court that he who bargains in matter of advantage with a person placing confidence in him is bound to show that a reasonable use has been made of the confidence; a rule applying to trustees, attorneys, or anyone else."

B It has been expressed in more general form by LORD CHELMSFORD in *Tate v. Williamson* (5) thus (2 Ch. App. at p. 61):

C "Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed."

D This is rested on confidence by the client and corresponding influence by the solicitor. Two questions will arise in cases of solicitor and client: first, as to the relationship of solicitor and client which will create this obligation; and, secondly, as to the nature of the obligation created. Where the relation of solicitor and client is in the very transaction attacked, it will, in my view, be almost, if not quite, impossible to avoid the obligation, and an independent solicitor should be employed by the client. It is called "putting him at arm's length." It might perhaps also be effected by a very clear declaration of the position, a declaration by the vendor: "Mind, I am going to get the highest price I can; be on your guard." It is inconsistent with the obligation upon him as solicitor to protect the interests of his client. It might be followed by a statement: "Subject to this, I will put in legal form the terms on which we agree." But the position would have to be made very clear to relieve the solicitor of obligations far exceeding those of an ordinary vendor, and it is a position to be avoided. More difficult questions arise when the employment as solicitor is in other matters more or less numerous or recent, and the transaction in question is a separate transaction, in which the solicitor does not act as such. TURNER, L.J., in *Holman v. Loynes* (3), after examining the cases which were said to limit the duty of a solicitor, said (4 De G.M. & G. at p. 283):

G "The very ground of the rule which requires attorneys purchasing from their clients, and not advising them with reference to the purchase, to prove that the confidential relation has been determined or the client put at arm's length is the influence which arises from the position of the attorneys; and I much doubt whether the confidential relation can be said to be determined at all whilst the influence derived from it can reasonably be supposed to remain. Gifts from clients to their attorneys can be maintained only when not only the relation has ceased, but the influence may rationally be supposed to have ceased also. That was laid down by LORD ELDON in *Wood v. Downes* (6), and I see no reason why the rule, which applies to gifts, should not equally in this respect apply to purchases. It is true that the rules of the court against gifts are absolute, and that against purchases they are modified; but this is a question, not upon the extent of the rules, but upon the circumstances under which they are to be brought into operation, and in that respect I see no difference between the cases of gifts and purchases."

I The relation may then be an actual relation of solicitor and client in the transaction impugned, or such an antecedent relation as gives rise to the influence by the solicitor and confidence by the client, the effect of which has not ceased at the time of the transaction impugned. It usually arises where the relation of solicitor precedes that of vendor.

What are the facts in this case if that is the law? About the middle of January Mr. Moody was negotiating with the trustees according to the entry in Mr. Hatt's

bill. Mr. Moody was told that he would have to pay the costs of negotiation. I do not think that that by itself is enough to make the relation of solicitor and client. But then on Feb. 8 the same term was put in the contract. We had Mr. Cox's own statement of what happened. I am not taking Mr. Cox as a witness to whom implicit credit should be attached, but this statement tells against him: "After the contract of Feb. 8 was signed we acted as solicitors. Mr. Moody said, 'You know all about it; I want you to act for me.' " Once a solicitor is in that position, and the purchaser has said to him: "You know all about it; I want you to act for me," and he accepts the position, it will be very difficult for him to escape from the fullest obligations attaching to a solicitor to make full disclosure, and not to contract with his client unless he can satisfy the court that the contract is for the client's benefit. From that date, Feb. 8, and from the time when Mr. Cox gives that account of the relation, it seems to me the full duty to disclose was on Mr. Hatt. How did he perform it? Again, I take Mr. Cox's own evidence. Part of the subject-matter of the contract was some cottages. Mr. Cox had a valuation made within a month or two months previously valuing those cottages at £160 a cottage. He sold them to Mr. Moody at £225 a cottage. He did not tell Mr. Moody of the valuation, and more he states: "I did say the cottages were worth £225; I knew they were not worth it because I had been advised they were worth a good deal less. I knew the value of the Marquis of Granby had depreciated since the probate valuation; I did not tell him the amount of the probate valuation." A man who says that admits in the plainest terms that he is not fulfilling the duty which lies upon him as a solicitor acting for a client.

But it is said that he could not disclose the information consistently with his duty to his other clients, the cestuis que trust. It may be that a solicitor who tries to act for both parties puts himself in such a position that he must be liable to one or the other, whatever he does. The case has been put of a solicitor acting for vendor and purchaser, who knows of a flaw in the title by reason of his acting for the vendor, and who, if he discloses that flaw in the title which he knows as acting for the vendor, may be liable to an action by his vendor, and, if he does not disclose the flaw in the title, may be liable to an action by the purchaser for not doing his duty as solicitor for him. It will be his fault for mixing himself up with a transaction in which he has two entirely inconsistent interests, and solicitors who try to act for both vendors and purchasers must appreciate that they run a very serious risk of liability to one or the other owing to the duties and obligations which such curious relation puts upon them. The law being what I have stated, and having Mr. Cox's own evidence, it seems to me clearly that Mr. Hatt, his employer, has not complied through him with the obligations which rest upon a solicitor. He has not disclosed to Mr. Moody things that he should have disclosed, and he has made actual misrepresentations material to the contract. On these two grounds it appears to me that the judgment of YOUNGER, J., is thoroughly justified, and that the two appeals must be dismissed.

Appeals dismissed.

Solicitors: *P. F. Walker; Stanley Evans & Co.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

AGDESHMAN v. HUNT

[KING'S BENCH DIVISION (Viscount Reading, C.J., Darling and Avory, JJ.), June 25, 1917]

[Reported 86 L.J.K.B. 1334; 117 L.T. 406; 81 J.P. 251;
15 L.G.R. 620; 26 Cox, C.C. 16]

Alien—Registration—Particulars to be supplied—False particulars—British subject—Mistake in registration card—Offence—"Any person"—Aliens Restriction Act, 1914 (4 & 5 Geo. 5, c. 12), s. 1—Aliens Restriction (Consolidation) Order, 1916 (S.R. & O. 1916 No. 122), art. 27 (2).

The Aliens Restriction (Consolidation) Order, 1916, art. 27 (2), applies to British subjects as well as to aliens, and, therefore, a British subject can be convicted of the offence of giving false particulars under that article.

Notes. The Aliens Restriction Act, 1914, s. 1, has been amended by the British Nationality Act, 1948, s. 3 (3). The Aliens Restriction (Consolidation) Order, 1916, has been revoked. See now the Aliens Order, 1953 (S.I. 1953 No. 1671), art. 25.

As to registration of aliens, see 1 HALSBURY'S LAWS (3rd Edn.) 516 et seq.; and for cases see 2 DIGEST (Repl.) 181 et seq. For the Aliens Restriction Act, 1914, s. 1, see 1 HALSBURY'S STATUTES (2nd Edn.) 691. For the Aliens Order, 1953, art. 25, see 2 HALSBURY'S STATUTORY INSTRUMENTS.

Case Stated by a metropolitan magistrate.

At a court of summary jurisdiction sitting at the Thames Police Court on April 20, 1917, the respondent, Alfred Hunt, an inspector of police, preferred an information against the appellant, David Agdesman, charging that on Mar. 26, 1917, at No. 21A, Commercial Street, Whitechapel, he unlawfully furnished to the respondent, whilst the latter was acting in his capacity as a registration officer under the Aliens Restriction (Consolidation) Order, 1916, false particulars with respect to the appellant's nationality. The following facts were proved or admitted. The appellant was born at Bessarabia, Russia, on Mar. 24, 1899. The appellant's father, Philip Agdesman, on Apr. 4, 1913, applied for and obtained a certificate of naturalisation as a British subject, and the appellant was the person referred to in the certificate as "David, aged fourteen years." In August, 1915, the appellant, on a form signed by him in pursuance of the National Registration Act, 1915, described himself as "Russian, naturalised British." A registration card was issued to the appellant in pursuance of the National Registration Act, 1915, and by mistake he was described on the card as "Russian." On Mar. 26, 1917, the appellant applied to the respondent to be registered under the Aliens Registration Act, 1914, and art. 19 of the Aliens Restriction (Consolidation) Order, 1916. On this application, the appellant, among other statements of a personal character, made a statement that he was of Russian nationality, whereas, in view of the facts set out above and by virtue of s. 10 (5) of the Naturalisation Act, 1870, he was in truth a person who is deemed to be a naturalised British subject. On Apr. 1, 1917, the respondent, having seen the naturalisation certificate, asked the appellant why he, knowing that he was a British subject, tried to register himself as a Russian. The appellant then produced his national registration card. The respondent informed the appellant that he had seen his (the appellant's) original registration form, on which he described himself as "Russian, naturalised British." The appellant stated that because he was nearly eighteen he had gone to a solicitor in order to obtain exemption from military service and had shown his national registration card, and that the solicitor told him that the authorities thought that he was a Russian, and he should go and register with the police and this would be enough. The appellant further stated that, when he reached the age of twenty-one, he could be what he liked, and until then he was going to be a Russian.

On behalf of the appellant it was contended (a) that a mis-statement as to nationality was not a "false particular" within the Aliens Restriction (Consolidation) Order, 1916, art. 27 (2), and that nationality, being partly a question of law, was not a matter as to which a "false particular" could be furnished; and (b) that art. 27 (2) did not make it an offence for a person who was not an alien to furnish false particulars to a registration officer, and if it purported to do so, it was to that extent *ultra vires*. The learned magistrate was of opinion that, nationality being one of the matters referred to in art. 19 (1) (a) of the order and set out in Sched. IV thereto in a list headed "Particulars to be furnished on Registration," a false statement as to nationality was a false particular within art. 27 (2). He was further of opinion that the statement of a false particular to a registration officer by a person who was not an alien came within art. 27 (2), and that s. 1 (1) (k) of the Aliens Restriction Act, 1914, empowered the making of such a regulation applying to persons who were not aliens, inasmuch as it was necessary and expedient, with a view to the safety of the realm, that, if a register of aliens was to be kept, it should be accurate. The learned magistrate found as facts that, at the time when the appellant furnished the false particulars to the respondent, he knew that he was a British subject, and that the appellant only adopted the mistake made on his national registration card and tried to register as a Russian in order to obtain exemption from military service. The learned magistrate, therefore, convicted the appellant and sentenced him to three months' imprisonment in the second division. The appellant now appealed.

Section 10 (5) of the Naturalisation Act, 1870, now repealed, provides:

"Where the father or the mother, being a widow, has obtained a certificate of naturalisation in the United Kingdom, every child of such father or mother who during infancy has become resident with such father or mother in any part of the United Kingdom shall be deemed to be a naturalised British subject."

Section 1 of the Aliens Restriction Act, 1914, provides:

"(1) His Majesty may at any time when a state of war exists between His Majesty and any foreign power, or when it appears that an occasion of imminent national danger or emergency has arisen, by Order in Council impose restrictions on aliens, and provision may be made by the order . . . (k) for any other matters which appear necessary or expedient with a view to the safety of the realm."

By the Aliens Restriction (Consolidation) Order, 1916, it is provided:

"19 (1). An alien, wherever resident, shall comply with the following requirements as to registration:—(a) he shall as soon as may be furnish to the registration officer of the registration district in which he is resident particulars as to the matters set out in the first part of the fourth schedule to this order. . . . [The particulars include nationality and birthplace.]"

"27 (2). If any person furnishes or causes to be furnished to a registration officer any false particulars, or, with a view to obtaining any permit or permission under this order, makes or causes to be made any false statement or false representation, he shall be deemed to have acted in contravention of this order."

"28. If any person aids or abets any person in any contravention of this order, or knowingly harbours any person whom he knows or has reasonable ground for supposing to have acted in contravention of this order, he shall be deemed himself to have acted in contravention of this order."

Cox-Sinclair and *Hynes* for the appellant.

Lamb for the respondent.

VISCOUNT READING, C.J.—In my opinion, the learned magistrate came to a correct determination in this case. According to the Case Stated, he arrived

at his decision on two grounds—namely, that the appellant furnished false particulars when applying for registration under the Aliens Restriction (Consolidation) Order, 1916, and that he knowingly gave these false particulars in order to obtain exemption from military service. It is not necessary to deal with the question of the false particulars at any length. It could not be seriously argued by anyone that there was no mis-statement of the particulars required under art. 27 (2). The question of nationality may not always be one which can be easily determined. But in this case there was no doubt at all. The appellant knew what his nationality was. He was born in Russia, and he became a naturalised British subject when his father took out his certificate of naturalisation in 1913. The learned magistrate has found that he wilfully gave false particulars, and that he did so with the purpose of evading military service. There was abundant evidence on which the learned magistrate could arrive at that decision, and, indeed, I do not see how it can be questioned in any way.

But another point has been raised, a point of law, and it is based on the construction of the language of art. 27 (2) of the Aliens Restriction (Consolidation) Order, 1916, which was made under the powers conferred by the Aliens Restriction Act, 1914. The contention put forward on behalf of the appellant is that the words of the article do not apply in his case because he has been declared to be a naturalised British subject, and the Act of 1914 and the order of 1916 only refer to aliens. It is clear that the words of art. 27 (2) are wide enough to apply to British subjects as well as to aliens in a general way, and, *primâ facie*, there is no reason why we should not give to the words their natural and ordinary meaning. That is admitted on behalf of the appellant, but it is contended that the scope of the Act and the order is directed against aliens, and that, where they are intended to apply to British subjects, specific language is used for the purpose of including British subjects. In my opinion, that contention is ill-founded. It is true that the Act was passed for the purpose of dealing with aliens and of imposing restrictions on them, but it was also intended to make such provisions as are necessary for the purpose of carrying those restrictions into effect. One has only to examine the Act to see how wide are the powers conferred to make restrictions by Order in Council. They are contained in s. 1 (1) of the Act, and para. (k) of that subsection shows that practically any regulation may be made which appears necessary or expedient with a view to the safety of the realm. The statute was drafted in very wide language, and this was essential so as to prevent any evasion of the powers which were conferred by the legislature on the King in Council. As I have said, the argument put forward on behalf of the appellant is that art. 27 (2) is not intended to apply to British subjects, because a British subject would be aiding and abetting, and would come within art. 28. I do not think that that argument is sound. There is at the outset a difficulty in the way of accepting it, because the opening language of the two articles—27 and 28—is the same, and, if the appellant's contention was correct, it would be necessary to say that the words "any person" in art. 28 are wide enough to cover a British subject, whilst in art. 27 they are not. I do not think that that can be so. Again, if the argument was right, it would be open to a British subject to furnish false particulars about an alien, and to say, when challenged, that he was not liable to be punished as he was a British subject, though if he aided and abetted an alien to give false particulars he would commit an offence under art. 28. I am quite satisfied in my own mind as to the construction to be placed on these articles, and I think that the learned magistrate was right in his decision. The appeal will be dismissed.

DARLING, J.—I agree. The appellant was born a Russian subject, but became a British subject by naturalisation. There is no doubt about that part of the case. But, owing to a mistake that was made when his registration card was issued to him, in which he was stated to be a Russian, he was able to represent himself as a Russian if he wished to do so. That was in 1915. But then there came the Military Service Acts, 1916, and the appellant clearly saw that, if he was

a British subject, he would become liable to military service under these Acts as soon as he reached the specified age. There can be no doubt that it was with the object of evading military service that he took advantage of the mistake in his registration card and applied for registration as an alien under the Aliens Restriction (Consolidation) Order, 1916. He then described himself as a Russian, and so gave false particulars as to his nationality, which was a contravention of the provisions of the order. The learned magistrate was, therefore, quite right in convicting him.

AVORY, J.—I am of the same opinion.

Appeal dismissed.

Solicitors: *Albin Hunt; Wontner & Sons.*

[Reported by J. A. SLATER, Esq., Barrister-at-Law.]

COLBOURNE AND ANOTHER v. LAWRENCE

[KING'S BENCH DIVISION (Darling, Avory and Sankey, JJ.), October 18, 1917]

[Reported [1917] 2 K.B. 857; 87 L.J.K.B. 219; 117 L.T. 666;
82 J.P. 6; 26 Cox, C.C. 92; 14 Asp.M.L.C. 168]

Shipping—Seaman—Desertion—Failure of master to enter statement of wages due to seaman “left behind”—Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), s. 28 (1) (a), (10).

A seaman deserted his ship in a foreign port, leaving nothing on board. There was no information whether, before the ship left the port, he sailed in another vessel. The ship's master was charged under the Merchant Shipping Act, 1906, s. 28, with failing to enter in the official log-book as soon as might be a statement of the amount due as wages to the seaman when he was left behind.

Held: the words “left behind” in s. 28 (1) (a) of the Act of 1906 included a deserter as to whose whereabouts the master of the ship might be uncertain, and, therefore, the master was guilty of the offence charged.

Notes. As to a seaman's wages, see 30 HALSBURY'S LAWS (2nd Edn.) 216 et seq.; and for cases see 41 DIGEST 224 et seq. For the Merchant Shipping Act, 1906, s. 28, see 23 HALSBURY'S STATUTES (2nd Edn.) 794.

Case referred to:

(1) *Deacon v. Quayle, Neate v. Wilson*, [1912] 1 K.B. 445; 81 L.J.K.B. 409; 106 L.T. 269; 76 J.P. 79; 12 Asp.M.L.C. 125, D.C.; 41 Digest 232, 720.

Case Stated by justices for the city of Bristol.

At a court of summary jurisdiction sitting at Bristol on Sept. 18, 1916, the appellant, an agent for the Solicitor to the Board of Trade, preferred an information against the respondent, Henry Lawrence, master of the British ship *Invermay*, charging that he unlawfully failed to enter in the official log-book of the ship, as soon as might be, a statement of the amount due to A. W. Grass, a seaman belonging to the ship and left behind out of the British Isles, on account of wages at the time when he was left behind, such omission being alleged to be an offence under the Merchant Shipping Act, 1906, s. 28 (1) (a) and (10). The appellant Colbourne was the superintendent of the mercantile marine, an officer of the Board of Trade at the port of Bristol, and the proper officer referred to in s. 28 of the above Act. The following facts were proved: The ship *Invermay* was a British sailing ship registered at the port of Aberdeen, and, at the material times, the respondent was her master. By articles of agreement opened at the port of Dublin

A on Feb. 5, 1915, for the voyage which commenced at that port on Feb. 12, 1915, the seaman was engaged amongst others as a member of the crew of the sailing ship for a voyage not exceeding three years' duration to any ports or places within the limits of 75 degrees N. and 60 degrees S. latitude, commencing at Dublin and proceeding thence to New York and/or any other ports within the above limits, trading in any rotation, and to end at such port in the United Kingdom or Continent of Europe (within home trade limits) as might be required by the master. The articles and the official log for the voyage were put in evidence. A. W. Grass, who signed the articles on Feb. 5, 1915, deserted the ship at New York on May 25, 1915, and did not rejoin the ship during the voyage. The ship arrived at Bristol on Aug. 19, 1916, and on Aug. 21, 1916, the respondent delivered the agreement, account of crew, and official log-book to the superintendent of mercantile marine. C The official log contained an entry recording the desertion of the seaman, and it was proved that he was in fact a deserter and took away all his effects when deserting the ship, and these facts were reported to the British consul at the port of desertion. The official log contained no statement of the amount due to the seaman on account of wages at the time when he deserted the ship, but the respondent's seamen's wages account book (which he delivered to the superintendent) contained particulars as to the balance of wages. Although there had previously been cases in Bristol in which masters had not made such entries in the official log no proceedings had previously been taken.

It was contended for the appellants that a seaman, who deserted his ship at a port out of the British Isles and was not brought away from such port by such ship, was a seaman "left behind" out of the British Isles within s. 28 of the Merchant Shipping Act, 1906, and that the failure of the respondent to enter in the official log-book a statement of the wages due to the seaman at the time when the ship sailed without him on board constituted an offence under the section. It was contended for the respondent that the provisions of the Act being penal it must be construed strictly, and that a deserting seaman who had joined another vessel and had left the port where the desertion took place whilst the vessel still remained in port could not be described as a seaman "left behind." A seaman who had been entered in the ship's articles as a deserter was not left behind within the true interpretation of the section. There was no evidence that the seaman had been left behind. It was not the practice of masters to treat deserters who were believed to have deserted for the purpose of joining other ships as men who had been "left behind," and these words had in practice been interpreted as applying to men who had (a) been unable to join in consequence of accident, illness, misadventure, or the like; (b) been punished for some offence and remained in prison or under restraint.

Evidence in support of these points was given by the respondent and by two masters called on his behalf, and it was proved that the vessel had remained in port at least several days after the desertion, and that the strong probability was that the seaman had joined another vessel and gone to sea and possibly had either returned to England or was on his way before the *Invermay* had left the port in which the desertion took place.

The justices dismissed the information and the appellants now appealed.

By the Merchant Shipping Act, 1906, s. 28:

I "(1) If a seaman belonging to any British ship is left behind out of the British Islands, the master of the ship shall subject to the provisions of this section—(a) as soon as may be, enter in the official log-book a statement of the effects left on board by the seaman and of the amount due to the seaman on account of wages at the time when he was left behind, . . . (10) If the master of the ship fails without reasonable cause to comply with this section, he shall (without prejudice to any other liability) for each offence be liable on summary conviction to a fine not exceeding twenty pounds . . ."

The Solicitor-General (Sir Gordon Hewart, K.C.) (G. A. H. Branson with him) for the appellants.

Inskip, K.C. (A. T. Miller with him) for the respondent.

DARLING, J.—This case turns entirely on the meaning to be given to a very few words in s. 28 (1) of the Merchant Shipping Act, 1906. [His LORDSHIP read the subsection and continued:] The man who is said to have been left behind was a seaman who deserted in a foreign port and left nothing on board the ship, and, although it is absolutely uncertain, it may be that, before the ship left the port, he had sailed from it in another vessel. We have no information about that. It is contended by counsel for the appellants that the man comes within the words "left behind," and that the amount due to him for wages should have been entered in the log-book. If the section went no further I should agree with counsel for the respondent, and I should think that the ordinary commonplace meaning was to be given to the words "left behind," and that, if the seaman left the ship, and if it was not known that he had gone off in another ship, it would be improper to describe him as a seaman left behind. But the subsection goes on to say, in para. (b), that the master, on the termination of the voyage, shall furnish certain accounts, including any expenses caused

"by the absence of the seaman in cases where the absence is due to desertion, neglect to join his ship, or any other conduct constituting an offence under s. 221 of the principal Act."

If, therefore, a seaman has deserted, the master is bound to give some account of him, and para. (b) provides that he shall do so at the termination of the voyage and in a particular form. But it all comes under the words "if a seaman is left behind," and I think that, although the master would clearly not be obliged to make those entries in the log-book if the section stopped at the end of para. (a), yet when one reads para. (b) one sees that the legislature used the words "left behind" to cover something more than being left on the shore when the ship actually sails away. The legislature apparently observed that something had been omitted, and by *arrière pensée* they inserted these words as to the cause of the seaman's absence. In the case of a deserter, with regard to whom it is not known where he has gone, the mere fact that he has deserted makes it very difficult to know whether he is staying on shore or whether he has left on another ship. I think that the words "left behind" include a deserter as to whose whereabouts the master may be quite uncertain. So to hold does not impose any burden on the master. The appeal must be allowed, but, as there is no moral blame on the appellant and the offence is a technical one, it will be without costs.

AVORY, J.—There is no finding of fact in this case, and there is no evidence, that the seaman did in fact join another vessel and go to sea before the ship from which he had deserted left the port in which the desertion took place. There is, therefore, no foundation for the contention put forward by counsel for the respondent that the seaman had not been left behind. The Case has not been stated for the purpose of a decision on that question of fact, but it has been argued on the assumption that this seaman had gone to sea before the ship from which he deserted left the port. On that assumption, the question is whether he can properly be described as having been left behind out of the British Islands within s. 28 (1) of the Merchant Shipping Act, 1906. It is important to observe the words "out of the British Islands" in that subsection. The magistrates have made the mistake of construing the words in the Act without having regard to the general tenor and object of the whole section in which they occur. It is true that, if you construe the words "left behind" by themselves, you would not speak of a man following another as leaving him behind. But it is reasonable to hold that the words merely mean that the master, when he leaves the port, must, as soon as may be, enter in the official log-book the required particulars with regard to any seaman whom he has not brought away with him; in other words, who has

A been left behind. It is immaterial whether the seaman is still standing on the quay or has gone to prison or has in fact joined another ship. As was pointed out in *Deacon v. Quayle* (1), the whole purpose is to carry out the objects of s. 221 and s. 232 of the Merchant Shipping Act, 1894, and, when you look at the purpose of those sections, it supports the view of counsel for the appellant that the words "left behind" include a deserter, whether he remains in the port at the time when his ship sails, or whether he has joined another ship and has, perhaps, sailed in her. The appeal succeeds, and the Case must be remitted to the justices to be dealt with.

SANKEY, J.—I agree.

Appeal allowed.

C Solicitors: *Solicitor to the Board of Trade; Ford & Ford, for Wansbrough, Robinson, Tayler & Taylor, Bristol.*

[*Reported by J. F. WALKER, Esq., Barrister-at-Law.*]

MEGUERDITCHIAN v. LIGHTBOUND AND OTHERS

E [COURT OF APPEAL (Swinfen Eady and Bankes, L.JJ., and Bray, J.), March 28, 29, 1917]

[*Reported* [1917] 2 K.B. 298; 86 L.J.K.B. 889; 116 L.T. 790; 61 Sol. Jo. 416; [1917] H.B.R. 176]

Solicitor—Lien—Extent of lien—Expenses incurred on instructions of client against whom lien claimed—Recovery of property through negotiation.

F A solicitor's lien extends only to his charges and expenses incurred on the instructions of the actual client against whom the lien is claimed, and the property over which the lien is sought must have been recovered or preserved as the result of some sort of legal proceedings and not merely of negotiations between parties.

G Accordingly, where one Z. instructed his solicitors to recover certain documents from one B., and after the solicitors had incurred expenses and earned costs in attempting to recover the documents Z. became bankrupt, whereupon his trustee in bankruptcy instructed the solicitors to recover the documents, which they succeeded in doing by negotiation,

H **Held:** the solicitors had no lien, as against the trustee in bankruptcy, on the documents recovered by negotiation for the costs incurred on the instructions of Z.

Notes. As to a solicitor's lien, see 31 HALSBURY'S LAWS (2nd Edn.) 238 et seq.; and for cases see 42 DIGEST 259 et seq.

Case referred to:

(1) *Shaw v. Neale* (1858), 6 H.L.Cas. 581; 27 L.J.Ch. 444; 31 L.T.O.S. 190; 4 Jur.N.S. 695; 6 W.R. 635; 10 E.R. 1422, H.L.; 42 Digest 317, 3528.

I Also referred to in argument:

Re Meter Cabs, Ltd., [1911] 2 Ch. 557; 81 L.J.Ch. 82; 105 L.T. 572; 56 Sol. Jo. 36; 19 Mans. 92; 42 Digest 278, 3120.

Ormerod v. Tate (1801), 1 East, 464; 102 E.R. 179; 42 Digest 282, 3169.

Re Born, Curnock v. Born, [1900] 2 Ch. 433; 69 L.J.Ch. 669; 83 L.T. 51; 49 W.R. 23; 44 Sol. Jo. 611; 42 Digest 299, 3327.

Ross v. Burton (1889), 42 Ch.D. 190; 58 L.J.Ch. 442; 60 L.T. 630; 54 J.P. 85; 38 W.R. 71; 42 Digest 282, 3166.

Re Moss (1866), L.R. 2 Eq. 345; 35 Beav. 526; 35 L.J.Ch. 554; 14 L.T. 536; 12 Jur.N.S. 557; 14 W.R. 814; 55 E.R. 1000; 42 Digest 305, 3393. A

Re Faithfull, Re London, Brighton and South Coast Rail. Co. (1868), L.R. 6 Eq. 325; 18 L.T. 502; 42 Digest 259, 2927.

Appeal by the defendants from an order of ROWLATT, J., made in an action tried by him without a jury.

The facts are stated in the judgment of SWINFEN EADY, L.J. B

Leslie Scott, K.C., and L. F. C. Darby for the defendants.

Ernest Pollock, K.C., and Eustace Hills, for the plaintiff, were not called on to argue.

SWINFEN EADY, L.J.—This is an appeal from an order of ROWLATT, J. The action was one in which the surviving syndic or trustee in bankruptcy of George Constantine Zervudachi sued the defendants, Messrs. Lightbound, Owen, and MacIver, who are solicitors, to obtain the return of certain documents. The defendants had received the documents and had possession of them, and did not claim any interest beyond a lien. They conceded that the documents belonged to the plaintiffs. The question between the parties was whether the defendants had a legal right to detain the documents by reason of their having a lien upon them. There was a small lien, I think, for £26 or £29, about which there was no dispute, but the defendants claimed a lien for a substantial bill of costs. The question in the action was: Had the defendants that lien? C

The circumstances under which the action was brought were these. Zervudachi, who lived in Egypt, had acquired by purchase a concession granted by the Sultan of Turkey in respect of certain asphalt mines at or near Lattaquie, on the coast of Northern Syria. There was, as I gather, not only a concession of the mines, but also a concession enabling a ropeway or aerial railway to be made from the mines to the coast. Zervudachi had entered into an agreement in writing dated Sept. 24, 1907, under which one Bergheim was to render services in connection with the concessions, and especially with reference to the flotation of a company to build a railway, to obtain shipping facilities, and otherwise to develop the property the subject of the concession. Bergheim was to have a considerable commission as remuneration for carrying out the matters referred to in that agreement. Before the date of the agreement Zervudachi had arranged with one Shakour Pasha to have an interest in the concession, and in a letter dated July 26, 1906, which Zervudachi had written to Shakour Pasha, he mentions that he has paid the vendor of the concession, Gilchrist, the original concessionnaire, £35,000 for the concession rights, and then says: D

"In order to have the small working capital necessary to meet the first requirements of this enterprise, and whilst other resolutions are being taken, I have decided to bring the first capital for this work to £50,000. Your participation being of 30 per cent., it follows that the part which you will have to pay is increased to £15,000 which sum you will be good enough to pay me at your earliest convenience. Thus it is with your knowledge and agreement I have given, under certain conditions, an option to participate up to the extent of 20 per cent. to the Neuchatel Asphalt Co., Ltd., of London." E

Shakour Pasha, or a company with which he is identified, paid the £15,000 to Zervudachi, and the parties were then interested as follows: Zervudachi thirty-five fiftieths, and Shakour Pasha fifteen fiftieths, subject to negotiations then on foot to admit other persons to different interests. That was the position when in the next year, 1907, Zervudachi made the agreement with Bergheim to which I have already referred. Then time went on, and Zervudachi complained that Bergheim did not fulfil his obligations under the agreement. Ultimately Zervudachi took proceedings against Bergheim in the courts in Egypt, and obtained there judgment by default against him for, I think, £15,000. It did not appear that there were any assets of Bergheim in Egypt that could be made available to satisfy the F

A judgment, or that Zervudachi could obtain anything more by further proceedings in Egypt, and accordingly in the next year, 1910, Zervudachi instructed the defendants to take proceedings in England, where Zervudachi was, to enforce the Egyptian judgment in the first instance. The defendants looked into the matter. There was very voluminous correspondence, and no doubt they incurred substantial costs in the matter, and their view was that, instead of suing in England upon the Egyptian judgment, the proper course would be to bring an action in England against Bergheim in respect of their original cause of action to obtain back the concessions with which Bergheim had been entrusted on entering into the agreement, and to obtain damages from Bergheim for his default in not implementing his obligations under the agreement. It then became apparent that Shakour Pasha had an interest in the property, and it was considered that he ought to be consulted before the proceedings were brought. There was an interview with M. Nassif, who represented Shakour Pasha, with regard to his being made aware of the proceedings that were contemplated and consenting to or approving such proceedings being taken. The matter was one of considerable complication, and it was then considered that the better plan would be for the defendants to send to Egypt a member of their firm to take proofs and statements of the witnesses and see exactly what evidence would be required and what facts could be proved. Mr. McIver, a member of the defendant firm, went out to Egypt and spent some time there in investigating the cause of action, taking proofs of witnesses, and so on, and generally attending to the case. Among others he had an interview with Shakour Pasha in Egypt and obtained a statement from him. He then returned, and with the material in their possession the defendants had an interview with Bergheim's solicitors on May 10, 1911, that is recorded in the bill of costs: Attending Norton, Rose & Co. [who represented Bergheim], conferring fully as to whether anything could be done with a view to simplify the question in dispute, when they informed us that Mr. Bergheim was willing to withdraw all claims against you [Zervudachi] if you were prepared to do likewise, but, in the event of your pressing your claim, he would give as much trouble as possible. We informed them that it was not worth our while submitting their offer. The matter went on. There was communication with representatives of Zervudachi, and in August a writ was threatened. On Aug. 28 the defendants wrote to Norton, Rose & Co. that the matter was receiving their attention, and they would probably be in a position to issue a writ before the close of the vacation, and they took counsel's opinion as to the legal position. Then it appears that Zervudachi got into financial trouble. Proceedings were taken in Egypt, there was an adjudication of bankruptcy, and ultimately he was arrested and died, I think, by his own hand. Bergheim went abroad, met with an accident, and he too died.

Then the position was this. The original parties, Zervudachi and Bergheim, were both dead. The defendants communicated with the syndics who were the representatives in bankruptcy of Zervudachi, and after a little time Norton, Rose & Co. were instructed to represent Bergheim's executors. Then the syndics looked into the matter, and ultimately, in February, 1912, they instructed the defendants to take proceedings against Bergheim or his representatives to recover £100,000 alleged damages for failure to perform his obligations under the agreement. There was further communication between the defendants and Norton, Rose & Co., from which it appeared that Bergheim or his representatives had then raised their terms. They were no longer prepared to give up the documents on equal terms as they were in May, 1911. It may be that the fact of the failure and death of Zervudachi had changed the position. They asked in the first instance for a sum, I think, of over £600, being the balance which Bergheim alleged was due to him in respect of expenditure and work done with reference to the concession. There were some negotiations, and ultimately it was arranged that £300 should be paid, with the result that the syndics agreed to pay to Bergheim's executors £300 in exchange for Bergheim's executors surrendering all the documents they had, the documents of value, of course, being the original asphalt concessions. Those were obtained.

Then the defendants, giving particulars of their costs, claimed to have a lien against the syndics on the documents so obtained from Bergheim's executors for all their costs in connection with the matter—that is to say, they claimed a lien in respect of the bulk of the costs which had been incurred on the instructions of Zervudachi and in respect of a comparatively small sum which was costs incurred since the syndics instructed the defendants. With regard to the latter costs no question arises. Those costs were paid, and the sole question is: Have the defendants a lien in respect of the costs incurred on the instructions of Zervudachi?

While the defendants were acting for Zervudachi and before the bankruptcy a large number of papers came into their possession, mostly correspondence, but very voluminous, running into hundreds and thousands of folios. No question arises with regard to any of those documents. No doubt the defendants would have a lien on documents which came into their possession while they were acting for Zervudachi and before his bankruptcy, and, no doubt, they would continue to have a lien upon them notwithstanding his bankruptcy, but no question arises with regard to any of those documents in this action. They are not documents of any value for the purpose of realisation; they are not documents out of which any money can be obtained. The other documents are the valuable ones, and I refer to them shortly as "concessions." Those were obtained after the bankruptcy and after the defendants had been instructed by the syndics to obtain them, and they were handed to the defendants as solicitors for the syndics.

The case on behalf of the defendants is put in two ways. It is first said that there was a partnership between Shakour Pasha and Zervudachi, that the defendants were retained as solicitors by the partners, and that both partners are liable in solido for the costs, and that the defendants have a lien against the partnership for all their costs. I am satisfied that the defendants' first point fails, and that there was no partnership. It was an equitable co-ownership possibly, but not a partnership, and certainly there was nothing that could put Shakour Pasha in a position of personal responsibility for those costs. There was an interview between the defendants and Shakour Pasha in which Shakour Pasha recognised that ultimately he might have to bear 30 per cent. of the costs, but it was not, I think, suggested to him then that he was personally liable for the whole of the costs. In my judgment the defendants have failed to establish any partnership with Shakour Pasha, and certainly any joint retainer under which Zervudachi had power to pledge the credit of Shakour Pasha by instructing the solicitors on their joint account to bring the action.

The other part of the case is this. There being no dispute with regard to the lien for such costs as the defendants incurred on the syndics' instructions, it is said that because the syndics instructed the defendants to take proceedings against Bergheim to obtain the concessions they must be deemed to have accepted and taken on the benefit of the negotiations which had previously been conducted by the defendants as solicitors for Zervudachi, and that the lien for costs of the defendants extended to the whole of the costs incurred by Zervudachi, and that is said although at the date of the bankruptcy of Zervudachi, these deeds (the concessions) remained with Bergheim, there was no possession by the defendants. It is said the effect of the syndics instructing the defendants was, notwithstanding the bankruptcy, to confer a lien on the defendants as soon as they obtained the documents in respect of all the past costs incurred by Zervudachi. It was attempted to establish that claim by analogy to cases where there are proceedings in court, or proceedings in an arbitration, or proceedings to establish a claim, and where after the proceedings have continued for some time on a bankruptcy there has been a change of interest, and the trustee, or representative of the bankrupt intervenes and takes up the litigation at the point at which the bankrupt had left it. In my opinion, there is no analogy at all between proceedings of that kind and the lien that it has been held that a solicitor can acquire under those circumstances. There is no analogy whatever between that class of case and a case

A where there are no proceedings, but merely negotiations with regard to a matter and correspondence taking place between the solicitors on either side. Although counsel for the defendants claimed that under such circumstances the solicitors would obtain a lien, yet he was quite unable to produce any authority whatever in support of the proposition. Case after case which he referred to were cases in which there was an action, or a suit, or proceedings of some kind. In one case B it was an administration suit in which the solicitors had maintained the claim of the client to share in a fund in court, but they were all cases with regard to proceedings, and not a single case was cited in which such a lien as is alleged to exist had ever been shown to exist. In my opinion the grounds upon which the learned judge below proceeded were right. The court has gone a considerable extent to uphold a solicitor's lien and to endeavour to see that a solicitor, having earned costs, should, so far as the practice of the court extends, be paid. After the case C in the House of Lords, to which counsel for the defendants referred, of *Shaw v. Neale* (1), where it was held that the solicitor had no lien or charge on real estate the Solicitors Act, 1860, was passed under which a charging order can be obtained in certain circumstances on property recovered or preserved. But that refers again D only to litigation, and under the circumstances in this case no such charging order could be obtained. In my opinion, the judgment below was right, and the claim sought to be established in these proceedings is not well founded, and the appeal fails.

BANKES, L.J.—I agree. One can quite understand that Messrs. Lightbound, Owen, and McIver feel that in this case the owners of the concessions, whoever E they are, are indirectly deriving a very considerable benefit from the work which they did and the expenses to which they were put on the instructions of Zervudachi before his bankruptcy; but although one would wish, if one could, to secure to a solicitor that he should be paid by the person who has actually benefited by the work which he has done, yet one can only do that if the solicitor brings his case within one or other of two well-recognised rules. Counsel for the defendants has F contended that he has brought himself within the object of those rules, and has established that Messrs. Lightbound, Owen, and MacIver are entitled to a general lien, and he has claimed also that they have established that they are entitled to a particular lien.

The first question depends entirely upon a question of fact. If in truth Messrs. Lightbound, Owen, and MacIver were acting for the syndics and for the syndics G only in those negotiations which ultimately resulted in the handing over of the concessions, it would not be disputed that they could not claim a lien upon those concessions for work which had been done upon the instructions of clients other than the syndics. The defendants have endeavoured to establish that they were really acting throughout for what he has called a partnership, which included (I do not know that it consisted of) Zervudachi and Shakour Pasha, and that the H instructions which were given by the syndics by that very formal letter of Feb. 17, 1912, were not instructions given on their behalf only and to be treated as a retainer by them only, but in some way which I do not understand it is to be treated as a retainer on behalf of the partnership. As a question of fact, I entirely disagree with the view presented by the defendants; it seems to me that the facts are quite conclusive the other way. [His LORDSHIP dealt with the facts and came I to the same conclusions as SWINFEN EADY, L.J.]

On the question of law it seems to me quite impossible to contend successfully that the rule of law which has been hitherto applied to the solicitor's lien in respect of property recovered can be applied to a case such as this. Counsel has claimed that the underlying principle should be applied to it. With great respect to him, I can see a very good reason why the principle should be applied in cases where there are proceedings, whether they consist of an action or arbitration, but I can see very good reasons why they should not be applied when the solicitors are left

free to take whatever course they choose in order to secure a compromise. In my opinion, this appeal fails.

BRAY, J.—I agree.

Appeal dismissed.

Solicitors: *Lightbound, Owen & MacIver; Meynell & Pemberton.*

[Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.]

Re PLATT. SYKES v. DAWSON

[CHANCERY DIVISION (Sargant, J.), July 20, 21, 1916]

[Reported [1916] 2 Ch. 563; 86 L.J.Ch. 114; 115 L.T. 524;
61 Sol. Jo. 10]

Annuity—Rights as to property charged—Bequest of fixed annuity out of income of share of residue—"Subject thereto" share bequeathed to others—Reasonable possibility of future deficiency of income—Present surplus of income—Retention of surplus—Duty of trustees.

A testator bequeathed to his widow an annuity of £1,000, to be paid out of the income of a share of his residuary estate. "Subject thereto" he gave the share and the income thereof on trust for a son and daughter and their children. The will also contained bequests of other annuities to the testator's widow, but as to these it provided expressly that a sufficient part of the residuary estate might be appropriated to meet them, and that the surplus income of the appropriated funds should be applied as income of the residuary estate. The testator died in 1906. The rate of dividend on shares in a company in which a large part of the residuary estate was invested had lately been reduced, and, though hitherto the income had been sufficient to pay the annuity of £1,000 to the widow, there was a reasonable possibility that the rate of dividend might still further be reduced, in which case the income would be insufficient.

Held: "subject thereto," in the context of the will, meant subject as at the time of payment of each instalment of the annuity, not subject to the satisfaction of the annuity down to the death of the annuitant; and, therefore, the trustees of the will were not entitled to retain surplus income of the share of residue to meet possible future deficiencies of income; but the surplus income, after paying the annuity down to date, must be applied on the other trusts declared by the will.

Notes. This case must be read as explained by the Court of Appeal in *Re Coller's Deed Trusts*, *Coller v. Coller*, [1937] 3 All E.R. 292, at p. 296.

Considered: *Re Earle*, *Tucker v. Donne* (1923), 131 L.T. 383; *Re Coller's Deed Trusts*, *Coller v. Coller*, [1937] 3 All E.R. 292. Referred to: *Re Strict*, *Vivers v. Holman* (1922), 67 Sol. Jo. 79; *Re Cameron*, *Currie v. Milligan*, [1955] 1 All E.R. 424.

As to distribution of surplus income of an annuity fund, see 32 HALSBURY'S LAWS (3rd Edn.) 564; and for cases see 39 DIGEST 151-153.

Cases referred to in argument:

Re Watkins' Settlement, *Wills v. Spence*, [1911] 1 Ch. 1; 80 L.J.Ch. 102; 103 L.T. 749; 55 Sol. Jo. 63, C.A.; 39 Digest 146, 408.

Re Rose, *Rose v. Rose* (1915), 85 L.J.Ch. 22; 113 L.T. 142; 39 Digest 148, 422.
Harbin v. Masterman, [1896] 1 Ch. 351; 65 L.J.Ch. 195; 73 L.T. 591; 44 W.R. 421; 12 T.L.R. 105; 40 Sol. Jo. 129, C.A.; 39 Digest 144, 392.

A **Originating Summons.**

B The testator, Frederick Platt, gave his residuary estate for division into six equal shares. After settling three of these shares to be held on trusts corresponding with those of certain settled hereditaments, the testator gave another sixth share on trust for his daughter during her life and for her children on her death, and another sixth share on trust for a son of the testator and his children. Out of the income of the remaining sixth share the testator directed his trustees to pay to his wife if she survived him an annuity of £1,000 in addition to any other annuities which he should bequeath to her by will or codicil. "Subject thereto," this sixth share of residue and the income thereof were to devolve on trusts under which they went by way of accruer to the sixth shares settled on the son and daughter. **C** The testator gave his wife other annuities in addition to that of £1,000, and he provided as to these that the trustees of the will should have power to appropriate sufficient of the residuary estate to meet them, and that the surplus income of the appropriated funds should be applied as income of the residuary estate. He died on Sept. 22, 1906. His wife, who was his second wife, survived him, as did the son and daughter. Both had children, but the son had since died. The residuary estate consisted largely of debentures and shares in a certain company, which by **D** the will the trustees were authorised to retain as investments. Since the outbreak of the war the dividend on some of the shares had been reduced, and fears were entertained that it might be reduced further, in which case the income of the one-sixth share of residue would become insufficient to pay the annuity of £1,000 in full. The trustees of the will accordingly took out this summons to determine whether they were entitled to retain surplus income of the one-sixth share which **E** had already accrued to meet possible deficiencies of the income in the future.

Gurdon for the trustees.

Leverson for the widow, the annuitant.

B. A. Hall for the testator's daughter and her children, entitled to the fund "subject to" the annuity.

F *Stamp* for the children of the testator's son, also entitled "subject to" the annuity.

G **SARGANT, J.**—I have felt great difficulty as to the meaning of the will in this case, but I do not think that I should resolve the difficulty by reserving judgment. The question arises with regard to the provision for the payment of an annuity of £1,000, which was directed by the testator to be paid to his widow out of the income of one-sixth of his residuary estate. The testator's widow was his second wife, and was not the mother of his children for whom provision was made by the will. [His LORDSHIP stated the material provisions of the will, and continued:] The residuary estate consists principally of debentures and preference and ordinary shares in a limited company. So long as the ordinary shares in the company pay **H** anything like the dividend hitherto paid, there are amply sufficient means of meeting the widow's annuity from the income of the one-sixth of residue in question. However, in view of present circumstances, doubts have recently been entertained whether for the current year any dividend, or only a reduced dividend of 2½ per cent., would be paid, in which case the income of this one-sixth of residue would not be sufficient to pay the full annuity to the widow. Fortunately **I** those fears have not been realised, and the company has been able to pay a dividend of 5 per cent.; but I must take it that there is a reasonable possibility of that not continuing to be the case, and of the income hereafter proving insufficient to pay the annuity in full. What is said on behalf of the testator's widow is that the surplus income in excess of £1,000, which is now in the hands of the trustees in respect of the past year, ought to be retained by the trustees to make good any possible deficiency in the future. Of course it is quite clear that, under the provisions of the will, the annuity is not dependent on the income of the one-sixth

of residue in any particular year. It is cumulative, and has to be paid out of the income of the share during the life of the widow; and I think—though I do not decide it so as to bind those entitled in remainder—that the terms of the gift are such as, according to the most recent decisions on the subject, charge the annuity upon the corpus of the share, the gift over being made “subject thereto.” If, therefore, there is a deficiency of income in any year, it will have to be made up at least out of any surplus in a subsequent year, and almost certainly, if she so requests, by a sale of a sufficient part of the corpus of the share, but it does not necessarily follow that the trustees are entitled to retain the surplus income of a past year to meet a possible deficiency of income in a future year. I have to construe the clause as it stands, and I am very much impressed by the fact that what is permitted to devolve under the accruer clause—in other words, what is given over to the settled shares of the son and daughter, subject to the annuity—is the same share and “the income thereof.”

At any particular time when the trustees have to consider whether the income is to devolve between the son's and daughter's shares they are met by this difficulty—that is, to be “subject thereto”—that is, to the annuity. Does that mean subject as at the time of payment of the annuity or subject to the satisfaction of the annuity down to the death of the annuitant? In my opinion, the former is the true meaning of the language, and I think that the administration of the trust would be extremely complicated if any other view were adopted. It is curious that, so far as I know, the point has never been decided; at any rate, no authority has been cited before me. However, that rather tells against the claim of the annuitant, since if any such right existed it would have been enforced from time to time by persons in the same position as she. One reason may be that a fund to secure an annuity is generally so invested that the income of the fund is reasonably certain, and not of a fluctuating character, though that does not entirely explain the absence of any authority upon the point. The annuitant will not be prejudiced, since in the view which I take she will be entitled to have capital sold to make good any deficiency in the annuity. It is true that in the circumstances realisation may not be easy, but I do not think that I can take that consideration into account. Taking the analogy of a company with preference and ordinary shares, I have never heard of any suggested power in the company—apart from express provisions in the articles of association—to postpone the payment of a proper dividend on the ordinary shares for the purpose of providing for the payment of dividends on the preference shares in the future, although those shares are cumulative. Counsel for the annuitant referred to a special power in the will to appropriate a sufficient part of the residuary estate to answer out of the income thereof the other annuities given to the widow by the will, by which it is expressly provided that the surplus income shall be applicable as income of the residuary estate; but any argument derived from that clause seems to me to be of a somewhat double-edged character. The testator may have intended to draw a contrast between the annuities, or, on the other hand, he may only have indicated the course to be pursued with regard to them generally.

On the whole, though I feel great doubt on the point, I am of opinion that the income to accrue on this share of residue, after satisfying the claims of the annuitant, down to date, ought to be distributed between the two other shares as directed by the will. Of course, if the trustees should foresee a certain deficiency, and should have surplus income in their hands, I do not intend to preclude them from applying this money to making good the annuity. As a matter of administration and of immediate adjustment, they might make good the annuity out of any income in their hands. All that I decide is that they are not to retain or accumulate any surplus income for the purpose of making good any possible deficiency in a future year.

Solicitors: *Gadsden & Pennefather.*

[Reported by T. DE LA POER BERESFORD, Esq., Barrister-at-Law.]

Re PRYCE. NEVILL v. PRYCE

[CHANCERY DIVISION (Eve, J.), December 13, 1916]

[Reported [1917] 1 Ch. 234; 86 L.J.Ch. 383; 116 L.T. 149;
61 Sol. Jo. 183]

Settlement—Marriage settlement—Covenant to settle after-acquired property—Enforcement of covenant by volunteers—Wife's next-of-kin—Opposition by wife.

By a marriage settlement in 1887 on the marriage of P., who died in 1907, to the defendant, the defendant (the wife) covenanted to settle after-acquired property. The residue of the wife's trust funds in remainder, in the event, which happened, of there being no children of the marriage, was held by trustees for her next-of-kin as though she had died intestate and without having been married, and the husband's fund in trust for him, his executors, administrators, and assigns, the husband covenanting to bring into settlement any sum to which he should become entitled under his father's will. By an appointment in 1868, P. became entitled, subject to the life interest of his mother, who died in 1913, to a share of property worth approximately £4,500. A sum of £4,700 had in 1889 been settled in trust for three persons as P.'s father, who died in 1891, should appoint, a third share being appointed to P. by his father's will. In 1904 P. executed a deed of gift to the wife which he confirmed by his will, under which the wife took all P.'s interest under the 1868 appointment, and also a life interest in P.'s residuary estate. The funds in question had not been got in by the trustees of the 1887 settlement, and the wife did not wish them to be recovered by the trustees for the benefit of her next-of-kin.

Held: P. became entitled to his share of the £4,700 under his father's will: *Re Crawshay, Walker v. Crawshay* (1), [1891] 3 Ch. 176, applied; *Evans v. Jennings* (2) (1862), 1 New Rep. 178, not applied, and so this share was caught by his 1887 covenant to settle; the interests assured to the wife by the 1904 deed of gift were caught by her 1887 covenant to settle after-acquired property: *Re Ellis's Settlement, Ellis v. Ellis* (3), [1909] Ch. 618, applied; but, as the wife's next-of-kin were outside the consideration of her 1887 marriage settlement, and so were volunteers, the court would not, merely at their instance and for their benefit, order the trustees of that settlement to get in these funds: *Re d'Angibau, Andrews v. Andrews* (4) (1880), 15 Ch.D. 228, applied.

Notes. Applied: *Re Kay's Settlement, Broadbent v. Macnab*, [1939] 1 All E.R. 245. Referred to: *Cannon v. Hartley*, [1949] 1 All E.R. 50.

As to covenants for settlement of after-acquired property, see 34 HALSBURY'S LAWS (3rd Edn.) 450-458, as to consideration for settlements, see *ibid.*, 458-461; and for cases see 40 DIGEST (Repl.) 533-565 and 566-581 respectively.

Cases referred to:

- (1) *Re Crawshay, Walker v. Crawshay*, [1891] 3 Ch. 176; 60 L.J.Ch. 583; 65 L.T. 72; 39 W.R. 682; 40 Digest (Repl.) 549, 566.
- (2) *Evans v. Jennings* (1862), 1 New Rep. 178; 40 Digest (Repl.) 537, 476.
- (3) *Re Ellis's Settlement, Ellis v. Ellis*, [1909] 1 Ch. 618; 78 L.J.Ch. 375; 100 L.T. 511; 26 T.L.R. 166; 40 Digest (Repl.) 539, 496.
- (4) *Re D'Angibau, Andrews v. Andrews* (1880), 15 Ch.D. 228; 49 L.J.Ch. 756; 43 L.T. 135; 28 W.R. 930, C.A.; 40 Digest (Repl.) 569, 750.
- (5) *Re Plumptre's Marriage Settlement, Underhill v. Plumptre*, [1910] 1 Ch. 609; 79 L.J.Ch. 340; 102 L.T. 315; 26 T.L.R. 321; 54 Sol. Jo. 326; 40 Digest (Repl.) 539, 497.
- (6) *Leigh-White v. Rutledge*, [1914] 1 I.R. 135; 40 Digest (Repl.) 540, *108.

- (7) *Pullen v. Koe*, [1913] 1 Ch. 9; 82 L.J.Ch. 37; 107 L.T. 811; 57 Sol. Jo. 97; 40 Digest (Repl.) 566, 718.

Also referred to in argument :

Coles v. Coles, [1901] 1 Ch. 711; 70 L.J.Ch. 324; 84 L.T. 142; 40 Digest (Repl.) 539, 495.

Spickernell v. Hotham (1854), Kay, 669; 2 Eq. Rep. 1103; 2 W.R. 638; 69 E.R. 285; 6 Digest (Repl.) 478, 3372.

Lovett v. Lovett (1859), John. 118; 33 L.T.O.S. 255; 7 W.R. 333; 70 E.R. 362; 40 Digest (Repl.) 517, 284.

A.-G. v. Chapman, [1891] 2 Q.B. 526; 60 L.J.Q.B. 602; 65 L.T. 119; 40 W.R. 79; 7 T.L.R. 640, D.C.; 21 Digest 13, 64.

Adjourned Summons to determine (i) whether a sum of approximately £4,500 to which Pryce Meyrick Pryce, the deceased husband of the defendant, became entitled under his father's marriage settlement and a joint appointment made in 1868 was caught by a covenant to settle after-acquired property; (ii) whether a third share of another sum of £4,700, was a sum to which Pryce M. Pryce became entitled under the will of his father; and (iii)—on which judgment was reserved—whether the trustees of the defendant's marriage settlement ought to take steps to recover these funds.

These questions were raised on the following facts.—By an indenture of marriage settlement dated Aug. 30, 1887, and made between Robert Davies Pryce of the first part, Pryce M. Pryce of the second part, Robert Swann of the third part, the defendant Mabel Georgina Pryce of the fourth part, and three trustees, now represented by the two plaintiffs, of the fifth part certain property and funds belonging to the defendant, and therein described as “the wife's trust funds,” were settled upon trusts for the defendant for her separate use during the joint lives of herself and her husband, with remainder to the survivors of herself and her husband for life, with remainder for the children of the marriage (of whom there never in fact were any), with remainder as to the sum of £6,000, part of the wife's trust fund, for the defendant Mabel G. Pryce absolutely,

“and as to the residue of the wife's trust funds, including any after-acquired property and subject to the trusts of the wife's trust fund, to the person or persons who would be entitled thereto under the statute of distributions of intestates' estates had Mabel G. Pryce died intestate and without having been married.”

Clause 3 of the marriage settlement contained the following provision :

“It is agreed that all real and personal property not hereinbefore settled to which Mabel G. Pryce at the time of the intended marriage or she or Pryce M. Pryce in her right at any time during her now intended coverture shall be or become entitled, whether in possession, reversion, or otherwise . . . shall, as soon as circumstances will admit and at the cost of the trust estate, be assured and transferred by Pryce M. Pryce and Mabel G. Pryce respectively and by all other necessary and proper parties (if any) under or otherwise vested in the trustees upon . . . the trusts and with and subject to the powers and provisions hereinbefore declared and contained concerning the wife's trust funds.”

Clause 5 contained the following provision :

“It is agreed and declared that the trustees shall stand possessed of any sum to which Pryce M. Pryce shall become entitled under the will of Robert D. Pryce (his father) upon the trusts following . . .”

In the clause were set out certain trusts of such sums (therein defined as “the husband's trust funds”), which trusts were for the husband during the joint lives of the spouses, then to the survivor of them, with remainder to their children, and in default (as happened) of there being any child cl. 5 declared that the trustees

should stand possessed of the husband's trust funds upon trust for Pryce M. Pryce absolutely.

Under the marriage settlement executed on Jan. 17, 1849 on the marriage of Robert D. Pryce, the father of Pryce M. Pryce, Robert D. Pryce and his wife were given a joint power of appointment over property and funds among the issue of his marriage after the death of the wife of Robert D. Pryce. This joint power was exercised in the year 1868, the property and funds subject to the 1849 settlement being appointed upon trust for the children of the marriage in equal shares at twenty-one or marriage. Robert D. Pryce died on Aug. 21, 1891, and his wife, who took a life interest in part of the property subject to the settlement of 1849, died on Dec. 28, 1913. Pryce M. Pryce was the second of the four children of the marriage of Robert D. Pryce and his wife, and Pryce M. Pryce accordingly became absolutely entitled under his father's marriage settlement and the appointment of 1868 to a vested interest in at least one-fourth share of the property and funds subject to the trusts of the 1849 settlement, the share amounting to about £4,500. On Dec. 12, 1904, Pryce M. Pryce executed a deed of gift to his wife, the defendant, the operative part of which deed was as follows:

"Pryce M. Pryce doth hereby convey unto Mabel G. Pryce, her executors, administrators, and assigns, all that the share and interest of him Pryce M. Pryce of and in the capital surplus moneys to arise or which have arisen from the sale of the land contained or referred to in the settlement of Jan. 17, 1849, and of and in all other the capital moneys to arise or which have arisen from the sale of the land mentioned or referred to in the settlement of Jan. 17, 1849, and of and in all other the capital moneys, legacies, portions, funds, stocks, securities, and personal estate comprised and described in the settlements, and thereby or otherwise rendered subject to the joint power of appointment to hold the same unto Mabel G. Pryce for her separate use absolutely subject to the life interests therein of Jane S. Pryce [the mother of Pryce M. Pryce]."

Pryce M. Pryce died on Jan. 17, 1907. By his will he appointed the defendant and his two brothers executors and trustees, and, after purporting again to give to his wife all his share and interest under the appointment of 1868 and all moneys appointed thereunder, gave his residuary estate upon trust for conversion and to hold the same and the investments thereof upon trust to pay the income to his wife during her life, and after her death in trust for his two brothers in equal shares. The defendant did not desire that effect should be given to the covenant contained in cl. 3 of her marriage settlement of 1887. By an indenture dated July 27, 1889, and made between Robert D. Pryce of the first part, Athelstan Robert Pryce of the second part, and two trustees of the third part, hereinafter referred to as "the deed of family arrangement," certain hereditaments were appointed and assured to the trustees to the use of Robert D. Pryce during his life and subject thereto to the use of the trustees for a term of 1,000 years upon trust to raise by mortgage or sale, first, £9,000 after Robert D. Pryce's death, and, secondly, a sum of £4,700 immediately after the death of the survivor of Robert D. Pryce and his wife, and the trustees were to stand possessed of such two sums of £9,000 and £4,700 for all or any of three named persons, of whom Pryce M. Pryce was one, as Robert D. Pryce should by deed or will or codicil appoint, and in default of such appointment upon trust for such three persons in equal shares, with a power to postpone payment.

Robert D. Pryce (who died in the year 1891), by his will made on July 30, 1889, gave the residue of his personal estate and American land to three of his sons, of whom Pryce M. Pryce was one, in equal shares, and appointed any sums coming within the power in the 1889 deed of family arrangement to such three sons in equal shares. By a codicil to his will he devised hereditaments to his eldest son, Athelstan R. Pryce, in fee simple charged with the payment of £3,500 to his younger sons, of whom Pryce M. Pryce was one. After his father's death Pryce M. Pryce, without the knowledge of the trustees of the settlement of 1887, received

and spent his shares of the £9,000 and £3,500. The third share of the £4,700 secured by the term of years limited by the 1889 deed of family arrangement was the only sum which remained receivable or recoverable under cl. 5 of the marriage settlement of 1887 and appointed by his father's will to Pryce M. Pryce.

An originating summons was taken out on behalf of the present trustees of the marriage settlement of Aug. 30, 1887, to which Mabel Georgina Pryce was defendant, asking for the determination of the three questions summarised ante.

EVE, J., having held that the £4,500 was caught by the covenant to settle the wife's after-acquired property, and that the share of the £4,700 came under the will of Pryce M. Pryce's father, and that no steps ought to be taken to recover those funds, intimated that he would give reasons for the latter conclusion at a later date.

J. M. Gover for the trustees.

D. D. Robertson for the defendant.

Cur. adv. vult.

Dec. 19, 1916. **EVE, J.**, read the following judgment.—These proceedings have been instituted by the plaintiffs, the present trustees of the settlement executed on the marriage in 1887 of the late Mr. Pryce Meyrick Pryce with the defendant, who is now his widow, with the object, first, of having it determined whether certain interests in reversion assured by the husband to his wife in December, 1904, were caught by the covenant to settle the wife's after-acquired property contained in the settlement; secondly, to have it determined whether the one-third share of the husband in two sums of £9,000 and £4,700 appointed to him by the will of his father in exercise of a special power of appointment contained in a deed of family arrangement come to in 1889 was caught by an agreement and declaration in the marriage settlement that the trustees should stand possessed of any sum to which the husband should become entitled under the will of his father upon the trusts therein mentioned; and, thirdly, to have it determined whether, in the events which have happened, the trustees ought to take any steps to recover or enforce payment or transfer to them of such (if any) of the said premises as the court shall hold to have been caught by the said covenant or agreement respectively.

I have already held, on the authority of *Re Ellis's Settlement* (3), followed in *Re Plumtre's Marriage Settlement* (5) and in *Leigh-White v. Rutledge* (6), that the interests assured by the husband to the wife were caught by the covenant to settle her after-acquired property, and, on the authority of *Re Crawshay, Walker v. Crawshay* (1), in preference to *Evans v. Jennings* (2), that the husband's third share of each of the two sums of £9,000 and £4,700 represented a sum of money to which he became entitled under the will of his father. His title to the one-third of the £9,000 occurred on his father's death in 1891, and shortly afterwards, without the knowledge of the marriage settlement trustees, he received and spent it. When he died in 1907 he left no estate beyond what was required for payment of his funeral and testamentary expenses and debts, and in these circumstances it is obvious that nothing can be gained by taking any proceedings to recover this particular sum, and no proceedings ought, therefore, to be taken in respect thereof. The interests given by the husband to the wife and the husband's one-third share of the £4,700 stand on a different footing from the item I have just dealt with. These have only fallen into possession on the recent death of the husband's mother, and are still outstanding in the trustees of the parents' marriage settlement and in the trustees of the deed of family arrangement respectively.

The question I have to decide is whether the plaintiffs, as trustees of the marriage settlement, ought to take steps to obtain transfer and payment to them of these premises. In considering this question it is material to note that there was never any issue of the marriage between the late Mr. Pryce and the defendant, and that, subject to the defendant's life interest in both funds, the residue of the wife's fund, after payment thereof to the defendant of a sum of £6,000, is held in trust for her statutory next-of-kin as though she had died intestate and without ever having

been married, and the husband's fund in trust for the husband, his executors, administrators, and assigns. As the defendant is tenant for life under the husband's will, no good can come of any action by the trustees to obtain payment to them of the one-third share of the £4,700, and accordingly I declare that they ought not to take any steps to recover that. The position of the wife's fund is somewhat different in that her next-of-kin would be entitled to it on her death, but they are volunteers, and, although the court would probably compel fulfilment of the contract to settle at the instance of any persons within the marriage consideration (see per COTTON, L.J., in *Re D'Angibau* (4), 15 Ch.D. at p. 242) and in their favour will treat the outstanding property as subjected to an enforceable trust (*Pullan v. Koe* (7)), "volunteers have no right whatever to obtain specific performance of a mere covenant which has remained as a covenant and has never been performed": see per JAMES, L.J., in *Re D'Angibau* (4), 15 Ch.D. at p. 246. Nor could damages be awarded either in this court or, I apprehend, at law, where since the Judicature Act the same defences would be available to the defendant as could be raised in an action brought in this court for specific performance or damages.

In these circumstances, seeing that the next-of-kin could neither maintain an action to enforce the covenant nor for damages for breach of it, and that the settlement is not a declaration of trust constituting the relationship of trustee and cestui que trust between the defendant and the next-of-kin, in which case effect would be given to the trusts even in favour of volunteers, but is a mere voluntary contract to create a trust, ought the court now for the sole benefit of these volunteers to direct the trustees to take proceedings to enforce the defendant's covenant. I think it ought not; to do so would be to give the next-of-kin by indirect means relief they cannot obtain by any direct procedure, and would in effect be enforcing the settlement as against the defendant's legal right to payment and transfer from the trustees of the parents' marriage settlement. The circumstances are not unlike those which existed in *Re D'Angibau* (4), and I think the position here is covered by the judgments of the lords justices in that case. Accordingly I declare that the trustees ought not to take any steps to compel the transfer or payment to them of the premises assured to the wife by the deed of Dec. 12, 1904. The costs must be taxed as between solicitor and client and paid out of the capital of the trust funds.

Solicitors: *Tyler & Co.*; *Palmer, Bull & Bartlett*, for *John A. Kingdon*, Basingstoke.

[Reported by W. P. PAIN, ESQ., Barrister-at-Law.]

MITCHELL, COTTS & CO. v. STEEL BROS. & CO., LTD.

[KING'S BENCH DIVISION (Atkin, J.), May 26, 1916]

[Reported [1916] 2 K.B. 610; 85 L.J.K.B. 1747; 115 L.T. 606;
32 T.L.R. 533; 22 Com. Cas. 63; 13 Asp.M.L.C. 497]*Shipping—Charterparty—Implied term—Undertaking by charterer not to send ship on illegal voyage.*

There is an implied undertaking by a shipper of goods that he will not ship goods which involve the risk of unusual danger or delay to the ship of which her owner does not know or might not reasonably know, without communicating to the owner the facts which are within his knowledge and indicating the risk. A shipment of goods upon an illegal voyage, i.e., a voyage that cannot be performed without violating the law of the flag of the country or the law of the place where the goods are to be carried—a shipment of goods which would involve the ship in the consequences of forfeiture or delay—is analogous to a shipment of goods which might cause the destruction of the ship.

Charterers chartered a vessel to ship a cargo of rice to P. They knew that the rice could not be discharged there without the permission of the British government, a fact which the shipowners did not know and of which they were not informed by the charterers. After negotiations had taken place permission was refused and as a result the ship was delayed. On a claim by the shipowners for damages for detention of the ship,

Held: as the shipowners did not know, and could not reasonably have known, that the vessel would not be allowed to proceed without special permission, the charterers were in breach of the charterparty and the shipowners were entitled to recover.

Statement of CROMPTON, J., in *Brass v. Maitland* (1) (1856), 26 L.J.Q.B. 49 at p. 57, applied.

Notes. Distinguished: *The Domald*, [1920] P. 56; *Transoceanica Societa Italiana di Navigazione v. H. S. Shipton & Sons*, [1923] 1 K.B. 31. Referred to: *Akt. Geysir v. Dansk Svovlsyre and Superphosphat Fabrik* (1919), 24 Com. Cas. 178; *Spanish Steamship Sebastian v. De Vizcaya*, [1920] 1 K.B. 332; *The Lisa*, [1921] P. 38; *Burley, Ltd. v. Stepney Corpn.*, [1947] 1 All E.R. 507.

As to shipment of goods likely to cause damage or delay to ship or cargo, see 30 HALSBURY'S LAWS (2nd Edn.) 302-304; and for cases see 41 DIGEST 314, 315.

Case referred to:

(1) *Brass v. Maitland* (1856), 6 E. & B. 470; 26 L.J.Q.B. 49; 27 L.T.O.S. 249; 2 Jur.N.S. 710; 4 W.R. 647; 119 E.R. 940; 41 Digest 314, 1750.

Also referred to in argument:

Dunn v. Bucknall Bros., *Dunn v. Donald Currie & Co.*, [1902] 2 K.B. 614; 71 L.J.K.B. 963; 87 L.T. 497; 51 W.R. 100; 18 T.L.R. 807; 9 Asp.M.L.C. 336; 8 Com. Cas. 33, C.A.; 41 Digest 410, 2552.

Greenshields, Cowie & Co. v. Stephens & Sons, [1908] A.C. 431; 77 L.J.K.B. 985; 99 L.T. 597; 24 T.L.R. 880; 52 Sol. Jo. 727; 11 Asp.M.L.C. 167; 14 Com. Cas. 41, H.L.; 41 Digest 597, 4225.

Award stated by an arbitrator in the form of a Special Case arising on a claim brought by the owners of the steamship *Kaijo Maru* against charterers for damages for detention of the ship.

By a charterparty dated March, 1915, the ship was chartered for the carriage of a cargo of rice from Bassein to Alexandria. The ship was loaded, and left her port of loading on Apr. 18 bound for Alexandria. While she was on her way the charter was varied, and it was agreed between the parties that the ship should go to Piraeus to discharge. When the ship arrived at Suez the charterers tried to

get the consent of the Admiralty authorities to her proceeding to Piraeus. There were negotiations, and eventually permission was refused. The ship remained for twenty-two days and then went to her original destination, Alexandria. The shipowners alleged that they were entitled to recover damages caused by the ship being thus detained. The matter went to arbitration and the arbitrator found that the ship was delayed at Port Said for twenty-two days; that such detention was wholly due to the fact that the charterers had not obtained the permission of the government authorities for the destination of the ship and cargo being changed to Piraeus and that, when negotiating with the owners for their agreement to the ship being sent to Piraeus, the charterers were aware of the fact that to send the ship to that destination permission from the government authorities was necessary, but they did not communicate that fact to the owners. On those findings the arbitrator made an award in favour of the shipowners. In a supplemental award the arbitrator found that the owners had no knowledge and might not reasonably have known that permission was necessary to discharge the cargo at Piraeus.

Roche, K.C., and *Norman Raeburn* for the shipowners.

Leslie Scott, K.C., and *R. A. Wright* for the charterers.

ATKIN, J., stated the facts, and continued: The shipowners say that this is analogous to the case of shipping goods which are known to the charterers to be dangerous, in which case the charterers would be responsible for such damage as happened to the ship or shipowners in the course of the voyage. I was referred to *Brass v. Maitland* (1), where the majority of the court seem to have laid down that there is an absolute obligation on a shipper to make good damage caused by a shipment of dangerous goods. **CROMPTON, J.**, however, took a narrower view. He said (26 L.J.Q.B. at p. 57):

"Suppose, for instance, that a shipment was made of goods to a foreign port to which, according to the information known at the shipping port, such consignments might be properly and safely made, but that by some recent law the foreign country has made such shipment illegal, would the shipper be liable in such case? I entertain great doubt whether either the duty or the warranty extends beyond the cases where the shipper has knowledge or means of knowledge of the dangerous nature of the goods when shipped or when he has been guilty of some negligence as shipper, as by shipping without communicating danger which he had the means of knowing and ought to have communicated."

I think there can be no question but that the shipment of goods upon an illegal voyage, i.e., upon a voyage that cannot be performed without violating the law of the flag of the country or the law of the place where the goods are to be carried to—a shipment of goods which would involve the ship in consequences either of forfeiture or delay—is precisely analogous to a shipment of dangerous goods which might cause the destruction of the ship. What is the full extent of the shipper's obligation? It appears to me that it amounts to this, that he stipulates that he will not ship goods which involve the risk of unusual danger or delay to the ship, which the owner does not know of or might not reasonably know of without communicating to the owner facts which are within his knowledge indicating that there is such a risk. I do not say that his obligation is not wider than that. I take the findings of the arbitrator to be here that the shippers did know when they made this contract of affreightment with the shipowners that the goods could not be taken to Piraeus though the government might, if the shippers succeeded in inducing them to do so, give them a licence. In other words, that the destination in itself was an illegal destination because the British government would not allow the goods to go through unless a special permission was given. I think it must be taken on the findings themselves, by which of course I am bound, that the shippers knew, and the shipowners did not know, and could not reasonably have known,

that the vessel would not be allowed to proceed without special permission. In these circumstances it appears to me that it follows on the findings of the arbitrator that this delay arose from a breach of the charterparty by the charterers. I think, therefore, the shipowners have a cause of action against the charterers for the delay so caused, the arbitrator has found what that should be, and with that I cannot interfere. Therefore, I think this award must stand, and the shipowners must have the costs of this hearing.

Award upheld.

Solicitors: *Waltons & Co.; Botterell & Roche.*

[*Reported by W. V. BALL, Esq., Barrister-at-Law.*]

MANN, CROSSMAN AND PAULIN, LTD. v. LAND REGISTRY

[CHANCERY DIVISION (Neville, J.), October 25, 26, 1917]

[*Reported* [1918] 1 Ch. 202; 87 L.J.Ch. 81; 117 L.T. 705;
34 T.L.R. 39; 62 Sol. Jo. 54]

Perpetuities—Lease—Reversionary lease to commence more than twenty-one years after date of grant—Interesse termini—Registration with good leasehold title.

A brewery company was lessee in possession of premises under a lease for fifty years granted in 1896. In 1917 the owner of the reversion in fee granted the company a reversionary lease of the same premises for thirty years to commence immediately upon the expiration of the previous lease at Midsummer 1946. The company, which was registered as proprietor with a good leasehold title in respect of the first lease, applied to the Land Registry for similar registration in respect of the reversionary lease. The registrar refused to register the reversionary lease with a good leasehold title, being doubtful of the validity of a lease commencing beyond the period allowed by the rule against perpetuities and the practice of the Land Registry having been to register such reversionary leases with a possessory title only. On a summons to determine the matter,

Held: under the reversionary lease the company had an immediate vested interest, and, therefore, the lease was not void under the rule against perpetuities and the company was entitled to be registered with a good leasehold title.

Notes. The doctrine of *interesse termini* was abolished by s. 149 (1) of the Law of Property Act, 1925, see 20 HALSBURY'S STATUTES (2nd Edn.) 752, but this case is useful as stating the law before 1926.

As to interests subject to the rule against perpetuities, see 29 HALSBURY'S LAWS (3rd Edn.) 293; and for cases see 37 DIGEST 76. As to future leases and the doctrine of *interesse termini*, see 23 HALSBURY'S LAWS (3rd Edn.) 476; and for cases see 30 DIGEST (Repl.) 479.

Cases referred to:

- (1) *Miller v. Green* (1831), 8 Bing. 92; 2 Cr. & J. 142; 1 Moo. & S. 199; 2 Tyr. 1; 1 L.J.Ex. 51; 131 E.R. 336, Ex. Ch.; 39 Digest 200, 900.
- (2) *Redington v. Browne* (1893), 32 L.R.Ir. 347; 37 Digest 82, 216i.
- (3) *Lord Llangattock v. Watney, Combe, Reid & Co., Ltd.*, [1910] 1 K.B. 236; 79 L.J.K.B. 233; 101 L.T. 766; 74 J.P. 73; 26 T.L.R. 125; 54 Sol. Jo. 117, C.A.; affirmed [1910] A.C. 394; 79 L.J.K.B. 559; 102 L.T. 548; 74 J.P. 174; 26 T.L.R. 418; 54 Sol. Jo. 456, H.L.; 30 Digest (Repl.) 483, 1257.

- (4) *Gillard v. Cheshire Lines Committee* (1884), 32 W.R. 943, C.A.; 30 Digest (Repl.) 480, 1218.

Also referred to in argument:

- Doe d. Rawlings v. Walker* (1826), 5 B. & C. 111; 7 Dow. & Ry. K.B. 487; 4 L.J.O.S.K.B. 93; 108 E.R. 41; 38 Digest (Repl.) 904, 962.
- Doe d. Pulteney v. Cavan* (1794), 5 Term Rep. 567.
- Smith v. Day* (1837), 2 M. & W. 684; Murp. & H. 185; 6 L.J.Ex. 219; 150 E.R. 931; 40 Digest (Repl.) 483, 1255.
- Knight v. City of London Brewery Co.*, [1912] 1 K.B. 10; 81 L.J.K.B. 194; 106 L.T. 564; 30 Digest (Repl.) 483, 1258.
- Re Frost, Frost v. Frost* (1889), 43 Ch.D. 246; 59 L.J.Ch. 118; 62 L.T. 25; 38 W.R. 264; 44 Digest 419, 2508.
- Re Da Costa, Clarke v. Church of England Collegiate School of St. Peter*, [1912] 1 Ch. 337; 81 L.J.Ch. 293; 106 L.T. 458; 28 T.L.R. 189; 56 Sol. Jo. 240; 37 Digest 73, 134.
- Beard v. Wescott* (1822), 5 B. & Ald. 801; 106 E.R. 1383; 37 Digest 117, 488.
- Woodall v. Clifton*, [1905] 2 Ch. 257; 74 L.J.Ch. 555; 93 L.T. 257; 54 W.R. 7; 21 T.L.R. 581, C.A.; 30 Digest (Repl.) 495, 1395.
- Williams v. Bosanquet* (1819), 1 Brod. & Bing. 238; 3 Moore, C.P. 500; 129 E.R. 714; 31 Digest (Repl.) 452, 5785.
- London and South Western Rail. Co. v. Gomm* (1882), 20 Ch.D. 562; 51 L.J.Ch. 530; 46 L.T. 449; 30 W.R. 620; on appeal (1882), 20 Ch.D. 576, C.A.; 40 Digest (Repl.) 331, 2716.
- Dunn v. Flood* (1883), 25 Ch.D. 629; 53 L.J.Ch. 537; 49 L.T. 670; 32 W.R. 197; affirmed (1885), 28 Ch.D. 586; 54 L.J.Ch. 370; 52 L.T. 699; 33 W.R. 315; 1 T.L.R. 206, C.A.; 37 Digest 73, 136.
- Re Hollis' Hospital Trustees and Hague's Contract*, [1899] 2 Ch. 540; 68 L.J.Ch. 673; 81 L.T. 90; 47 W.R. 691; 43 Sol. Jo. 644; 37 Digest 72, 133.
- Re Ashforth, Sibley v. Ashforth*, [1905] 1 Ch. 535; sub nom. *Re Ashforth's Trusts*, *Ashforth v. Sibley*, 74 L.J.Ch. 361; 92 L.T. 534; 53 W.R. 328; 21 T.L.R. 329; 49 Sol. Jo. 350; 37 Digest 98, 336.
- Re Abbot, Peacock v. Frigout*, [1893] 1 Ch. 54; 62 L.J.Ch. 46; 67 L.T. 794; 41 W.R. 154; 3 R. 72; 37 Digest 108, 415.
- Lock v. Furze* (1865), 19 C.B.N.S. 96; 6 New Rep. 340; 34 L.J.P. 201; 12 L.T. 731; 11 Jur.N.S. 726; 13 W.R. 971; 144 E.R. 722; on appeal (1866), L.R. 1 C.P. 441; Har. & Ruth. 379; 35 L.J.C.P. 141; 15 L.T. 161; 30 J.P. 743; 14 W.R. 403, Ex. Ch.; 31 Digest (Repl.) 147, 2858.
- Lewis v. Baker*, [1905] 1 Ch. 46; 74 L.J.Ch. 39; 91 L.T. 744; 21 T.L.R. 17; 30 Digest (Repl.) 509, 1488.

Summons taken out by the plaintiffs asking whether the registrar of the Land Registry ought to comply with the request for registration of the plaintiffs, or whether such application ought to be refused on the ground that the reversionary lease was void as offending against the rule against perpetuities.

The plaintiffs, a brewery company, were lessees in possession of a beerhouse known as the Anchor and Hope, St. George's Street East, in the county of Middlesex, under a lease for fifty years, granted in 1896, at a premium of £225 and an annual rent of £30. In 1917 Isabella Hind, the widow of the lessor of the first lease and owner in fee of the reversion, granted a lease of the same premises to the plaintiffs, dated Mar. 23, 1917, for a term of thirty years, to commence immediately upon the expiration of the previous lease—i.e., at Midsummer, 1946. The plaintiffs, who were registered as proprietors with a good leasehold title in respect of the first lease, applied at the Land Registry for similar registration as to the reversionary lease. The registrar, having regard to the warranty as to title implied by such registration and to the doubts which existed as to the validity of a reversionary lease commencing beyond the period allowed by the rule against

perpetuities, refused to register the lease. It had been the practice of the Land Registry to register such reversionary leases with possessory title only.

Bryan Farrar for the plaintiffs, the lessees.

J. G. Wood for the lessor.

Austen-Cartmell for the registrar.

NEVILLE, J.—What I have to decide is whether the interest in question which may arise in possession more than twenty-one years hence is, within the meaning of the rule against perpetuities, a vested interest or whether it is not.

I have heard a very interesting inquiry as to whether the law still requires an entry to perfect a lease, but I am certainly not going to decide that question, because I do not think that it is necessary for the determination of the present case. I think, however, that the reference to the nature of an *interesse termini* in 2 Co. Litt. at p. 270a, in that connection is worthy of attention. He states it thus :

“For before entry the lessee hath but an *interesse termini*, an interest of a term, and no possession, and therefore a lease which enures by way of enlarging of an estate cannot work without a possession, for before possession there is no reversion; and yet if a tenant for twenty years in possession make a lease for B. for five years and B. enter, a release to the first lessee is good, for he had an actual possession, and the possession of his lessee is his possession. And so it is if a man make a lease for years, and the first lessee doth enter, a release to him in the remainder for years is good to enlarge his estate.”

Counsel for the registrar has pointed out there may be a distinction between the case of one lease, so to speak, overlapping another and subject to the other, and two leases one beginning when the other terminated, and it is not easy to see from the words used which was intended by the learned author. The note which is of authority does appear to indicate that the real question is whether the interest is vested or not. Then, again, it has been observed that the observation is only with reference to the operation of the Statute of Uses. I confess I had some little difficulty in feeling sure that the case where the lease was to commence at a future date when the lessor is in possession is identical with the case of a lease by the lessor when his lessee is in possession at the time of the granting of the lease. I am not satisfied in that case that the taking possession by the lessee later in date is necessary.

There is another point with regard to that. MR. JOSHUA WILLIAMS [in WILLIAMS ON REAL PROPERTY (22nd Edn.) 201, 202] certainly seems to have thought that, both with regard to a lease dating from the present and with regard to a lease dating in futuro, the lease ought to be made good either under the common law, if it was accompanied by possession or followed by possession, and under the Statute of Uses if it was made by bargain and date. Then we have in connection with that the interesting case of *Miller v. Green* (1), in which TINDAL, C.J., lays it down that it is for the lessee to say in a case of a lease which is capable of being held as a bargain and date, whether he takes it as lessee under the Statute of Uses or as a common law demise. He may elect to treat the lease to him by his landlord from either point of view. It could not be done in the case before the court there, because the persons buying were not the lessees but strangers to the lease, and could not exercise the election which the lessees might have exercised. I say these things by the way, because I do not feel satisfied in my mind that it is a sound proposition of law to say that a lease in futuro must be accompanied by or followed by possession to make it complete. However, whether that be so or not, the question, to my mind here is, having regard to the rule against perpetuities, whether the *interesse termini* which undoubtedly the tenant in futuro takes is a vested or an executory or contingent interest. I think if it is vested it does not come within the rule against perpetuities; I think if it is executory or contingent it does.

I now turn to the definition of "vesting" in FEARNE ON CONTINGENT REMAINDERS (10th Edn.) vol. 2, p. 27. There the matter is stated thus:

"Where the right is a right of present possession, and the party is in possession, whether personally or by substitute, the estate is said to be vested in possession. When it is a present right of having that possession whenever it may become vacant by the determination of a preceding chattel interest, or whenever it may become vacant by the determination of a preceding freehold estate, or at some other future time to which only the possession is postponed, in each of these cases the estate is said to be vested in right or interest. And even when it is a present right of present possession, if such right has been attended with possession, but ceases to be so the estate can only be said to be vested in right of interest."

Applying that proposition to the present case, undoubtedly the interest here is vested in right or interest. It has been decided with regard to an interesse termini that it is alienable and passes on the death of the lessee to his executors, and consequently it seems to me impossible to say that that is not a right of taking possession whenever it has become vacant by the determination of a preceding chattel interest. I think that is a complete and perfect definition of the proposition we find here. So much for the general principle, but before passing from that, I would refer to CRUISE'S DIGEST (4th Edn.) vol. 4, p. 89, s. 21, where the author says:

"Every estate and interest in lands and tenements may be assigned; as also every present and certain estate or interest in incorporeal hereditaments, such as rents, allowances, etc., even though the interest be future, as a term for years to commence at a subsequent period, yet it may be assigned, for the interest is vested in presenti, though only to take effect in futuro."

Now, to turn to the decisions. Strangely enough, the question of whether a lease in futuro not to come into effect until after the expiration of twenty-one years is good or not has never been expressly decided by the English courts. But in *Redington v. Browne* (2) in the Irish courts the question was actually raised and decided, and BEWLEY, J., who tried it, says (32 L.R.Ir. at p. 355):

"I understand Mr. Redington's counsel to be prepared if necessary to contend that if a lease has been made for lives and for a term of years, of which more than twenty-one years are still unexpired, it is not competent for the lessor to make or agree to make any lease in reversion to commence on the expiration of the subsisting terms. This startling proposition, however, would be clearly not in accordance with the law."

That is the exact point raised in this case. The learned judge deals expressly with the rule against perpetuities, and says:

"The effect of the rule is to restrict the inalienability of property and limit the period for which its absolute vesting may be postponed. If the future limitation is vested in interest in an ascertained living person at the time of the execution of the instrument by which it is created or must necessarily vest within the period fixed by law—that is to say, within a life in being and a period of twenty-one years after, it is not open to the objection of remoteness; and it is immaterial that the actual enjoyment in possession may be deferred for a much longer period."

With respect, I entirely agree with that expression of the law; I think BEWLEY, J., accurately laid down the rule against perpetuities as it is, at all events, understood to-day.

There has been no decision on the exact point in the English courts, but I have been referred to several cases, of which *Lord Llangattock v. Watney, Combe, Reid & Co., Ltd.* (3) is an instance where the courts seem to have recognised without argument and without the point being raised, sub silentio in fact, the existence

of terms in futuro, to commence at a date exceeding the time limited by the rule against perpetuities, and I cannot but think that if there was any real doubt about the question it is quite impossible that the matter should have escaped observation in those cases. The real difficulty has arisen from what is to be found in the books of the best writers on the subject. We have some of them confidently stating that such a lease is void, and the passage in HALSBURY'S LAWS OF ENGLAND (1st Edn.) vol. 18, p. 404 [see now (3rd Edn.) vol. 29, pp. 293, 294] is one of them; some equally confidently stating it to be valid; and others again saying that the point is doubtful. I do not think I should serve any useful purpose by going in detail through their different views. They have all been very properly called to my attention, and I must bear them in mind in coming to a conclusion, and, of course, until the matter came to be decided by the English courts expressly, such a difference of opinion could not be put an end to.

On the question what is the nature of an *interesse termini*, there is one case which I think is of the greatest importance as indicating that in the true sense of the word it is a vested interest, an interest which conveys a right actually in the land itself, although the time fixed for the commencement of the term has not arrived. I refer to *Gillard v. Cheshire Lines Committee* (4). There the plaintiff agreed to take a theatre for eight weeks, to commence on a future day. Before the commencement of the term, and before entry by the plaintiff, the defendants by excavations on their property deprived the theatre of the support of the adjacent land, so that the theatre was rendered unsafe and was closed during the eight weeks by order of the proper local authorities. The plaintiff sued the defendants in respect of the damage suffered by him in consequence of their act, and was held entitled to maintain his action. BOWEN, L.J., says in the course of his judgment:

"When that demise was made to the plaintiff he had vested in him an interest known to the law as an *interesse termini*. That is more than a right of entry; it is an interest which the law recognises in a future term, coupled with a right to complete that interest by possession. If that was a bare right of action arising out of contract, it would not give such an interest in the property as probably would entitle the owner to bring an action against anyone who interfered with the property. But it seems to me that this is a right in rem; a right which is alienable at common law; a right which not only passes to the executor, as pointed out in WILLIAMS' SAUNDERS [vol. 1, p. 251], but can be granted away."

If that is not a definition of a vested interest in the land itself, I fail to understand the meaning of the learned judge's words. I think it very strongly confirms the conclusion at which I have arrived, that with regard to the rule against perpetuities this reversionary lease is a vested interest which does not come within the mischief of the rule. I hold, therefore, that the plaintiffs are entitled to be registered with a good title in respect of this lease. There must be a declaration that the lease is not void as offending the rule against perpetuities, with a direction to the registrar to proceed with the plaintiff's application. I ought to add that the registrar was perfectly right, having regard to the obvious difference which had arisen amongst lawyers, to have the matter brought before the court, because he could not on his own authority have decided it.

Order accordingly.

Solicitors: *Crossman, Pritchard, Crossman & Block; Wrensted, Hind & Roberts; Treasury Solicitor.*

[Reported by R. R. FORMOX, Esq., Barrister-at-Law.]

JONES v. LORD HATHERTON

[COURT OF APPEAL (Swinfen Eady and Bankes, L.JJ., and Bray, J.), March 12, 13, 15, 1917]

[Reported [1917] 2 K.B. 412; 86 L.J.K.B. 1206; 116 L.T. 657;
81 J.P. 101; 61 Sol. Jo. 383]

Licensing—Licence—Renewal—Opposition—Service of notice—Service on "holder of licence"—Service on grantee of protection order—Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 16 (3).

Notice of opposition to an application for the renewal of a justices' licence must, to be valid, be served on the holder of the licence. A person to whom a protection order has been granted is not a "holder" of the licence for this purpose, and service on him of a notice of objection does not give the licensing justices jurisdiction to entertain the objection, even though by the time the application for renewal and the objection come to be heard the licence has been transferred to the applicant for removal.

Decision of Divisional Court, [1917] 1 K.B. 148, reversed.

Licensing—Justices—Liability for costs—Repayment out of local funds—Unsuccessful appeal to High Court—Case stated by quarter sessions—Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 32.

An appeal by licensing justices to the High Court on a Case stated by quarter sessions, arising out of their refusal to renew a licence, was dismissed.

Held: an order for costs would be made against the justices, they being entitled to obtain repayment out of local funds under s. 32 of the Licensing (Consolidation) Act, 1910 [now s. 37 of Licensing Act, 1953].

Notes. The Licensing (Consolidation) Act, 1910, was repealed by the Licensing Act, 1953 (33 HALSBURY'S STATUTES (2nd Edn.) 142). Section 16 (3) and (4) and s. 32 (1) and (7) of the Act of 1910 have been replaced by s. 11 (3) and s. 23 (1) and (4) of the Act of 1953 respectively.

As to renewal of licences and costs, see 22 HALSBURY'S LAWS (3rd Edn.) 549 et seq., 610-614; and for cases see 30 DIGEST (Repl.) 15-21, 70-73.

Cases referred to:

- (1) *Blencowe & Co., Ltd. v. Lord Hatherton, etc.*, *Justices* (1907), 96 L.T. 817; 71 J.P. 210, D.C.; 30 Digest (Repl.) 16, 91.
- (2) *Price v. James*, [1892] 2 Q.B. 428; 61 L.J.M.C. 203; 67 L.T. 543; 57 J.P. 148; 41 W.R. 57; 8 T.L.R. 682; 36 Sol. Jo. 624, C.A.; 30 Digest (Repl.) 16, 90.
- (3) *R. v. Hughes* (1879), 4 Q.B.D. 614; 48 L.J.M.C. 151; 40 L.T. 685; 43 J.P. 556; 14 Cox, C.C. 284, C.C.R.; 33 Digest 386, 476.
- (4) *R. v. Salford Hundred Justices*, [1912] 2 K.B. 567; sub nom. *R. v. Salford Hundred Justices, Ex parte Bolton Justices* 81 L.J.K.B. 952; 107 L.T. 174; 76 J.P. 395; 23 Cox, C.C. 110, D.C.; 30 Digest (Repl.) 71, 530.

Also referred to in argument:

Kydd v. Liverpool Watch Committee, [1908] A.C. 327; 77 L.J.K.B. 947; 99 L.T. 212; 72 J.P. 895; 24 T.L.R. 772; 52 Sol. Jo. 639; 6 L.G.R. 903, H.L.; 33 Digest 450, 1607.

Wills & Sons v. McSherry, [1914] 1 K.B. 616; 83 L.J.K.B. 596; 110 L.T. 65; 78 J.P. 120; 12 Asp.M.L.C. 426, D.C.; 41 Digest 244, 848.

Walsall Poor Overseers v. London and North Western Rail. Co. (1878), 4 App. Cas. 30; 48 L.J.M.C. 65; 39 L.T. 453; 43 J.P. 108; 27 W.R. 189, H.L.; 16 Digest 186, 920.

Appeal by the licensee and owners of licensed premises against an order of a Divisional Court (VISCOUNT READING, C.J., RIDLEY and Low, JJ.), made on a

Case stated by Stafford Quarter Sessions in the matter of an appeal wherein Clement James Jones, the licensee of the premises, and the owners thereof, were the appellants, and Lord Hatherton and others, justices of the peace for the county of Stafford, were the respondents.

The appeal was heard on Apr. 5, 1916, by the quarter sessions against the refusal of the respondents, on Feb. 14, 1916, to renew to the appellant, Jones, a licence to sell intoxicating liquors on premises known as the King's Arms, situate at Hednesford, within the petty sessional division of Penkridge, which premises belonged to the other appellants, who were the trustees and executors of Edward Wright, deceased.

The general annual licensing meeting for the petty sessional division of Penkridge was held at Penkridge on Feb. 14, 1916. On Jan. 24, 1916, a protection order or temporary authority to sell intoxicating liquors under the licence was granted to the appellant Jones in pursuance of s. 88 of the Licensing (Consolidation) Act, 1910, and Jones on the same day commenced and thereafter continued to sell intoxicating liquors and to carry on the business under the powers conferred on him by the protection order or temporary authority and the licence. On Feb. 2, 1916, a notice of objection to the renewal of the licence on the ground that the premises had been ill-conducted, requiring the appellant Jones to attend at the general annual licensing meeting on Feb. 14, 1916, was served by the police on Jones. At the general annual licensing meeting on Feb. 14, 1916, the licence was transferred to Jones under s. 23 of the Licensing (Consolidation) Act, 1910, before the hearing of the application for the renewal of the licence. After the transfer had been granted, Jones at the same meeting applied for the renewal of the licence, and the justices proceeded to hear evidence in opposition to the renewal and in support of the objection contained in the notice served on Jones. Jones was represented by a solicitor, who called evidence in support of the renewal, but no objection was raised as to the invalidity or irregularity of the notice or as to the service thereof by the police upon the appellant Jones. After hearing the evidence the justices refused to renew the licence, and on Feb. 18, 1916, the appellant gave notice to the justices of his intention to appeal against the refusal to the next quarter sessions. On the hearing of the appeal the notice of appeal was admitted, and evidence was called in opposition to the renewal and in support of the notice of objection served on Jones. Immediately before this evidence was called the appellant submitted that there was no jurisdiction to entertain any objection to the renewal of the licence, inasmuch as at the time of the service of the notice of objection on Jones he was not the holder of the licence, and, therefore, notice of objection had not been served on the holder of the licence seven days before the commencement of the general annual licensing meeting as required by s. 16 of the Licensing (Consolidation) Act, 1910. The appellants cited *Blencowe & Co., Ltd. v. Lord Hatherton, etc., Justices* (1). The respondent contended that before and at the time of the hearing of the objection to the renewal of the licence on Feb. 14, 1916, the licence had been transferred to Jones, that he was then the holder of the licence and as such had applied for the renewal thereof, that he had received seven days' notice as required by s. 16, that such notice was valid, and that, if not, he had waived any irregularity in the service of the notice of objection by appearing before the licensing justices in support of the renewal without raising any objection to the notice. The respondents cited *Price v. James* (2), *R. v. Hughes* (3) and *Blencowe & Co., Ltd. v. Lord Hatherton, etc., Justices* (1). Before going into the facts the court considered the question of the notice and found that the service of the notice was invalid and bad in law, but at the request of the respondents consented to state this Case. The court then heard the evidence for the respondents and for the appellant, and found upon the facts that the ground of objection to the renewal of the licence had been proved.

By the Licensing (Consolidation) Act, 1910, s. 16 [see now Licensing Act, 1953, s. 11]:

"(3) Subject to the provisions of this section, the licensing justices shall not, where the holder of a justices' licence applies for the renewal of his licence, entertain any objection to or take any evidence with respect to the renewal thereof unless written notice of an intention to oppose the renewal of the licence stating in general terms the grounds on which the renewal is opposed, has been served on the holder thereof not less than seven days before the commencement of the general annual licensing meeting. (4) The licensing justices may, notwithstanding that no notice of intention to oppose the renewal of a justices' licence has been given, on an objection being made to the renewal, adjourn the consideration of the renewal to a future day fixed by them (whether more or less than one month from the date of the original general annual licensing meeting), and require the attendance of the holder of the licence on that day when the case will be heard and the objection considered as if notice to oppose had been given."

By s. 88 (7) [see now s. 23 of Act of 1953] :

"Any person to whom a protection order is granted shall, while the order is in force, be subject to the provisions of this Act, with respect to the regulation, government, or control of holders of justices' licences, in the same manner as if he were the holder of a justices' licence."

The Divisional Court held that the service of the notice under s. 16 (3) of the Licensing (Consolidation) Act, 1910, meant service on the holder of the licence at the time of application for renewal, and the service was good, though at the time of service Jones was not the holder of the licence. Jones and the owners of the premises appealed.

Disturnal, K.C., and *H. H. Joy* for the appellants.

R. W. Coventry (Vachell, K.C.), with him) for the respondents.

SWINFEN EADY, L.J. [having stated the facts] : The question turns upon the true construction of s. 16 of the Licensing (Consolidation) Act, 1910. Sub-section (2) provides that :

"The holder of a justices' licence applying for the renewal of his justices' licence need not attend in person at the general annual licensing meeting, unless he is required by the licensing justices to attend, and he shall not be required so to attend save for some special cause personal to himself."

[His LORDSHIP read sub-s. (3).] At the date when the notice of intention to oppose was served upon Jones he was not the holder of the licence, and, therefore, the question is whether the service was sufficient. In the opinion of the court the true construction of this section requires that the notice should be served on the holder of the licence applying for renewal. By sub-s. (2), "The holder of a justices' licence applying for the renewal need not attend in person unless," and so forth. The section is dealing with the holder of a justices' licence applying for a renewal. In my opinion, the person to be served under sub-s. (3) is alone that person, the holder applying for the renewal, and where sub-s. (3) says "unless written notice of an intention to oppose . . . has been served on the holder thereof" the service is not effective under the statute unless the person so served is at the time when he is served, the holder thereof—the holder of a justices' licence. It is said that such a construction may produce inconvenience in practice, because cases may arise in which the full seven days' notice before the commencement of the general annual licensing meeting cannot be given, because the transfer to the holder has taken place in a shorter period of time before the meeting. In the present case the transfer was on the very day of the meeting, but earlier in the day, and as the notice must be given before the commencement of the general annual licensing meeting, it is said there may be some cases—there may be few, but there certainly may be some—in which it is impossible to give seven days' notice of that kind. The answer to that is that such cases are provided for in s. 16 (4) which provides :

"The licensing justices may, notwithstanding that no notice of intention to oppose the renewal has been given, on an objection being made to the renewal, adjourn the consideration of the renewal to a future day fixed by them . . . and require the attendance of the holder of the licence on that day when the case will be heard and the objection considered as if notice to oppose had been given."

So, in cases of difficulty that arise in giving the notice, where the conditions are such that an effectual notice cannot be given under sub-s. (3), the licensing justices have full power to deal with the matter by adjourning the application to a future date, and then on that future date, on the adjourned hearing, they can consider the objection as if notice to oppose had been duly given. The construction that notice is to be given to the holder applying for the renewal is quite consistent with *Blencowe & Co., Ltd. v. Lord Hatherton, etc., Justices* (1). It is said that it would be a departure from the Licensing Act, 1872, and that an alteration of the law in that respect is not to be expected in the Licensing Consolidation Act. I am not satisfied that the position under the Act of 1872 would not be exactly the same. Section 42 of that Act, referring to an application by a "licensed person" for the renewal of his licence, provided:

"The justices shall not entertain any objection to the renewal of such licence or take any evidence with respect to the renewal thereof unless written notice of an intention to oppose the renewal of such licence has been served upon the said holder not less than seven days before the commencement of the general annual licensing meeting."

The word "holder" had not been previously used in the section. There was a definition, in s. 74 of that Act, of "licensed person": "Licensed person means a person holding a licence as defined by this Act." A person to whom temporary protection has been granted is not a person holding a licence, and such a person, holding a merely temporary authority, is not entitled to apply for the renewal of the licence. He must first obtain a transfer to himself of the licence; then he became a "licensed person" within the meaning of the Act of 1872, and, on his applying for a renewal of the licence, there had to be served on him a notice under s. 42 not less than seven days before the commencement of the general annual licensing meeting. In my opinion, the language of the 1910 statute is clearer than the language of the 1872 statute, because the latter refers to the "said holder" without having previously mentioned the words. Under the present Act, as under the Act of 1872, I am of opinion that the person to be served must be the holder applying for a renewal, and, for there to be an effective service of notice of objection, he must be the holder of the licence at the date when he is served, and the same person must be the person applying at the general annual licensing meeting, or at an adjournment thereof, for the renewal of the licence.

Under these circumstances I am of opinion that the decision of the court below should be reversed, and that the decision of the Court of Quarter Sessions should be restored, and that the view which quarter sessions took was the true view of the construction of the statute.

BANKES, L.J.—I agree. I regret being obliged to differ from the court below, but it does not appear to me to be possible to put into the language of the Act the construction which the Divisional Court gives to the words used. It is sufficient to say that the words "the holder thereof not less than seven days before the commencement of the general annual licensing meeting" in s. 16 (3), must mean the person who was at that time the holder of the licence; but I think that is made plainer, if it requires to be made plainer than the words themselves make it, by reference to other sections of the statute which are applicable to this particular case.

On Jan. 24, 1916, a man named Horne was the holder of the licence granted in respect of these licensed premises, and on that day a protection order was granted to Jones under s. 88 of the Act of 1910. Jones was at that time, no doubt, the

person to whom it was proposed to transfer the justices' licence, and, the protection order having been made to Jones, the position is defined by s. 88 (7) which provides: "Any person to whom a protection order is granted shall, while the order is in force, be subject to the provisions of this Act with respect to the regulation, government, or control of holders of justices' licences in the same manner as if he were the holder of a justices' licence." Those words seem to me to indicate quite plainly that, although the Act does not regard Jones as the holder, he is to be subject to the same obligations with reference to the carrying on of the house, and so forth, as the holder. This section is silent as to any provision that he is to be treated as a holder for all purposes of the Act, which might include the service of a notice upon the holder. The section deals with the case where the transfer of a justices' licence may be authorised. By s. 23: "For the purposes of this Act the transfer of a justices' licence is the grant of a justices' licence in respect of certain premises to one person in substitution for another person who holds or has held the licence." The grounds upon which a transfer may be granted are set out in Sched. 4 to the Act, and the words "held or has held" are used because that schedule includes cases where the holder is dead, in which it is necessary to use the words "has held," and it refers to cases where the occupation of the premises is given up by the holder of the licence or his representative, which is this case. Horne had given up the occupation under s. 23; therefore he would remain the holder of the licence by the terms of that section. On Feb. 2, whilst Horne remained the holder, notice of objection was served on Jones. From one point of view Jones was the right person on whom to serve the notice, because directly Horne had gone out of occupation and Jones had applied for the temporary authority, Horne ceased to be the person who was intending to apply for the renewal. The temporary authority having been granted to Jones by the court, he was the person who intended to apply for the transfer, and therefore, the applicant for the transfer within Part 2 of Sched. 2 to the Act of 1910. The section dealing with transfer is s. 16 (3). The objection there referred to is one of the objections which the Act provides may be taken to the renewal. A list of those objections is set out in Part 2 of Sched. 2. They refer, so far as they are personal, not to the case of the holder of the licence but to the case of the applicant. In the circumstances which happened here, Jones, not Horne, was the applicant. Therefore, if the notice was to be given at all, it was to be given to Jones and not to Horne.

We come back to s. 16 (3), to see whether this particular case was provided for by this subsection. In my judgment, the only possible construction to be put upon the language is that the words to "the holder of the licence," both at the beginning and at the end of that subsection, refer to a person who is the holder and also the applicant for the renewal. Where the word "holder" is used in the beginning of that subsection its meaning is plain, because the subsection speaks of the holder of a justices' licence applying for the renewal, and, therefore, it must have reference to a holder who is the applicant; and, when the word is used later in the subsection you find the language is this: "unless written notice of an intention to oppose the renewal of the licence, stating in general terms the grounds upon which the renewal is opposed, has been served on the holder thereof," which must be the holder at that date, who is also the applicant at the transfer sessions. A notice given to a person who was not the applicant would not comply with the provisions of the statute as to what is necessary to make a good objection. On those grounds, in my opinion, it is not possible to put the construction upon the statute which the Divisional Court put, because it is plain that they were of opinion that Jones had received the notice which the Act contemplated that the applicant should have. The answer seems to me to be that the case was not contemplated or provided for by the actual language used.

BRAY, J.—I also agree. The question we have to decide is what is the true construction of certain words in sub-s. (3) of s. 16 of the Licensing Consolidation Act, 1910—namely, "to the holder thereof not less than seven days before the com-

mencement of the general annual licensing meeting." It seems to me that the natural interpretation of these words is that the person to be served must be the holder of the licence at the time he is served. It is quite clear that Jones was not the holder at the time when he was served; he did not become the holder until the day on which he made the application for the renewal. If that be so, is there any reason for our putting other than the ordinary interpretation on those words? The Lord Chief Justice has said that "the words of the statute might compel one to hold a view which to me would be wholly absurd and unreasonable." I do not think it can be fairly said that the natural interpretation of those words is either absurd or unreasonable, because s. 16 (4) provides for a case like this. He then goes on to say that he thinks the language used in sub-s. (3) means only that the person who is applying for the renewal of his licence must have had at least seven days' notice. I cannot agree with that. I think if Parliament had desired it to read thus they would have used quite different words. It would have been perfectly simple to say "had been served on the person applying for the renewal of the licence," but those words are not found. RIDLEY, J., refers to the Act of 1872, and says that the result of giving the interpretation which the appellants desire in this case—the interpretation which quarter sessions put upon the subsection—would be to involve a change of the law. In my opinion, this is by no means clear. I am not at all satisfied that the words "the said holder" in s. 42 of the Act of 1872 would not also involve that the person on whom service was to be made should be the holder at the time of the service, but when s. 16 (3) of the Act of 1910 is looked at it appears that it has been re-drafted. There is a very important provision in it which is not to be found in the Act of 1872—namely, that the written notice must state in general terms the grounds on which the renewal is opposed. Those are entirely new words. Then, instead of saying "on the said holder," it says "on the holder thereof." It is necessary, therefore, for us to consider the section as it stands, and, in my opinion, the interpretation is one which must have been put on some similar words in the Act of 1872.

Mar. 16, 1917. **SWINFEN EADY, L.J.**—This case stood over until to-day to be mentioned as to costs in order that the practice of the King's Bench Division with regard to the position of licensing justices might be ascertained. The Master of the Crown Office reports to us that he has had the books examined, and he finds that from the beginning of 1911 up to the present time there have been eight proceedings by way of Special Case from quarter sessions in which the licensing justices have either been appellants or respondents. In five of those cases costs were ordered by the Divisional Court to be paid to the justices. Of the remaining three cases, in two the justices were respondents and in the third case the justices were appellants in the Divisional Court. In those three cases they were ordered to pay costs. The result, therefore, is that in all the cases that have been decided costs have been given either for or against the licensing justices as if they were ordinary people. In the present case the justices were respondents in the Court of Quarter Sessions, but they were appellants to the Divisional Court, and as the parties proceeding upon a Special Case the justices entered into recognisance under the Crown Office rules to pay the costs. In *R. v. Salford Hundred Justices* (4) it is shown that the indemnity against costs to which licensing justices are entitled under s. 32 of the Licensing (Consolidation) Act includes costs of an appeal to the High Court on a Special Case. We are of opinion that in the present case the practice should be followed, and that the licensing justices should be ordered to pay costs here and below, they being entitled to obtain the repayment by virtue of s. 32 of the statute.

Appeal allowed.

Solicitors: *Field, Roscoe & Co.*, for *Selby Gardner*, Cannock; *Robinson & Bradley*, for *C. A. Lorton*, Walsall.

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

PLUMMER v. PLUMMER

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Bankes and Warrington, L.J.J.), June 5, 1917]

[Reported [1917] P. 163; 86 L.J.P. 145; 117 L.T. 321; 33 T.L.R. 417; 61 Sol. Jo. 558]

Marriage—Validity—Marriage by licence before registrar—Notice to registrar—Statement in notice false to knowledge of both parties—Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 4.

Whereas a wilful and fraudulent mis-statement made to the knowledge of both parties will invalidate a marriage by banns, such a false statement contained in the notice or declaration given or made to the superintendent registrar pursuant to s. 4 of the Marriage Act, 1836, will not invalidate a marriage by licence.

Holmes v. Simmons (falsely called Holmes) (1) (1868), L.R. 1 P. & D. 523, 529, considered.

Re Rutter, Donaldson v. Rutter (2), [1907] 2 Ch. 592, applied.

Notes. The Marriage Act, 1836, and the Marriage and Registration Act, 1856, have been replaced by the Marriage Act, 1949. For the requirement of notice and declaration, and as to want of due notice affecting the validity of a marriage, see ss. 27, 28, 49 of the 1949 Act.

Followed: *R. v. Lamb*, [1934] All E.R.Rep. 540.

As to notice and misdescriptions in notice, see 19 HALSBURY'S LAWS (3rd Edn.) 786, 787; and for cases see 27 DIGEST (Repl.) 57, 58. For the Marriage Act, 1949, see 28 HALSBURY'S STATUTES (2nd Edn.) 650.

Cases referred to:

- (1) *Holmes v. Simmons (falsely called Holmes)* (1868), L.R. 1 P. & D. 523; 37 L.J.P. & M. 58; 18 L.T. 770; 16 W.R. 1024; 27 Digest (Repl.) 58, 361.
- (2) *Re Rutter, Donaldson v. Rutter*, [1907] 2 Ch. 592; 77 L.J.Ch. 34; 97 L.T. 883; 24 T.L.R. 12; 27 Digest (Repl.) 57, 354.
- (3) *Prowse v. Spurway and Bowley* (1877), 46 L.J.P. 49; 26 W.R. 116; 27 Digest (Repl.) 57, 353.

Also referred to in argument:

Bevan (falsely called M'Mahon) v. M'Mahon (1861), 2 Sw. & Tr. 230; 30 L.J.P.M. & A. 61; 3 L.T. 820; 7 Jur.N.S. 218; 164 E.R. 983; 27 Digest (Repl.) 55, 333.

Appeal from a decision of BARGRAVE DEANE, J.

A petition was presented to the Divorce Division of the High Court by Albert William Plummer, a coach painter, asking that a ceremony of marriage between himself and Rose Elizabeth Loveday should be declared null and void.

In his petition the petitioner stated that on Aug. 24, 1903, at the register office in the district of Fulham, in the county of London, a ceremony of marriage took place between himself and one Rose Elizabeth Loveday. The ceremony of marriage took place by virtue of the licence of the superintendent registrar of the district, which licence was granted upon certain information furnished to the superintendent registrar by the petitioner and Rose Elizabeth Loveday. At the time of the giving of such information the true name of Rose Elizabeth Loveday was not disclosed to the superintendent registrar, but was falsely given as Rose Elizabeth Findlow. William Charles Loveday, the father of Rose Elizabeth Loveday, was then alive, but the name of the father was given as William Charles Findlow, and he was stated to be deceased. These false particulars were given knowingly and wilfully by the petitioner and by Rose Elizabeth Loveday to the superintendent registrar, and were duly published by him, and after such publication the ceremony of marriage took place at the time and place aforesaid.

The petition came on for hearing as an undefended suit on June 20, 1916, when a decree nisi of nullity was pronounced by BARGRAVE DEANE, J. It subsequently transpired that there had been issue of such marriage one child only, a daughter, born on June 1, 1904, and named Dorothy Frances Plummer. By an order dated Dec. 15, 1916, the Official Solicitor was assigned as guardian ad litem of Dorothy Frances Plummer for the purpose of presenting a petition for a declaration of her legitimacy, and on May 1, 1917, it was ordered that she be allowed by her guardian ad litem to intervene forthwith in the suit pursuant to the provisions of the Matrimonial Causes Act, 1907. The Court of Appeal thereupon granted the infant leave to enter an appeal against the decree nisi.

Hollis Walker, K.C. (with him *Stuart Bevan*), for the intervener (the infant).

Gordon Hewart, K.C. (with him *Bayford*), for the King's Proctor, supported the intervener.

McCall, K.C. (with him *W. A. Metcalfe*) for the husband.

LORD COZENS-HARDY, M.R.—This is a case of general interest and importance, but, having listened to the arguments of counsel with attention, I have no hesitation in saying that the order of BARGRAVE DEANE, J., cannot be supported. The case is one in which the marriage of the parties was celebrated at a registrar's office. It was a marriage by licence and not a marriage by banns. There is a distinction as regards notice between a marriage by licence and a marriage by banns. Thus a wilful and fraudulent mis-statement to the knowledge of both parties will invalidate a marriage by banns. A licence to marry, however, can be obtained on the payment of a certain sum of money, and after the application for a licence and before the marriage has taken place no publicity is necessary, which seems to me to show that the principles which have been applied to marriages by banns or on notice without licence ought to have no application to a case where the marriage takes place by licence.

There are three authorities to which our attention has been called. The first is *Holmes v. Simmons* (falsely called *Holmes*) (1), which was a decision of LORD PENZANCE. That was a case not of marriage by licence, because there the marriage was proposed to be made without licence, and is in a different class of case altogether. The only passage in the judgment in that case which I think assists the petitioner here is where LORD PENZANCE suggested a doubt whether a notice can be properly considered a notice at all if it does not comply with the form and is fraudulent in intent. For he there said (L.R. 1 P. & D. at p. 529):

"Whether a notice in a wholly false name (which must be done fraudulently) could be properly held a notice at all may possibly still be a question."

That is a mere dictum of LORD PENZANCE; a dictum entitled, no doubt, to great weight in a case where the circumstances are similar. But here the circumstances are not similar. The second case is *Prowse v. Spurway and Bowley* (3), a decision of LORD HANNEN, which strongly supports the appellant here. Lastly there is *Re Rutter, Donaldson v. Rutter* (2), which was a decision of SWINFEN EADY, J., which, if sound, goes the whole way required in the present case. SWINFEN EADY, J., there said ([1907] 2 Ch. at p. 595):

"Section 17 of the Marriage and Registration Act, 1856, prevents any question of residence being raised in any proceedings touching the validity of a marriage once solemnised, and, though ss. 18 and 19 impose the penalties of perjury, and liability to forfeiture of property accruing by the marriage on parties wilfully giving a false notice, they do not invalidate the marriage thereby procured,"

for which he cites *Holmes v. Simmons* (falsely called *Holmes*) (1) and *Prowse v. Spurway and Bowley* (3). And he adds:

"Marriages in false names have been held valid in many cases of marriage by licence."

Therefore I think that we should be taking a retrograde step if we were to hold this marriage invalid, with the result of bastardising the child of the marriage. It was no doubt by a slip, but it was a serious slip that the petition did not mention the birth of issue. I think that one of the witnesses, not a very friendly witness, I gather, to the petitioner, let fall the remark that there was a child, and that was all. That being so, the child not being a party to the suit, the court has made an order which declares the marriage null, and therefore bastardises the issue. In my opinion that decision cannot be supported, and the appeal must be allowed.

BANKES, L.J.—I agree. The matter does not appear to have been fully discussed before BARGRAVE DEANE, J., but the question that has been brought before us on appeal has been fully argued, and, after hearing the argument, I am clearly of opinion that the judgment of BARGRAVE DEANE, J., cannot stand.

The point is quite a short one. The marriage between the parties was a marriage after notice to the registrar under s. 4 of the Marriage Act, 1836. It is not in dispute that a false name of the lady was given to the knowledge of both the persons concerned, and was given with the intention of concealing the fact from her father that the lady was about to go through the form of marriage. Section 4 of that Act provides:

"That in every case of a marriage intended to be solemnised in England according to the rites of the Church of England, unless by licence or by special licence, or after publication of banns [which this marriage was not] and in every case of marriage intended to be solemnised in England according to the usages of the Quakers or Jews or according to any form authorised by this Act, one of the parties shall give notice under his or her hand . . . to the superintendent registrar of the district within which the parties shall have dwelt for not less than seven days next preceding . . . and shall state therein the name and surname and the profession or condition of each of the parties intending marriage, the dwelling-place of each of them, and the time, not being less than seven days, during which each has dwelt therein, and the church or other building in which the marriage is to be solemnised. . . ."

There is no dispute here that the notice was in due form, but the particulars which were filled in were incorrect, and incorrect to the knowledge of the parties in more than one particular. Then s. 42 provides that:

"If any person shall knowingly and wilfully intermarry under the provisions of this Act in any place other than the church, chapel, registered building, office, or other place specified in the notice and certificate as aforesaid, or without due notice to the superintendent registrar, or without certificate of notice duly issued . . . the marriage of such persons, except in any case hereinafter excepted, shall be null and void."

The argument before BARGRAVE DEANE, J., and repeated here is that, inasmuch as the notice was incorrect in the particulars which I have indicated, it was not a due notice, and stress was laid upon decisions, a number of which have been referred to (and there are others a number of which might have been referred to) in which it has been held that the words "due publication of banns" include a true statement of the names of the parties who intend to go through the ceremony of marriage. There is no authority for the proposition that "due notice" to the registrar includes a correct statement of all the particulars which are required to be included in the notice, but the passage in the judgment of LORD PENZANCE in *Holmes v. Simmons* (falsely called *Holmes*) (1) has been relied upon as sufficient authority for the proposition which BARGRAVE DEANE, J., accepted. LORD PENZANCE in that case expressed himself in these terms (L.R. 1 P. & D. at pp. 528, 529):

"I think, therefore, that the 'due notice' required by the statute for the validity of a marriage, such as that now in question, is a notice conforming to the formalities by the statute provided, and that the words 'due notice'

will be satisfied though the contents of the notice in respect of Christian name or residence or other details are not strictly true or accurate."

Therefore he covers the question of an inaccurate statement of the Christian name, and of course the same reasoning would apply to an inaccuracy in the surname. But then he goes on to say:

"Whether a notice in a wholly false name (which must be done fraudulently) could be properly held at notice at all may possibly still be a question."

He merely left that point open as a matter for further consideration.

It seems to me that there is no principle upon which you can draw the distinction which the learned judge hinted at. If a deliberate mis-statement, according to the learned judge's view, is not sufficient to constitute a notice not a "due notice," it seems to me impossible to draw a logical distinction between that case and a case which somebody might designate as a case of fraud where a person deliberately and with set purpose gives a false name. It seems to me impossible to draw a distinction between a case where it is done fraudulently and a case where it may be said not to be done fraudulently. But SWINFEN EADY, J., in *Re Rutter, Donaldson v. Rutter* (2), treated the matter as beyond all question. He said, and I think that he was right in saying, that "marriages in false names have been held valid in many cases of marriage by licence," and then he cited authority in support of that view, and, as far as I have been able to look into them in the short time at my disposal, they seem to me to entirely support the learned judge's view. The conclusion which I have come to is that there is no authority for saying that the giving of due notice requires anything more than the giving of notice in due form of law, that is to say, in the form required by the statute, and that the reasoning applicable to the due publication of banns does not apply to the case of a notice. On these grounds I think that this appeal succeeds.

WARRINGTON, L.J.—I am of the same opinion. The marriage in this case was solemnised before the registrar by licence of the superintendent registrar. In such a case the provisions of the Marriage Act, 1836, and the Marriage Registration Act, 1856, applicable are to this effect: First, notice of the intended marriage must be given, and that notice must state that the marriage is to be by licence. It has also to state amongst other things the name and surname of each of the parties intending marriage. It must be accompanied by a declaration confirming the correctness of the statements contained in the notice, and a person making a false declaration is rendered liable to the penalties of perjury. The notice in the case of a marriage by licence is, like other notices, filled in by the superintendent registrar, and a copy thereof entered in a book which is open to inspection without payment of any fee, but it is not otherwise published, as was the case of a notice of a marriage intended to be solemnised not by licence. Not only is the notice not otherwise published than by being entered in the registrar's book, but the only interval necessary between the giving of the notice and the issuing of the certificate of due notice and the issue of the licence itself is one day. It is obvious, therefore, from those provisions that the legislature did not intend in the case of a marriage by licence before the registrar that there should be any more publication of the fact of the intended marriage than in the case of a marriage by licence in a church under the old ecclesiastical rules. The matter does not rest there. Provisions were made both in the Marriage Act, 1836, and the Marriage and Registration Act, 1856, for validating the marriage notwithstanding that certain conditions had not been complied with. Section 43 of the Act of 1836 [repealed] recognised that a marriage might be valid although it was had by means of "any wilfully false notice, certificate, or declaration"; and s. 19 of the Act of 1856, which replaces s. 43 of the Act of 1836, contains a similar provision where the marriage is had by means of "any wilfully false declaration, notice, or certificate." It seems to me, therefore, that in a case of marriage by licence under the express terms of the statute, although the notice or declaration may be wilfully false, yet the marriage

itself will be valid, the means resorted to by the legislature for protecting the public and the parties concerned against such false notice being the imposition of extremely severe penalties upon those who sign a false notice or make a false declaration.

But the matter does not rest merely on the interpretation of the statute as it seems to me it ought to be interpreted, because I think that the present case is covered by authority, and in particular I refer to the statement of the law by LORD PENZANCE in *Holmes v. Simmons* (*falsely called Holmes*) (1), not in giving judgment, but in the course of the argument (L.R. 1 P. & D. at p. 525). I think what he said there covers the case of a marriage by licence, although the case before him was not one of marriage by licence, but of marriage after publication in the registrar's office of the notice, and that the passage which appears in his judgment as to notice in a wholly false name must be read in reference to the facts of the case before him. Secondly, I think that the present case is covered a fortiori by the decision in *Re Rutter, Donaldson v. Rutter* (2), which was also a case of marriage after publication by notice, and was not a case of marriage by licence.

I am of opinion, therefore, that it comes to this, that in the case of a marriage by licence, which is the only case with which we here have to deal, although both parties may make a false statement as to the names or the purpose of the notice and declaration required by the Act of 1836, yet the marriage will be valid, the consequence of giving the false notice being not to invalidate the marriage, but to expose the parties to the penalties for perjury.

LORD COZENS-HARDY, M.R.—The appeal will be allowed, the decree nisi rescinded, and the petition dismissed.

Appeal allowed.

Solicitors: *Official Solicitor; King's Proctor; Sterns.*

[*Reported by E. A. SCRATCHLEY, ESQ., Barrister-at-Law.*]

HULTON v. HULTON

[COURT OF APPEAL (Swinfen Eady, Bankes and Scrutton, L.JJ.), January 26, 29, 30, 31, February 1, 1917]

[Reported [1917] 1 K.B. 813; 86 L.J.K.B. 633; 116 L.T. 551;
33 T.L.R. 197; 61 Sol. Jo. 268]

Husband and Wife—*Action by wife against husband—Rescission of deed obtained by husband by fraud—Action "for tort"—Competency—Married Women's Property Act, 1882 (45 & 46 Vict., c. 75), s. 12.*

There is nothing in s. 12 of the Married Women's Property Act, 1882, to take away from a married woman the right which she possessed before the passing of the Act of taking proceedings against her husband to have set aside any deed obtained by him from her by fraud or duress. Such proceedings are not proceedings for tort within s. 12 although in proving the facts which would entitle her to rescission the wife might prove fraudulent misrepresentation on the part of the husband.

Contract—Rescission—Restitutio ad integrum—Precise restoration of statu quo impossible—Substantial equality of benefit between parties.

A court of equity will give relief by way of the rescission of a contract whenever by the exercise of its powers it can do what is practically just,

although it cannot restore the parties precisely to the state in which they were before the contract. It is sufficient if the party against whom rescission is sought has substantially received a quid pro quo for what the party seeking rescission has received under the contract.

Decision of LUSH, J., [1916] 2 K.B. 642, affirmed.

Notes. Referred to: *Lever Bros., Ltd. v. Bell*, [1931] 1 K.B. 557.

As to the right to sue a spouse for tort, see 19 HALSBURY'S LAWS (3rd Edn.) 875, 876; and for cases see 27 DIGEST (Repl.) 222-224, 258 et seq. As to actions for rescission for fraud, see 26 HALSBURY'S LAWS (3rd Edn.) 874 et seq.; and for cases see 35 DIGEST 65 et seq.

Cases referred to:

- (1) *Andrews v. Cradock* (1713), 1 Eq. Cas. Abr. 72; Prec. Ch. 376; Gilb. Ch. 36; 21 E.R. 884; 28 Digest (Repl.) 669, 1676.
- (2) *Lambert v. Lambert* (1767), 2 Bro. Parl. Cas. 18; 1 E.R. 764, H.L.; 27 Digest (Repl.) 223, 1786.
- (3) *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218; 48 L.J.Ch. 73; 39 L.T. 269; 27 W.R. 65, H.L.; 35 Digest 77, 748.
- (4) *Ashlin v. White* (1816), Holt, N.P. 387, N.P.; 35 Digest 28, 192.
- (5) *Pasley v. Freeman* (1789), 3 Term Rep. 51; 1 Digest (Repl.) 27, 205.

Also referred to in argument:

- Webster v. Webster*, post p. 1016; [1916] 1 K.B. 714; 85 L.J.K.B. 691; 114 L.T. 701; 32 T.L.R. 290; 27 Digest (Repl.) 260, 2106.
- Evans v. Carrington* (1860), 2 De G.F. & J. 481; 30 L.J.Ch. 364; 4 L.T. 65; 25 J.P. 195; 7 Jur.N.S. 197; 45 E.R. 707, L.C.; 27 Digest (Repl.) 222, 1774.
- Evans v. Edmonds* (1853), 13 C.B. 777; 1 C.L.R. 653; 22 L.J.C.P. 211; 21 L.T.O.S. 155; 17 Jur. 883; 1 W.R. 412; 138 E.R. 1407; 27 Digest (Repl.) 222, 1773.
- Urquhart v. Macpherson* (1878), 3 App. Cas. 831, P.C.; 35 Digest 76, 747.
- Rees v. De Bernardy*, [1896] 2 Ch. 437; 65 L.J.Ch. 656; 74 L.T. 585; 12 T.L.R. 412; 12 Digest (Repl.) 124, 742.
- Donovan v. Fricker* (1821), Jac. 165; 37 E.R. 813; 35 Digest 651, 3848.
- Whittington v. Seale-Hayne* (1900), 82 L.T. 49; 16 T.L.R. 181; 44 Sol. Jo. 229; 35 Digest 74, 719.

Appeal by the defendant from an order made by LUSH, J., in an action tried by him with a special jury.

In 1895, when the plaintiff first met the defendant, she was a married woman, her husband having deserted her and gone to South Africa. She became on very friendly terms with the defendant who asked her to marry him when she had obtained a divorce from her husband. She assented, and in March, 1900, she obtained a decree nisi for divorce against her husband. On Sept. 12, 1900, the decree was made absolute. She then became engaged to marry the defendant. He was then about thirty-one years of age, and she was about thirty-seven. The defendant's father was a newspaper proprietor in Manchester. The business had been sold to a limited company, in which the father held the bulk of the shares—namely, 103,276 out of 114,757 issued £1 shares—and the defendant then held about 11,000 of the shares. The plaintiff stated in evidence that when the defendant asked her to marry him he said that he had £1,000 a year from his father in payment for services, which could be taken from him at his father's pleasure, that he had no other property or income, and that he would give her half of the £1,000 for herself and domestic purposes. The parties were married before the registrar at Bedford on Nov. 28, 1900, and the defendant made the plaintiff an allowance of £500 a year. His father died in March, 1904, leaving an estate of about £558,000. The plaintiff stated that she had an interview with the defendant about April, 1904, when he told her that the money left to him by a previous will had been finally left to his sisters, that he was no better off after his father's death, and that his gross income was bigger, but his net income the same. On June 7, 1910,

the parties executed a deed of separation which was impeached in the action on the ground that it was obtained by untrue misrepresentations as to defendant's means—that the defendant had persistently represented that he had no more than £1,000 a year or thereabouts, the truth being that upon his father's death his pecuniary position had improved very greatly and his income was upwards of £30,000 a year, which figure was not disputed by the defendant. The plaintiff alleged that by reason of this fraud by the defendant she had been prevented from demanding or receiving a proper allowance adequate to her position as the defendant's wife, and she claimed damages for fraud and/or rescission of the deed. The defendant, by his defence, traversed the allegations made by the plaintiff, and he contended that the action did not lie by reason of s. 12 of the Married Women's Property Act, 1882, which provides: "Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also . . . the same remedies and redress by way of criminal proceedings, for the protection and security of her own property, as if she were a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for tort . . ." [The section is printed here as amended by the Law Reform (Married Women or Tortfeasors) Act, 1935, Scheds. 1 and 2]. The jury found at the trial that the plaintiff was induced to execute the deed by the false and fraudulent representations and concealment of the defendant. LUSH, J., ordered the deed to be rescinded, but held that the plaintiff could not in law recover damages. The defendant appealed on the grounds that the verdict was perverse and such as no reasonable jury could return and that the action was not maintainable under s. 12 of the Act of 1882. The plaintiff gave notice of cross-appeal against that part of the judgment which decided that she could not recover damages for the fraud, but the cross-appeal was not proceeded with. On Feb. 7, 1916, the plaintiff obtained a decree absolute dissolving her marriage with her husband and subsequently an order was made giving her £5,000 a year permanent maintenance.

Schwabe, K.C., and Barrington-Ward for the defendant.

Sir John Simon, K.C. (Hemmerde, K.C., W. O. Willis, and Guedalla with him) was only called upon on the question whether the plaintiff was entitled to rescission without repaying to the defendant the sums which she had received under the deed.

SWINFEN EADY, L.J., stated the facts, held that it was impossible to hold that no reasonable men could upon the evidence before them have found the verdict which the jury returned, and that therefore the application for a new trial must fail, and continued: It was next contended that the plaintiff could not maintain this action by reason of the Married Women's Property Act, 1882, s. 12. It was not disputed that previous to the passing of this Act a married woman could have sued her husband to set aside a deed obtained by fraud or duress, the married woman, according to the old practice, suing by her next friend: see *MITFORD ON PLEADING*, p. 28; and consenting to the action being brought. The practice of the Court of Chancery was for actions that lay in infants or married women to be instituted by the next friend, the difference between them being that when the infant was plaintiff his consent was not necessary for the institution of the action, but that where the action was brought by a married woman by her next friend her consent was necessary. This was pointed out in *Andrews v. Cradock* (1). *Lambert v. Lambert* (2) was referred to. That was an action brought by a wife by her next friend against her husband and others to set aside as having been obtained by duress a deed dated Nov. 29, 1762, whereby the husband agreed to give his wife £20 a year by way of a separate maintenance. The wife succeeded in the action, and the decree was affirmed by the House of Lords.

The defendant in the present case, however, contended that the right to bring such an action was taken away from a married woman by s. 12 of the Act of 1882, as the wife would be suing the husband for a tort. In my judgment, this contention is not well founded, whether the claim to set aside the deed is based on facts

which would or would not as between other parties give ground for an action of deceit. A proceeding to set aside a deed for fraud is not suing for a tort within the meaning of s. 12. It is one of the matters which by the Supreme Court of Judicature Act, 1873, s. 34 [now Supreme Court of Judicature Act, 1925, s. 56], are assigned to the Chancery Division. A claim in an action to obtain damages for deceit would, in my opinion, be suing for a tort. In my judgment, there is nothing in s. 12 of the Act of 1882 to take away from a married woman the right which she previously possessed of taking proceedings against her husband to have set aside any deed obtained by him from her by fraud or duress. The ancient jurisdiction of the court in this respect is not diminished or affected by s. 12 of the Act of 1882.

There remains the further point that the plaintiff cannot obtain the setting aside of the deed as there cannot be complete *restitutio in integrum*. The learned judge accepted the plaintiff's undertaking to repay the debt of £375, from which she was released by the deed, by allowing that sum to be set off against costs awarded to her, but he declined to require her as a condition of relief to repay the annual sums of £500 paid to her between the date of the deed and the date of the decree absolute made by the Divorce Court. It must be remembered that the plaintiff had been receiving an allowance of £500 a year from 1905 or before to the date of the deed in 1910. The same sum continued to be paid to her after the deed and pursuant to the deed, and she lived upon that amount, and the defendant's credit was not pledged by the plaintiff for any necessities. These were obtained by means of the annual payment. Moreover, the deed, so long as it stood, was a bar to the plaintiff obtaining alimony *pendente lite* from the Divorce Court. The permanent maintenance of £5,000 a year now fixed by that court as a suitable provision for the plaintiff, and to be paid by the defendant to her, only commences to run from the date of the decree absolute—namely, Feb. 7, 1916. The defendant contends that he ought to escape from all liability to maintain his wife between June 7, 1910, the date of the deed, and Feb. 7, 1916, and that the plaintiff ought to be put upon terms to refund all sums paid in respect of the period between the two last-mentioned dates—in other words, that the plaintiff should repay all sums paid to her, while he retains the full benefits and advantage during that period of not having been called upon to maintain his wife, and of having by means of the deed and so long as it remained in force prevented her from obtaining any alimony *pendente lite* from the Divorce Court. In my judgment, this would be entirely inequitable. As against the defendant, upon the facts as they are now known, it must be taken that no less a sum than £500 a year could be considered a suitable provision for the wife's maintenance, and this is all that he has paid. I agree with the view expressed by the learned judge at the trial that, having regard to the defendant's actual means and to the finding of the jury, such a sum was altogether inadequate. The general rule is that as a condition of rescission there must be *restitutio in integrum*, but at the same time the court has full power to make all just allowances. It was said by LORD BLACKBURN in *Erlanger v. New Sombrero Phosphate Co.* (3) (3 App. Cas. at p. 1279) that the practice had always been for a court of equity to give relief by way of rescission whenever by the exercise of its powers it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract. In the present case the defendant has obtained certain advantages for which he stipulated, which cannot be taken away from him—the destruction of his letters is an accomplished fact—and he has been relieved of any claims in respect of the maintenance of his wife between the date of the deed and the date of the decree absolute. Under these circumstances the most that can be required of the plaintiff, as a condition of rescission, is to restore to the defendant the status quo ante with regard to the advance of £375. This she does by allowing the amount to be set off against her costs. It was further urged that the plaintiff did not really desire rescission, and could gain nothing by it. This must be considered with reference to the date when the action was commenced, namely, Mar. 2, 1915. The deed was then a subsisting

contract which prevented the plaintiff from instituting proceedings for restitution of conjugal rights, from obtaining a divorce for any previous matrimonial offence, and from obtaining alimony pendente lite, and it bound her to indemnify the defendant from all torts theretofore committed or thereafter to be committed by her. If such a deed was obtained from her by fraud—and the jury have found that it was—she was entitled to have it set aside. In my opinion, the appeal fails and should be dismissed.

BANKES, L.J.—I agree. This court has no power to set aside the verdict of a jury upon the ground merely that we do not agree with it. We can only set aside a verdict upon the ground that it is against the weight of the evidence if we come to the conclusion that the verdict is one which no reasonable men could have arrived at. That is the question which we have to consider. The main claim of the plaintiff was for damages. That claim was from the outset an impossible claim and, as a matter of law, in my opinion, could not succeed. The second ground of claim was for the rescission of the deed of separation. [His LORDSHIP reviewed the evidence and came to the conclusion that the verdict was not one which no reasonable men could have arrived at.] With regard to the point that the plaintiff is not entitled to recover because she is, in reference to the claim for rescission, suing her husband for a tort within the meaning of s. 12 of the Married Women's Property Act, 1882, I entirely agree with what has been said by SWINFEN EADY, L.J. I think, however, it is sufficient to say that, in my opinion, the words in that section "sue for a tort" relate to something quite different from that which is described in s. 34 of the Judicature Act, 1873—"a cause or matter for the purpose of the setting aside or cancellation of deeds or other written instruments." With regard to the point that the plaintiff is not entitled to succeed without bringing into account the £500 a year which she received between June 7, 1910, and Feb. 7, 1916, the date of the decree absolute, it is sufficient to say that, in my opinion, we should not be doing justice or equity if we were to order the plaintiff under the particular circumstances of this case to repay that amount either directly or in account.

SCRUTTON, L.J.—I agree. On the part of the claim for "rescission of the aforesaid deed" it was argued for the husband that, as the wife, in proving facts which would entitle her to rescission, would prove fraudulent representations which might also give rise to a claim for damages in an action between parties other than husband and wife, a claim for rescission was really a claim for tort within s. 12 of the Married Women's Property Act, 1882. The jurisdiction to rescind a contract in some cases for innocent misrepresentation and in some cases for fraud has been exercised by courts of equity for at least 200 years before the Act of 1882 was passed and before the action of deceit came into existence. The action of deceit, whereby damages were obtained for fraudulent representation, as I understand the history of the English law, was first started by the courts in *Pasley v. Freeman* (5). In that case GROSE, J., who dissented, said that that was the first instance on record in which such a claim had been made, and about thirty years afterwards in *Ashlin v. White* (4) GIBBS, C.J., said (Holt, N.P. at p. 388):

"I am old enough to remember when this species of action came into use.

It was dexterously intended to avoid the Statute of Frauds."

Therefore, in 1882, when s. 12 of the Married Women's Property Act was enacted, there were two forms of action, one affecting the formation of a contract and alleging that the contract was badly formed if it had been obtained by fraud and asking for rescission, and the other claiming damages for a fraudulent representation for a tort in law. I think that the proceeding in a court of equity to obtain rescission is not an action "for a tort" within the meaning of s. 12. I take that expression to mean an action complaining of a tort or wrong independently of contract and asking for damages following from such a tort. I do not see how that language can apply to a proceeding which is asking for rescission on the ground of fraud in connection with the making of a contract. This part, therefore,

of the husband's appeal fails, and the court below had jurisdiction to consider whether the deed of separation was obtained by fraud.

The next question is whether this court should interfere with the finding of the jury that the plaintiff was induced by the false and fraudulent representation of the defendant to execute the deed of separation, not upon the ground that there was no evidence to support it, but upon the ground that the verdict was perverse and against the weight of the evidence though in my view it comes to nearly the same thing; and the question which we have to ask ourselves is whether twelve reasonable men could on the evidence have found the verdict. [His LORDSHIP considered the evidence, and came to the conclusion that it could not be said that the verdict was one which a reasonable jury could not have found, and that therefore the defendant failed to make out a case for a new trial on the ground that the verdict was against the weight of the evidence.]

There remains the last point. It is said that the court will only rescind the deed if it can put the other party back in the position in which he was before the contract. Courts of equity, which have long exercised this power of rescission, have endeavoured to use it on the principle that he who seeks equity must do equity, and that he who asks to have a contract rescinded must, as far as possible, put matters back into the position in which they were before the contract was originally made. The passage from LORD BLACKBURN's opinion in *Erlanger v. New Sombrero Phosphate Co.* (3) which has been referred to by SWINFEN EADY, L.J., points that out in very clear language. It is said that the court in this case should not order rescission for two reasons. In the first place, it is said that the letters of the parties have, under the terms of the deed, been destroyed, and that as those letters cannot be restored the court will not decree rescission. As to that, I must take it on the verdict of the jury that those letters contained misrepresentations by the defendant. I further take into account that it was the defendant who was very anxious that those letters should be destroyed. I cannot in these circumstances treat the letters as so important to him that there can be no rescission because they cannot now be brought back into existence. Secondly, it is said that the plaintiff has been receiving under the deed £500 a year for over five years, and that if the deed is to be rescinded the plaintiff ought to be ordered to repay to the defendant that £500 a year. A court of equity has, as I understand, always in such a case endeavoured to do justice between the parties by making each return whatever benefit he has received under the deed, and if the benefits on the one side and the other are commensurate there is no question of return, because whatever has been received by the one party will be paid for by the other. As illustrating that, I may take the case of the purchase of a house being set aside and a reconveyance ordered on repayment of the purchase money, when the party who has occupied the house has to pay an occupation rent: see *KERR on FRAUD AND MISTAKE* (4th Edn.) p. 371, where the authorities are collected. Applying that principle to the present case, while it is true that the wife has received an allowance of £500 a year for some years, the husband has received during those years freedom from molestation and from proceedings by the wife for restitution of conjugal rights, and other very considerable advantages. Taking that into account, I see no reason for the return of the £500 a year, because a sufficient quid pro quo has been given to the husband. On all the points raised by the defendant I think the appeal ought to fail.

Appeal dismissed.

Solicitors: *Guedalla & Jacobson; Lewis & Lewis.*

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

JOHNSON v. BRAHAM AND CAMPBELL

[KING'S BENCH DIVISION (Rowlatt and Sankey, JJ.), May 22, 1916]

[Reported [1916] 2 K.B. 529; 85 L.J.K.B. 1166; 115 L.T. 76;
60 Sol. Jo. 681]

B [COURT OF APPEAL (Swinfen Eady, Bankes and Scrutton, L.JJ.), January 19, 1917]

[Reported [1917] 1 K.B. 586; 86 L.J.K.B. 613; 116 L.T. 188;
61 Sol. Jo. 586]*Agent—Misrepresentation—Principal induced to enter into contract by untrue statement negligently made by agent—Measure of damages.*

C Where a principal employs an agent to procure him an engagement, and he is able to show that he was induced to take up the engagement by the negligence of the agent, he is entitled to recover the amount of his actual loss, and also to compensation for loss of time. He is not entitled to any anticipated profit that he might have made from the engagement.

D **Notes.** As to remedies of a principal for his agent's default, see 1 HALSBURY'S Laws (3rd Edn.) 188-190; and for cases see 1 DIGEST (Repl.) 481 et seq.

Cases referred to:

(1) *Bell v. Cunningham* (1830), 3 Pet. 69.(2) *Cassaboglou v. Gibb* (1883), 11 Q.B.D. 797; 52 L.J.Q.B. 538; 48 L.T. 850; 32 W.R. 138, C.A.; 1 Digest (Repl.) 554, 1747.

E (3) *Salvesen & Co. v. Rederi Akt. Nordstjernen*, [1905] A.C. 302; 74 L.J.P.C. 96; 92 L.T. 575, H.L.; 1 Digest (Repl.) 555, 1754.

Appeal by the defendants from a decision of the judge of the Westminster County Court.

F The plaintiff, who was an artiste, claimed damages for negligence and breach of duty owed by the defendants to the plaintiff as her agents for reward in connection with the making of a contract in writing, dated Oct. 19, 1915, between the plaintiff and the Suitu Co., Ltd. The plaintiff alleged that the defendants, by their manager, represented to the plaintiff, shortly before the date of the contract, that the weekly takings of the Palace, Northampton, the music-hall of the above company, were not less than £250, that the hall was a first-class hall, that all assistance, staff, lighting, &c., would be available at the hall, that the company G to be taken over by the plaintiff was booked for £60, that Harold Montague was one of the company booked, and that a grand piano would be provided free of charge. The plaintiff alleged that, by these representations, she was induced to enter into the contract. The plaintiff took her company to the Palace, Northampton, and played there for a week commencing Nov. 29, 1915. The total takings were only H £68 11s. 7d. She incurred a liability to the Suitu Co., Ltd., of £25 11s. 11d. She also lost £35 13s., being the expenses of her company, and alleged further that she had lost the profits which she should have made from performing for the week, which she estimated at £38. The county court judge found as a fact that the defendants' manager, in perfect good faith, told the plaintiff that the weekly takings at the hall were not less than £250, but as to the other alleged representations he found in the defendants' favour. He gave judgment for the plaintiff for I £55 13s., being £35 13s. for her expenses and an extra £20. The defendants appealed.

*Hawke, K.C. (Lever with him), for the plaintiff.**Compston, K.C., and Beazley (Patrick Hastings with them) for the defendants.*

ROWLATT, J.—In this case, the first point taken on behalf of the defendants is that there was no evidence to support the finding of negligence. It was said by the plaintiff that the agent had given inaccurate information and had failed to exercise due care. It appears that when the takings at another revue were £120

net, he assumed that they would be £250 gross; that he admitted he would make such an assumption in his own case, but that, in the case of a client he would make further inquiry. On that it was, in my opinion, open to the county court judge to find, as he did, that the agent had been negligent. It was a question of fact. The appeal, therefore, fails on the main point.

There remains, however, another point not free from difficulty. The plaintiff's right to recover the £20 is challenged. It is said on behalf of the defendants that, where a principal complains of being misled by the negligence of an agent into entering into some transaction, and a loss ensues because the venture does not succeed, he is only entitled to be restored to the position in which he would have been had he never met the agent who had been guilty of negligence. It is contended that he is not entitled to the speculative profit he might have earned had he made other use of his money. In my opinion, that proposition is sound. The principal may not say: "Had I been able to employ my £100 otherwise I could have made £150." To award him damages on that basis would be to assume that he would make a fortunate speculation. In the present case, what the learned judge actually did is not quite clear. We have no note by him of his judgment. If he meant to award this £20 to the plaintiff on the ground that that is what she might have made, I do not think he could do so. That is not the measure of damage. The damage is the loss which she would have avoided if she had not embarked on this enterprise. It would appear from such note of the judgment as we have seen that the learned judge did not essay to calculate her loss of profit. He said, in effect, that, in addition to her out-of-pocket expenses, she was entitled to something for loss of time. He may well have said to himself that £20 was the value of a week of her time on the average; just as a professional man may be awarded the value of what he would have earned because his time is of value. In my opinion, if he took that view, his judgment can be supported.

The cases cited do not afford much assistance. In *Bell v. Cunningham* (1), which is an American decision, it appeared that an agent at Leghorn, having funds of his principal in hand, was directed to invest part of them in tiles and part in paper, and to ship the cargo for Havana. He invested the whole in paper, which, on the ship's arrival, sold at a loss, whereas the tiles would have realised a profit. The defendant claimed to have the damages estimated at the value of the money which ought to have been invested in tiles at Leghorn, and not at the value they would have sold for at Havana. The court decided against him. The decision of the court is thus summarised in *MAYNE ON DAMAGES* (8th Edn.) at p. 645:

"They said this measure would be correct if the breach of contract consisted in the nonpayment of the money and not in the failure to invest that sum in tiles. Speculative damages, dependent on possible successful schemes, ought never to be given; but positive and direct loss, arising plainly and immediately from the breach of orders, may be taken into estimate. Thus, in this case, an estimate of possible profits to be derived from investments at Havana of the money resulting from the sale of the tiles, taking into view a distinct operation, would have been to transcend the proper limits which a jury ought to respect; but the actual value of the tiles themselves, at Havana, affords a reasonable standard for the estimation of the damages."

It is clear that in that case if the agent had executed his commission the principal would have had the money in his pocket, so that those damages flowed directly from the breach. In *Cassaboglou v. Gibb* (2) the plaintiff ordered agents in Hong Kong to purchase certain opium for him. No such opium could be obtained, but, instead of informing the plaintiff of this fact, the defendants mistakenly informed him that they could procure it, and did in fact send opium of an inferior description. It was held that the relation between the plaintiff and the defendants was not that of vendor and purchaser, but of principal and agent, and that, therefore, the true measure of damages was not the difference in value of the opium ordered and shipped, but the loss actually sustained. In the other case cited,

A *Salvesen & Co. v. Rederi Akt. Nordstjernen* (3), a ship did not get employment owing to the negligence of certain agents. It was held that the shipowners were entitled to damages for trouble which they had incurred; but LORD DAVEY expressly pointed out ([1905] A.C. at p. 311) that there was no evidence that the respondents lost any opportunity of profitably employing the vessel. I have no doubt that if the plaintiff in the present case could have specifically shown that she had made a loss she would be entitled to recover it. But the profit was merely speculative.

B I, therefore, come to the conclusion that the plaintiff was entitled to this sum of £20 as compensation for loss of time.

C **SANKEY, J.**—On the question of damages, I think that where the principal employs an agent, and is able to prove a breach of contract by that agent, the true measure of damages is the principal's actual loss, not his anticipated profit. Was there here an actual loss? I desire to found myself on the judgment of LORD DAVEY in *Salvesen's Case* (3), where he says ([1905] A.C. at p. 311):

D "But the appellants were guilty of breach of their duty to the respondents, their principals, in giving them incorrect information as to their business, and are liable in damages for such a breach of duty. The measure of damages in such a case has recently been discussed in the Court of Appeal in England in the case of *Cassaboglou v. Gibb* (2). It was there determined that the measure of damages was the loss actually sustained by the principal in consequence of the misrepresentation, and that it did not include the anticipated profit which he might have made if the representation had been true. I am of opinion that the proper measure of damages in the present case is the same as in the case I have referred to."

E It appears to me that there was evidence on which the county court judge could find that the plaintiff lost the opportunity of profitably occupying her time. It is true that on one reading of his judgment he seems to have awarded this sum of £20 on account of profits. But I do not so read it. He really awarded it for time lost. This appeal should be dismissed.

F The defendants appealed.

Patrick Hastings and *Wallington* for the defendants.

Hawke, K.C., and *E. F. Lever* for the plaintiff.

G **SWINFEN EADY, L.J.**, stated the facts, and continued: In my opinion, there was evidence to support the county court judge's finding of fact, and, therefore, no appeal lies in respect thereof. The only question is as to the damages. It is not denied that the plaintiff is entitled to her out-of-pocket expenses. These she proved to the sum of £35 13s. The county court judge gave her in addition a sum of £20. The Divisional Court came to the conclusion that this sum was given as compensation for her loss of time in going to Northampton and performing there. There was evidence before the county court judge as to other engagements H which she had, and so he had evidence before him as to the value of her time. There was evidence, therefore, on which he could award her this sum of £20 for her loss of time. No question of principle is involved in this case. The appeal must be dismissed.

BANKES, L.J.—I agree.

I **SCRUTTON, L.J.**—I am of the same opinion.

Appeal dismissed.

Solicitors. *Roberts, Seyd & Co.*; *Wingfield, Blew & Kenward.*

[Reported by W. VALENTINE BALL, Esq., and EDWARD J. M. CHAPLIN, Esq.,
Barristers-at-Law.]

CLARKE BROS. v. KNOWLES

[KING'S BENCH DIVISION (A. T. Lawrence and Lush, JJ.), November 20, 1917]

[Reported [1918] 1 K.B. 128; 87 L.J.K.B. 189; 118 L.T. 253]

County Court—Jurisdiction—“Court in district of which cause of action partly arose”—Letter containing offer posted by plaintiff within, but received by defendant outside, jurisdiction—County Courts Act, 1888 (51 & 52 Vict., c. 43), s. 74.

By the County Courts Act, 1888, s. 74: “. . . every action or matter . . . may be commenced by leave of the judge or registrar . . . in the court in the district of which the cause of action or claim wholly or in part arose.”

The plaintiffs contracted to purchase certain goods from the defendant. The plaintiffs' offer was posted by them in West Hartlepool and received and accepted by the defendant in Croydon. The defendant failed to deliver the goods, and the plaintiffs applied under s. 74 of the Act of 1888 for leave to commence proceedings in the West Hartlepool County Court, on the ground that, by posting the offer there, part of the cause of action arose within the jurisdiction of that court. Leave was granted and a plaint was issued. The defendant's solicitor thereupon demanded particulars of the claim in order to ascertain whether the West Hartlepool County Court had jurisdiction. On receipt of the particulars, the defendant applied for a writ of prohibition directed to the West Hartlepool County Court and to the plaintiffs.

Held: the posting of the offer was not part of the cause of action; the defendant's demand for particulars did not, in the circumstances, amount to waiver; and, therefore, the application succeeded.

Notes. The County Courts Act, 1888, was repealed and replaced by the County Courts Act, 1934 (which has been repealed and replaced by the County Courts Act, 1959). For s. 74 of the Act of 1888, see now the County Court Rules, 1936, Ord. 2, r. 1.

Referred to: *Smythe v. Wiles*, [1921] 2 K.B. 66.

As to the place where a county court action may be commenced, see 9 HALSBURY'S LAWS (3rd Edn.) 166 et seq.; and for cases see 13 DIGEST (Repl.) 415 et seq. As to prohibition, see 9 HALSBURY'S LAWS (3rd Edn.) 332, 333; and for cases see 13 DIGEST (Repl.) 489 et seq.

Cases referred to:

(1) *Lee v. Cohen* (1894), 71 L.T. 824; 39 Sol. Jo. 27, C.A.; 16 Digest 123, 211.

(2) *Farquharson v. Morgan*, [1894] 1 Q.B. 552; 63 L.J.Q.B. 474; 70 L.T. 152; 58 J.P. 495; 42 W.R. 306; 10 T.L.R. 240; 9 R. 202, C.A.; 13 Digest (Repl.) 491, 1199.

Also referred to in argument:

R. v. Tristram, [1902] 1 K.B. 816; 71 L.J.K.B. 418; 86 L.T. 515; 50 W.R. 477; 18 T.L.R. 406, C.A.; 19 Digest 241, 224.

Green v. Beach (1873), L.R. 8 Exch. 208; 42 L.J.Ex. 151; 21 W.R. 856; 13 Digest (Repl.) 420, 464.

Jones v. James (1850), 1 L.M. & P. 65; Cox, M. & H. 290; Rob.L. & W. 197; 19 L.J.Q.B. 257; 14 L.T.O.S. 424; 13 Digest (Repl.) 494, 1225.

Moore v. Gamgee (1890), 25 Q.B.D. 244; 59 L.J.Q.B. 505; 38 W.R. 669, D.C.; 13 Digest (Repl.) 494, 1231.

Appeal from an order of Low, J., at chambers.

The plaintiffs, who carried on business at West Hartlepool, contracted to purchase certain goods from the defendant at Croydon. A written offer made by the plaintiffs was posted by them at West Hartlepool and received and accepted by the defendant at Croydon. This constituted the contract. The defendant failed to deliver the goods. The plaintiffs applied under s. 74 of the County Courts Act, 1888, for leave to commence an action at West Hartlepool. In accordance with

A the County Court Rules, Ord. V, r. 13, the plaintiffs filed an affidavit stating that part of the cause of action arose within the jurisdiction, i.e., the posting of the offer at West Hartlepool. Leave having been granted, a plaint was issued. The defendant's solicitor, on receipt of it, wrote for particulars of the claim, and said that he would accept service of all proceedings in the action at his office as specified. He also said:

B "I have been instructed by the defendant to defend this action, and, subject and without prejudice to any point which the defendant may raise as to the jurisdiction or otherwise, I send you the enclosed demand for further particulars of the plaintiffs' claim."

C On receipt of the particulars, the defendant applied to the judge in chambers for a writ of prohibition to the West Hartlepool County Court and the plaintiffs to prohibit them from proceeding further in the action, but the application was dismissed. The defendant appealed.

J. B. Matthews, K.C. (Morle with him), for the appellant.
Neilson for the respondent.

D A. T. LAWRENCE, J.—This is an appeal from an order of Low, J., at chambers dismissing an application for a writ of prohibition. An action was brought to recover damages for breach of contract for the sale of certain brass and iron. The action was commenced in the County Court of West Hartlepool. For the judge to have jurisdiction, part of the cause of action must arise within the jurisdiction of the county court, and where the plaintiff tries to serve process outside, he must apply to the judge or registrar. For that purpose, the plaintiff must state his reasons in an affidavit. In the present case, the plaintiffs did apply, and they filed an affidavit stating that part of the cause of action arose within the jurisdiction. The fact relied on here is the posting of the offer at West Hartlepool. It is said by defendant that this fact did not constitute a part of the cause of action, and that, inasmuch as this was apparent on the face of the proceedings, the court had no jurisdiction. I think counsel for the defendant is right in saying that, while the posting of the offer was not part of the cause of action, the making of the offer clearly was. It does not matter where the letter containing the offer was posted, as it was only made when it reached its destination. While counsel may be correct in saying that it appears on the face of the affidavit that there was no jurisdiction, counsel for the plaintiffs relies on waiver. For this purpose, he has referred us to an application made by the defendant's solicitor on receipt of the affidavit, which, by the rules of the county court, must accompany the summons. It is said that he wrote a letter which contained a notice amounting to a waiver.

H I do not think this is correct. Counsel for the defendant's answers, or some of them, were sufficient to defeat the argument. The letter was in express terms. [His LORDSHIP referred to the letter, and continued:] Counsel for the defendant says the demand in question was a step in the action. I come to the conclusion that it was not a step in the action, and for this reason, that its whole object was to obtain further particulars which would enable the defendant to ascertain whether the court had jurisdiction. That follows, as it seems to me, from the use of the words "without prejudice." They import that no consent to the jurisdiction is to be implied. There has, therefore, been no waiver, and it seems to me that *Lee v. Cohen* (1) supports the view that such a document cannot amount to a waiver. The headnote reads (71 L.T. 824):

I "Where an action has been commenced in the Mayor's Court the defendant does not, by entering appearance, not under protest, and taking other steps, waive his right to object to the jurisdiction so soon as he ascertains exactly what the nature of the plaintiff's claim against him is."

And LINDLEY, L.J., said (*ibid.* at p. 825):

"Then as to the point whether the defendant has waived his right to object to the jurisdiction of the Mayor's Court by the steps he has taken, when one looks at it it comes to this: So soon as the defendant's legal advisers ascertained exactly what the nature of the plaintiff's claim was, the defendant objected to the jurisdiction, and applied for the writ of prohibition. That being so, he has not, in my opinion, waived his right to object by having entered appearance and taken the other steps that he did. I think, therefore, that the prohibition must go, and that the appeal must be allowed with costs in the usual way."

A. L. SMITH, L.J., agreed, giving judgment to the same effect. There was stronger evidence of waiver in that case than in this, because here it was guarded by the words "without prejudice." This being my view, it is unnecessary to say anything further as to counsel for the defendant's point that there was want of jurisdiction apparent on the face of the proceedings. He cites *Farquharson v. Morgan* (2), but that need not be relied on to decide this case. I think this application succeeds, and that the prohibition must go.

LUSH, J.—Three questions arise in this court. The first is whether the whole or any part of the cause of action arose in the district of the West Hartlepool County Court. If any part did so arise, then the prohibition must be refused because of s. 74 of the County Courts Act, 1888. The plaintiff did apply for and obtained leave. I agree with what A. T. LAWRENCE, J., has said on this part of the case. Counsel for the plaintiffs said correctly that the material facts must arise within the jurisdiction in order to establish the claim; but he says that one of these was the dispatching of the offer, and that, as it was dispatched in the West Hartlepool district, part of the cause of action arose in that district. I disagree with his contention. It is true that the sending of the offer must be proved, but the material fact is that the offer was made. That is proved partly by proving dispatch and partly proving receipt of the offer, but the question is, where was the offer made? It was made not where it was dispatched, but where it was received. The posting of the offer was, therefore, not part of the cause of action. As to acceptance, it is clear that an offer is accepted when it is put in the post, and, therefore, it was accepted at Croydon, and the whole of the contract was concluded outside the district in which these proceedings were commenced. It cannot be said that any part of the cause of action arose in the West Hartlepool district.

Counsel for the defendant raised a further question. He said that, as it was apparent on the face of the affidavit that the cause of action arose outside the West Hartlepool district, therefore want of jurisdiction was apparent on the face of the proceedings; and he contended, on the authority of *Farquharson v. Morgan* (2), that, if the want of jurisdiction appears on face of the proceedings, it is bad, although the defendant may have acquiesced. Applying that here, counsel says the defendant is entitled to a prohibition *ex debito justitiæ*. Perhaps it is not necessary for us to deal with the point, but, as I have formed an opinion, I propose to state it. In *Farquharson v. Morgan* (2), there was a total absence of jurisdiction. The county court judge there had no jurisdiction, without regard to whether he was a judge of one county court or another. Inasmuch as it was apparent to the county court judge that it was a claim which could never be submitted to a county court, he was entertaining a claim which he ought to have known could only have been entertained by the High Court. Therefore, the Court of Appeal, following older decisions, but expressing reluctance, held that, although the defendant consented, yet, notwithstanding the consent, he was entitled to a prohibition *ex debito justitiæ*. If the present case is on all fours with that, then it must be followed. In that case, the interests of the litigants were subordinated to the court. LORD HALSBURY said ([1894] 1 Q.B. at p. 556):

"The court must protect the prerogative of the Crown and the due course of the administration of justice by prohibiting the inferior court from proceeding in matters as to which it is apparent that it has no jurisdiction."

Here, however, there has been no such total absence of jurisdiction. The county court judge had some jurisdiction. It was an ordinary action for breach of contract well within the limits of jurisdiction. Although the registrar had no power to give leave, the defect of jurisdiction was not such as it was in the case I have referred to. It was a mere defect in so far as the locality of the county court was concerned. In my view, this was rather a matter of procedure than jurisdiction, using that word as it was used in *Farquharson v. Morgan* (2). That, in my opinion, is the distinction between this case and *Farquharson v. Morgan* (2).

The third question is: Was there any waiver? When the solicitor for the defendant wrote the letter which has been referred to, he sent with it a very formal document demanding particulars. He also says: [His LORDSHIP referred to the letter, and continued:] As first sight it strikes one that it was an undertaking to act as solicitor at West Hartlepool, and a consent to the suit proceeding there. On reflection, however, I have come to the conclusion that this is not the correct view. He says, in effect, "I take this step without prejudice." If he had taken a step with a view to his ultimate success, his saying "I reserve my right to object to the jurisdiction" would not have mattered. He would have waived his right to object. One must remember that the particulars already given were very meagre. Thus, the plaintiffs did not say where the contract was made; they gave no information to enable the defendant to form any opinion whether he could succeed in an application for prohibition. For that purpose, the defendant was entitled to further particulars. True, the letter said where the notices must be sent, but the defendant's solicitor only applied for particulars so that he could advise his client. That is all that was meant or done by the solicitor for the defendant. The defendant did not, in my opinion, acquiesce in the jurisdiction. To decide otherwise would be to disregard the substance of the matter. He seems to me to tell the plaintiffs in clear terms that it is not to operate as a waiver. I, therefore, agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *F. Gowen*, Croydon; *Crossman, Pritchard & Co.*, for *J. H. Smith*, West Hartlepool.

[*Reported by W. V. BELL, Esq., Barrister-at-Law.*]

FOWLER v. MIDLAND ELECTRIC CORPORATION FOR POWER DISTRIBUTION, LTD.

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Bankes and Warrington, L.J.J.),
April 24, 25, 1917]

[Reported [1917] 1 Ch. 656; 86 L.J.Ch. 472; 117 L.T. 97;
83 T.L.R. 322; 61 Sol. Jo. 459]

Company—Debenture—Payment of principal and interest—Duty of company to seek out debenture holder.

Unless the covenant to pay principal and interest to the registered holders of debentures issued by a company contains some special provision, as, e.g., a condition fixing a place of payment, excluding the common law obligation as between debtor and creditor, and in the absence of any evidence that the debenture holder had prevented the payment to him by deliberately absenting himself or deceiving the company as to his whereabouts, it is the duty of the company to seek out the debenture holder for the purpose of performing the covenant.

Notes. As to debentures generally, see 6 HALSBURY'S LAWS (3rd Edn.) 466 et seq.; and for cases see 10 DIGEST (Repl.) 763 et seq.

Cases referred to in argument:

New Zealand Gold Extraction Co. (Newbery-Vautin Process) v. Peacock, [1894] 1 Q.B. 622; 63 L.J.Q.B. 227; 70 L.T. 110; 9 R. 669, C.A.; 9 Digest (Repl.) 333, 2133.

Webb v. Crosse, [1912] 1 Ch. 323; 81 L.J.Ch. 259; 105 L.T. 867; 56 Sol. Jo. 177; 35 Digest 667, 4029.

Thornton v. Court (1854), 3 De G.M. & G. 293; 22 L.J.Ch. 361; 20 L.T.O.S. 318; 17 Jur. 151; 43 E.R. 151, L.J.J.; 35 Digest 667, 4036.

Appeal from an order made by EVE, J., in an action by a debenture holder.

In 1903 the defendant company issued a series of debentures of £100 each, amounting to £250,000. By each debenture the company covenanted to pay to the person therein named, or other the registered holder for the time being, the principal money thereby secured, together with a premium of 2½ per cent., on June 30, 1913, and until payment of such principal moneys to pay interest on the principal sum thereby secured at the rate of 4½ per cent. per annum on June 30 and Dec. 31 in each year. The debentures did not contain any charge on the company's assets, but by one of the conditions indorsed thereon it was provided that the holders of the debentures were and would be entitled *pari passu* to the benefit of an indenture therein mentioned, whereby certain freehold and leasehold properties belonging to the company had been assured or covenanted to be assured to, and the other assets and the undertaking of the company had been charged in favour of, trustees to secure the debenture debt and interest. By that indenture it was provided that

"upon payment by the trustees to debenture-holders of any principal moneys or interest hereby or thereby secured the respective debentures shall be produced to the trustees who shall cause a memorandum of the respective amounts and dates of payment to be indorsed thereon respectively."

Neither the debentures nor the deed fixed any place for payment of the debentures. By the articles of association of the company it was provided that in the event of the death of a registered holder of debentures his executors or administrators, or, in the case of joint holding, the survivor or survivors of the several joint holders, should be the only person or persons recognised by the company as having any title to the debenture. It was provided that a notice to a debenture-holder should be deemed to be duly served if sent through the post prepaid addressed to the

debenture-holder at his registered address, and that a notice so sent should be deemed to be served twenty-four hours after it was posted. Miss Mary Jane Fowler was the registered holder of eighteen of the debentures. She died on Jan. 19, 1913, having by her will appointed J. Challiner and E. Fowler her executors. Considerable delay arose in proving her will, caveats having been entered against the probate. The company proposed to issue on July 1, 1913, £400,000 of 5 per cent. guaranteed first mortgage debenture stock, partly in place of the debentures which would then have become payable, and for that purpose it was necessary to pay off the debentures. On May 23, 1913, the company sent a circular letter to M. J. Fowler (in common with the other debenture holders) to her registered address, offering to issue to her such amount of debenture stock in exchange for her debentures as she might elect to take. No answer was received to this letter on behalf of M. J. Fowler, and on June 23, 1913, the company wrote a further letter to her at her registered address, stating that, as she had not elected to exchange her debentures for debenture stock, it was assumed that she wished the debentures to be redeemed, and asking her to forward the debentures to the company duly cancelled for that purpose. No answer was received to this letter. On June 29, 1913, the company sent a warrant for the amount due to M. J. Fowler for interest on June 30 to her registered address, and on July 1 this warrant was returned to the company by her bankers with the information of her death, and that Challiner, whose address was given, was one of her executors. In July, 1913, the company paid to the trustees of the debenture trust deed £1,845, being the principal money due, with £45 the agreed bonus. This sum was placed by the trustees on deposit at Parr's Bank. It was subsequently invested in Treasury Bills, which were paid off in July, 1916, when the trustees again placed the principal together, with the accrued interest on the bills upon deposit. On Aug. 15, 1913, the company sent a letter to M. J. Fowler at her registered address informing her that they had paid the money to the trustees, and asking her to send the debentures to Parr's Bank, the trustees' bankers. No answer was received to this letter. In October, 1913, the company wrote to Challiner that they held the interest warrant, which had been sent on June 29, uncashed, in anticipation of probate of M. J. Fowler's will being lodged for registration. Challiner replied stating that he had renounced probate, and that E. Fowler, whose address he gave, was the only executor, adding that he understood that probate was not likely to be taken out for some time, but that if the company applied to Fowler he could inform them more fully. The company then wrote to Fowler, pointing out to him that until probate was registered with them there was no one to whom they could make a legal tender of the amount due in respect of the debentures. On Oct. 25, 1913, Fowler wrote to the company stating that the caveats had been withdrawn, and that he expected that probate would be obtained within the next three weeks. Probate was granted to Fowler on Nov. 5, 1913, but Fowler placed the debentures in the National Safe Deposit, and appeared to forget all about them, and the probate was not registered with the company until Apr. 10, 1916. The company then paid to Fowler the interest due on June 30, 1913, and offered to pay to him the £1,845 and the amount of the interest thereon earned by the deposit with the trustees' bank and the interest on the Treasury bills. Fowler, however, claimed interest on the £1,800 from June 30, 1913, to the date of payment at $4\frac{1}{2}$ per cent., and, as the company refused to pay this interest, commenced this action to recover the £1,845 and interest on the £1,800 at the said rate. The company paid into court the £1,845 and £159 10s. 9d., the amount of the interest earned as before-mentioned, as sufficient to satisfy the plaintiff's demand. The action was continued to recover the difference between the £159 10s. 9d. and the interest on the £1,800 at $4\frac{1}{2}$ per cent. from June 30, 1913. On Feb. 19 the action came on for trial before EVE, J.

In the course of his judgment EVE, J., said that the short point raised by the action was whether the holder of a registered debenture, not containing any provision appointing a particular place for payment, who from oversight, carelessness,

or other cause had neglected to present his debenture for payment off on the due date, could, in a case where there had been no legal tender, recover from the borrowers interest on the principal moneys secured by the debenture down to the date of actual payment. In other words, was it the duty of the borrowers in such circumstances to seek the creditor if he is within the realm and to pay the money without request? It was not disputed that the general rule that the debtor must seek his creditor might, and probably would, have applied had the registered holder, Miss Fowler, survived June 30, 1913, but it was suggested that the real bargain being a covenant to pay Miss Fowler or other the registered holder, with express terms that the company should recognise and treat the registered holder of each debenture as being sole absolute owner thereof, and as alone entitled to receive and give effectual discharges for the principal moneys and interest, and that on the death of a registered holder his administrator or executor should be the only person recognised by the company as having any title to the debenture, and might be registered as the holder thereof, the company was not bound to look beyond the register, and that when it was discovered that the person whose name appeared on the register as the holder was dead, the company was relieved from any obligation to seek out the administrator or executor, and could retain the overdue principal moneys or deposit them with the trustees without being liable to pay interest on them until such time as the legal personal representative chose or was able to have the grant to him recorded in the register. HIS LORDSHIP continued: I do not think this suggestion is well founded. The contract is in express terms to pay interest until payment of the principal moneys, and the conditions relating to the register, and to the absolute title of the registered holder and his legal personal representatives, are not intended to operate, nor do they in fact operate, as a qualification on the covenant to pay. They are inserted to protect the company and the debenture trustees against the possible consequences of notice of any trust in favour of or any claim advanced by a third party, and to relieve the company and the trustees of all obligation to pay regard to any persons other than those in whom the legal title is vested. Beyond this they do not, in my opinion, affect the rights of the debenture-holder and his legal personal representatives, and I cannot so construe them as to hold that they transfer to the creditor the obligation of seeking out the debtor. But then it is said that, if this conclusion be right, a careless debenture-holder, or one who was more content to leave his money with the company, possibly at a high rate of interest than to have it repaid, might inflict hardship on the company by neglecting to surrender his debenture, or possibly by delaying the application for a grant of administration to the estate of a holder who had died intestate. This may be so, but, in the first place, the whole difficulty can be, and I think at the present time generally is, met by a condition fixing a place of payment, and, in the next place, even in the absence of such a condition, a legal tender to the careless debenture-holder would determine his right to subsequent interest, and by payment into court in redemption or administration proceedings the same result would probably be brought about in the case of a deceased member. But these latter considerations do not really apply to the present case, for, as I have already shown, the company was supplied, on the very day or the day after the debenture matured for payment, with the name of one of the deceased holder's executors, and by the 24th of the following October the information was given that the plaintiff was the only proving executor and was expecting to receive the grant within a few weeks. The defendants were, therefore, from the first in possession of information which told them the person or persons to whom a tender might be made, and, although it is true that caveats had been entered and this might have made them hesitate for a time to make such tender, all grounds for any such hesitation were removed by the letter addressed to them in October. There must be judgment, with costs, for the plaintiff for the amount of the difference between the £159 10s. 9d. and the interest on the £1,800 at 4 per

cent. per annum from June 30, 1913, down to judgment, less tax, and an order for payment out to him of the moneys in court. The defendants appealed.

Maugham, K.C., and *R. W. Baxter* for the defendants.

Clayton, K.C., and *F. L. Wright*, for the plaintiff, were not called upon to argue.

LORD COZENS-HARDY, M.R.—This seems to me to be a very plain case. A Miss Fowler was entitled to debentures for £1,800, carrying an express rate of interest, the capital sum with a premium being made payable on June 30, 1913. The debentures were secured by a charge upon the property created by a deed, which is referred to on the back of each debenture. We have not anything to do with the charge upon the property here. This is simply an action on the debentures themselves in respect of the £1,800 principal money, which became due on June 30, 1913. It was not paid, and it is said that it carries interest till payment, and that it ought to be paid to the plaintiff, who is the legal personal representative of Miss Fowler. Miss Fowler is said to have been, and I assume she was, a trustee for some charity. That she held the debentures as trustee for a charity makes no difference, because when we look at the debentures it is quite clear from cl. 11 thereof that

"In the event of the death of the registered holder of debentures, his executors or administrators, or, in the case of joint holding, the survivor or survivors of the several joint holders, shall be the only person or persons recognised by the company as having any title to the said debentures."

It is entirely immaterial, therefore, whether Miss Fowler was beneficially interested in the £1,800, or whether she was, as in truth apparently she was, merely a trustee for the charity. The money was payable to her representative, and not to any new trustee the charity might select.

Miss Fowler, as the holder of these debentures, had her name on the register, and dividend warrants were from time to time paid by the company by cheque through her bankers. The cheque for the first half year of 1913 was returned through the bankers with the information that the lady was dead. The bank gave the information which they then had that one of the executors was Mr. Challiner, who, when he was applied to, said that he had renounced probate, and gave the name of the other executor, the plaintiff. In June, 1916, this action was commenced. The defendants paid into court the £1,800 and the premium and interest up to June 30, but that is all. The plaintiff says that he has a legal right under the express covenant made by the company with Miss Fowler, and the company must satisfy their legal obligation, which is to pay £1,800 with the premium and interest until payment.

We are invited to hold that there is something special and peculiar in the debentures of this company which renders the ordinary law applicable to such a case inoperative. I entirely refuse to assent to that. There is here an obligation under seal by the company to pay on June 30, 1913, a certain sum of £1,800 with a premium and with interest. The interest goes on accruing until payment is made, unless it has been shown that there is a tender which was not accepted or that there has been some default of an obligation on the part of the plaintiff which stops the interest from running. I can see no trace of such a thing here. The debenture does not name any place where the capital sum is to be paid. There is no clause similar to that which provided for a definite payment of interest, and I think that it would be dangerous in the last degree to listen for a moment to the suggestion which has been made that there is some company law in the city, when transactions of this kind are dealt with, which makes it improper that the company should be chargeable with interest up to the date when the full payment is made. I do not myself think that there is any obligation whatever as executor to register. I cannot find anything in the deed to require that. I think that if the executor goes to the company and says: "My testatrix is the registered owner of these debentures, here they are, here is the probate of her will, I am the sole executor, please pay me the amount due under that debenture," that is perfectly good, and there is not the least necessity for any kind of registration of probate with the

company at all. There is no obligation for it, no necessity for it, and no harm done by its not having been registered before. I am unwilling to say very much more about this case. I agree entirely with the judgment of Eve, J. I think that the defence to this action is misconceived, and that the appeal must be dismissed with costs.

BANKES, L.J.—I agree with what the learned judge in the court below said with reference to the construction of this debenture. Counsel for the defendant company has suggested that if our decision goes against him the position of secretaries of companies will be a pitiable one, and that their main duty, or a great part of their duty, will consist of rushing about the country seeking out the creditors of the company. He has appealed to what he says is "the universal practice of mankind" to induce us to accept his view of the construction of this document. If there is a universal practice of mankind, and if it is applicable to this case at all, I should say it would lead one to the conclusion that the occasions are rare when the creditor does not demand, and if necessary present himself promptly to receive, payment of money which is due to him, and in those rare cases where he does not do so, either from carelessness, or neglect, or ignorance, then the rights of the parties have to be dealt with according to the strict letter of their bargain. The bargain, as I understand it, contained in this debenture was that on a given date the company would repay the principal, and would pay interest until the principal was repaid. If there was any evidence whatever that the creditor had prevented, in the ordinary sense of the word, the payment to him by the company by absconding or deliberately absenting himself, or keeping himself out of the way, or deceiving the company as to his whereabouts, there might be foundation for some of the observations that were addressed to us. But in this case it is plain what the position was. The lady died, and one of the named executors did not intend to accept probate. But by Oct. 25, 1913, the company received information from Mr. Fowler that he expected probate would be obtained within the next three weeks, the caveats which had been entered against probate having been withdrawn, and a request by him that the cheque for interest due down to June 30 should be sent to a certain bank. Having that information the company wrote back and said that until probate had been registered they had no authority to pay. By "registered" the company merely meant noted in their books the fact that probate had been obtained. It may be a convenient practice to adopt, but there is nothing in the contract which entitled them to say that, although Mr. Fowler had sent in the probate and they had made that note concerning it, they would not consider that the time had come when they were under an obligation to pay and that they would continue to be under an obligation to pay the interest. That being the position of things in 1913, the company themselves did nothing. They knew who the creditor was. It was open to them to write a letter and say that they insist upon having probate registered, and asking when Mr. Fowler was going to send it in, because he was entitled to the principal. They did nothing for three years until 1916, and then, when it turned out that the executor had forgotten what the real position was, having put this debenture away, they turned round and said: "You have prevented us from paying." As far as I can see, there is not the slightest ground for supporting that view here.

WARRINGTON, L.J.—I am of the same opinion. This case is an extremely simple one. By a document which is called a debenture, but which is for the present purpose to my mind an ordinary covenant to pay, the defendant company covenanted to pay Miss Mary Jane Fowler, as the registered holder, the sum of £1,800 with a certain premium on June 30, 1913, together with interest at 4½ per cent. per annum. June 30, 1913, arrived. Miss Fowler happened to be dead. Her will was not proved till some months later, and for reasons which are quite immaterial, probate of the will was not produced to the company and noted in their books until April, 1916. They then refused to pay any interest on the £1,800

from June 30, 1913, and the present action is brought to enforce the covenant to pay. What possible answer can there be? The registered holder has done nothing to prevent the company from paying the debt. The obligation, if you look at the terms of the covenant itself and the conditions indorsed on it, is to pay the registered holder, or, if the registered holder is dead, his executor or administrator. The company have not paid the executor in this case. The only answer is that there is something peculiar about the contract between the company and the debenture-holder, something which renders it incumbent on the court to hold that the ordinary common law rule as to the duty of the debtor to seek out the creditor and pay him is not to apply. I altogether repudiate any such suggestion. It is an ordinary covenant to pay, and, unless the covenant contains some special provisions in terms excluding the common law obligation as between debtor and creditor, I do not think that the court ought to recognise any such exclusion, or to countenance the idea for a moment that there should be such an exclusion to the common law right. This is an ordinary action on a covenant to pay. Payment has not been made, and the plaintiff is plainly entitled to judgment.

Appeal dismissed.

Solicitors: *Rawle, Johnstone & Co.*, for *Hill, Dickinson & Co.*, Liverpool; *Ranger, Burton & Frost*, for *George Trenam*, Balham.

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

GREAT WESTERN RAILWAY CO. v. WILLS

[HOUSE OF LORDS (Earl Loreburn, Viscount Haldane, Lord Kinnear, Lord Shaw and Lord Parmoor), October 26, 27, November 2, 1916, March 13, 1917]

[*Reported* [1917] A.C. 148; 86 L.J.K.B. 641; 116 L.T. 615; 33 T.L.R. 254; 61 Sol. Jo. 335]

Carriage of Goods—"Non-delivery"—*Short delivery*—*Goods carried at owner's risk*—*Carrier liable for "non-delivery of consignment"*—*Appreciable part of consignment not delivered.*

The respondent delivered goods to the appellant railway company for carriage on the terms of a consignment note which exempted the railway company from liability "for all loss, damage, misdelivery, delay, or detention," except where caused by the wilful misconduct of the servants of the company, and proceeded: "But nothing in this agreement shall exempt the company from any liability they might otherwise incur in the following cases of non-delivery, pilferage, or misdelivery (that is to say):—1. Non-delivery of any package or consignment fully and properly addressed, unless such non-delivery is due to accidents to trains or fire. 2. Pilferage from packages of goods protected otherwise than by paper or other packing readily removable by hand provided the pilferage is pointed out to a servant of the company on or before delivery. 3. Misdelivery where goods fully and properly addressed are not tendered to the consignee within 28 days after dispatch. Provided that the company shall not be liable in the said cases of non-delivery, pilferage, or misdelivery on proof that the same has not been caused by negligence or misconduct on the part of the company or their servants." The company failed to deliver at its destination what the county court judge found to be an appreciable, though not a great, portion of the consignment. On a claim by the respondent for the value of the undelivered goods,

Held (LORD SHAW dissentiente): on the true construction of the consignment note as a whole non-delivery of a consignment meant non-delivery of the whole

consignment and not short delivery, and, therefore, the respondent had failed to prove non-delivery of the consignment within exception No. 1 of the consignment note, and was not entitled to succeed.

Decision of Court of Appeal, [1915] 1 K.B. 199, reversed.

Notes. Referred to: *O'Keefe v. Great Western Rail. Co.* (1920), 123 L.T. 269.

As to special contracts of carriage, see 4 HALSBURY'S LAWS (3rd Edn.) 154-157; and for cases see 8 DIGEST (Repl.) 41-43, 60 et seq.

Appeal by the railway company, the defendants in the action, from an order of the Court of Appeal (BUCKLEY and PICKFORD, L.JJ.; PHILLIMORE, L.J., dissentiente), which affirmed a decision of the Divisional Court, reported [1914] 1 K.B. 263, upholding a judgment given for the plaintiff in an action commenced by him in the Bristol County Court.

The facts are stated in the headnote and their Lordships' opinions.

Schiller, K.C., and *Bernard Campion* (for *C. K. Tatham*, serving with his Majesty's Forces) for the appellants.

Rawlinson, K.C., and *F. E. Weatherly* for the respondent.

The House took time for consideration.

Mar. 13, 1917. **EARL LOREBURN.**—The majority of the House place upon this consignment note a construction which is favourable to the appellants, but also the majority of the House are of opinion that, the point not having been tried by the learned judge, there should logically be a new trial. As, however, we apprehend that what the appellants desire is a construction of the note, we ask whether it is necessary to have a new trial.

The learned counsel for the parties having agreed to dispense with a new trial, the following opinions were read.

EARL LOREBURN.—What alone matters in this case is the construction to be placed on the owner's risk note. The railway company are relieved from liability for loss, damage, misdelivery, delay or detention subject to a qualification which does not apply here. But the agreement does not exempt the company

"in the following cases of non-delivery, pilferage, or misdelivery, that is to say, the non-delivery of any package or consignment fully and properly addressed."

There is again a qualification which does not apply here, so I omit further reference to these qualifications.

The company is to be ordinarily not liable for a loss, but liable for non-delivery (which is a loss) when the thing not delivered is a package or consignment fully and properly addressed. That is the general effect of the agreement. You are to distinguish packages or consignments so addressed from other things, no doubt because it is easier to convey them safely if so identified and addressed. If it is desired the consignor can send each article as a separate consignment fully and properly addressed and then the railway company would be answerable for every single article. Probably this is in many cases practically an impossible thing to do, or it might entail a heavier charge for carriage. But if he does not do that, then, in my opinion, the question is whether or not the consignment as a whole has been delivered. It was argued that when you have such a package or consignment the railway company is liable unless everything contained in it or of which it consists is delivered—for example, that the loss of one egg out of 500 or of one handle in a piece of furniture amounts to non-delivery of the package or consignment. Subtle arguments might be multiplied on this footing, as all kinds of things are packed or consigned. In my opinion, it is not a question of law but a question of fact in each case whether there has been delivery or non-delivery, which are the antitheses the one of the other. And a judge or jury ought to answer the question: Was there in substance and in a business sense delivery or not?, according to the circumstances, as they would answer about the delivery of a cargo,

and would look at the nature of the things packed or consigned. If they came to a conclusion which a reasonable man could reach on the evidence their finding would be supported. A court can construe the meaning of words, but I do not think it is a question of construction whether a deficiency in the delivery of a package or consignment amounts to non-delivery of the package or consignment or not. Nor do I think it is possible as a matter of law on this contract to say either that to deliver a consignment means delivering everything that composes it or to prescribe by percentage or by any other automatic standard what does or does not amount to delivery. I regard it as a question for the jury. We are not assisted by the maxim *de minimis non curat lex*, for that maxim merely applies to negligible trifles. In my opinion, the construction is plain. The railway company are not relieved from liability where there has been non-delivery of the package or consignment, but the judge of fact or the jury have to say whether or not there has been as a matter of business in substance non-delivery. If there were a considerable shortage and the jury found there had been delivery I should set aside the finding on the ground that there was no evidence to support it, and I do not believe that a court of law can give more assistance to those who have to decide the facts than by saying that. You cannot convert a question of fact into a question of law by saying it is inconvenient not to have any certain standard by which you can automatically ascertain liability. The parties here have chosen to make liability depend on the ascertainment of a fact.

VISCOUNT HALDANE.—It is after hesitation that I have arrived at a conclusion as to the construction of this consignment note, and that hesitation has not been the less because of the eminence and experience of learned judges in the courts below who have taken a different view. But the question is one of the construction of an ill-drawn and obscure document on which those who have to interpret it must form their own opinions.

The consignment note in controversy is framed with the object of relieving the company from liability as common carriers and under s. 7 of the Railway and Canal Traffic Act, 1854, a section which prohibits contracting out of the principle it lays down, excepting under conditions which may be adjudged just and reasonable by the court. In particular cases, such conditions may be so adjudged if the goods are carried at a reduced rate and if the stipulations excluding liability are not grossly unfair. I will not read over again the terms of the particular stipulations for carriage at reduced rates under construction in the present case. It is enough that their substance is that the company is to be free from all liability for loss, damage, misdelivery, delay, or detention, unless, firstly, these are due to the wilful misconduct of the company's servants, or secondly, they fall under certain specified kinds of non-delivery, pilferage, or misdelivery, which, in the absence of any misconduct of the company's servants, would, but for this exception, come within the sweeping exemption conferred by the main words. Even these specified cases of exceptional liability may be got rid of if the company can prove that they have not been due to negligence or misconduct by themselves or their servants. But if they cannot discharge the burden of proving this, then they are liable if there is non-delivery of any package or consignment fully and properly addressed, unless the non-delivery is due to accident to a train or to fire. A second head under which liability is preserved is that of pilferage from properly covered packages, and a third is misdelivery where goods properly addressed are not tendered to the consignee within twenty-eight days after dispatch. This last head points to damage arising from delay caused by goods ultimately delivered to the consignee having previously been wrongly delivered to some other person. In the conditions annexed to the note there is one in particular, the third, which must be kept in mind in construing the exceptions to which I have referred. It excludes claims in respect of goods for loss or damage during the transit, unless made within three days after delivery of the goods, or, in case of non-delivery of any package or consignment, within fourteen days after dispatch. It will be

noticed that in the second of these alternatives the expression "package or consignment" is used instead of "goods" as in the first, a variation which suggests that the non-delivery contemplated is not one arising merely by loss of items during the transit, but non-delivery of something which is an entirety. Loss, say by pilferage or other cause of short delivery, would be literally covered by the words in the first alternative, and is apparently meant to be excluded from the second, which is, I think, directed to absolute non-delivery as contrasted with short delivery. This is not without its bearing on the real question in the appeal which is the meaning of the expression "consignment" in the first of the exceptions to freedom from liability bargained for in the body of the note.

Reading the note and the conditions as a whole, I have come, though not with any great degree of confidence, to the conclusion that by "consignment" in the first exception is meant the consignment in its entirety of what is included in a consignment note, as distinguished from the items which together make up the consignment. The juxtaposition of "package," which connotes a single whole, with consignment appears to me to point to this interpretation. It seems, from the second exception, that pilferage is not treated as covered by partial non-delivery, and this indicates that non-delivery of a part is not to be contemplated as within the first exception. As I have already said, there is nothing in the provisions of condition 3, which prescribe the method of claim in all cases, that, as I read it, conflicts with this construction. I do not find myself in agreement with BUCKLEY and PICKFORD, L.JJ., in their interpretation of the word "loss" as it occurs in the third condition. I think that "loss" is there meant to include loss by failure to deliver items as distinguished from the entirety.

These considerations dispose of the real question of importance in the appeal. They seem to me to imply that, on the facts as established before the county court judge, there was a delivery of what was included in the consignment note, a delivery which was short by reason of the loss of certain items at some stage of the transit, but not the less a delivery within the meaning of the condition. This is how I construe his finding, and, if I am right in my interpretation of the note itself, his judgment was consequently wrong.

LORD KINNEAR.—I have found this case to be one of difficulty. But, after consideration, I am unable to accept the conclusion of the court below, and I agree with the noble and learned viscount [LORD HALDANE] that the appeal must be allowed. The question before the House, as I understand it, is purely one of construction, since the facts have been ascertained finally, and with sufficient precision, by the learned judge of the county court. I assume, therefore, in accordance with his decision, that certain carcasses of sheep and lambs, parts of three separate consignments from one of the appellants' railway stations to the respondent at Bristol were not delivered, and that, although the proportion of the undelivered parts to the entire consignments was in each case small and of no great value in money, there was still an appreciable difference between the quantities delivered and the quantities consigned. The respondent claims the value of the undelivered carcasses, and I apprehend that if the consignments had been made under an ordinary contract of carriage by which the appellants had undertaken to bring the goods safely to their destination or to indemnify their owner for their loss or injury, the claim would have been good. But that is by no means the contract between the parties in this case. The appellants, like other railway companies, allow to traders the option of having their goods carried under one or other of two different arrangements. They may be carried at the ordinary rate, which is not alleged to be excessive, under the ordinary liability of a railway company as fixed by statute, or else they may be carried at a reduced rate, provided the sender undertakes to relieve the railway company from all liability for loss or damage, except in certain distinctly specified cases. The respondent adopted the second method, and the consignment note, which is in usual terms, and is for

"goods to be carried at reduced rates at owner's risk," sets forth that the goods mentioned "are to be carried at the reduced rate below the company's ordinary rate, in consideration whereof I agree to relieve the Great Western Railway Co. and all other companies over whose lines the goods may pass from all liability for loss, damage, misdelivery, delay or detention except when proof that such loss, etc., arose from wilful misconduct on the part of the company's servants." Under the further exception:

"Nothing in this agreement shall exempt the company from any liability they might otherwise incur in the following cases of non-delivery, pilferage or misdelivery (that is to say): 1. Non-delivery of any package or consignment fully and properly addressed unless such non-delivery is due to accidents to trains or fire."

The respondent, therefore, undertakes for valuable consideration that his goods shall be carried at his own risk and not at the risk of the appellants, except in certain specified cases. I apprehend that such exception to be effective must be expressed with explicit accuracy. I do not suggest that the case is governed by any fixed rule of law by which a stipulation of this kind must be construed against or in favour of one party or the other, but still it is for the respondent, who stipulates for an exception in his favour from his own clear obligation, to show clearly that the case falls within the terms of the exception, and in this, I think, he has failed. The particular exception upon which he relies is that last quoted—"Non-delivery of any package or consignment fully and properly addressed," and the question to be decided is simply what is meant by "consignment."

I am of opinion that, taking the words in their ordinary and grammatical meaning, it means the entire consignment, and not any part or parts of it. The subject of the stipulation is not the consignment or any part of it, but the whole consignment, including every part of it. It is regarded as an integral unity. This is in accordance with the assumption on which the pleadings of the parties are stated. They are at one as to the meaning of the word as used in their contract: and there is nothing to suggest that either entertained the slightest doubt as to the identification of the three consignments in question. The respondent does not allege that the consignments have not been delivered, but claims damages for the non-delivery of certain carcasses "which formed parts of three consignments delivered by him to the appellants for carriage" to Bristol; and then sets out that the said shortage "appears in the delivery sheets prepared by the appellants' servants." This is quite in accordance with the ordinary use of language. Non-delivery of a consignment is one thing and short delivery of the same consignment is another and different thing; and when the respondent claims damages in respect of short delivery only, he does so in terms. But then his exemption from the general risk he has undertaken does not arise in the case of short delivery but of non-delivery of the entire consignment. It is urged very forcibly that if an appreciable part of a consignment is not delivered the entire consignment is not delivered; and if the thing to be proved were that the appellants had delivered a consignment in terms of a contract to that effect, the argument would be unanswerable. But if the question is whether non-delivery of an entire consignment has been proved, it is irrelevant. It is no part of the appellants' case that they should prove delivery. They have not insured the safe delivery of the goods intrusted to them; and no obligation of theirs comes into consideration at all, until the respondent has exempted himself, by force of the special exception, from his general obligation to take the risk of carriage on himself. The affirmative or negative of delivery makes all the difference in the meaning and effect of the stipulation. But it does not alter the thing to be delivered. I agree that if a part is not delivered the consignment cannot be said to be delivered. But for the same reason the non-delivery of a part does not prove the non-delivery of the whole.

I agree with the noble and learned viscount that this view is confirmed by the terms of the second exception, which deals with pilferage. This would have been

altogether superfluous if short delivery or partial non-delivery had been already covered by the first exception. Goods that have been pilfered in transit are not delivered; and it cannot be suggested that if the first exception stood alone short delivery of a consignment would have been covered and short delivery of a package would not. It may be that a package is more obviously a single thing than a consignment, which may be made up of a variety of goods. But each is contemplated as possessing the same degree of unity in this respect, that it must be capable of being fully and properly addressed, and so being regarded as one definite subject of a particular contract. Moreover, the component parts of a package, as of any other consignment, may be disintegrated and scattered in the course of transit. In that case, if any part were missing, there would be short delivery. But the terms of the second exception make it clear that that would not be enough to throw liability on the railway company. For it is only in one particular case, to wit, when the packet has been protected otherwise than by paper or other packing easily removable by hand, that the exception comes into force, and even then it is only allowed subject to a proviso that due notice shall be given to the company's servants. All this is, to my mind, a very significant indication that the case provided for in exception No. 1 is that of a total non-delivery of a definite thing which is assumed to be deliverable once for all, and I think the same inference is to be drawn from the third of the conditions on the back, which has been said to be inconsistent with it. It is not the purpose of this clause to define the grounds on which the company's general exemption from liability may be excluded, but to fix the conditions on which claims against the company may be made, assuming them to be in themselves admissible under the contract. But in laying down these conditions it was necessary to provide for the two different cases which we have been considering. There may have been a partial or insufficient delivery due to the misconduct of the company's servants and involving loss or damage to the owner, and in that case it is provided that notice must be given within a certain time after delivery of the goods. Or there may have been a total non-delivery bringing into force the conditions of exception No. 1, and in that case notice must be given within fourteen days after dispatch. I think with my noble and learned friend that the variation of language in the expression of these alternatives is significant. Throughout the contract the same language is used when it is necessary to distinguish between partial delivery and absolute non-delivery of an entire consignment. I venture to think that the interpretation I adopt is in harmony with the declared object and design of the main contract between the parties. The intention is to relieve the railway company of liability for safe delivery in return for a reduced rate. It is not inconsistent with this, that the general exemption should be qualified by certain specific exceptions, resting upon intelligible grounds. But it ought not, in my opinion, to be displaced by any exceptional condition which has not been expressed with clearness and certainty.

LORD SHAW.—Owing to the difference of opinion among us in this House on the subject of this case, I have given a full reconsideration to it. It humbly appears to me that the result reached by all the courts below is right.

There are really two questions. The first and most important is whether on a sound construction of the contract between the parties a case of non-delivery arises when it is admitted that there has not been delivery of an appreciable part of the goods consigned. The second question is whether non-delivery of a portion of the goods consigned falls within the scope of "loss and damage during the transit." The claimant (respondent in the appeal) made three consignments of carcasses of sheep and lambs—752 in number—from the appellants' railway station at Bristol to himself at Bristol. Each carcass was separately addressed, and each was marked. Of the total number twelve were not delivered. It is agreed that the case is not to be determined on any principle of *de minimis*, and that it should be taken on the footing put by the county court judge, that an appreciable part of

the goods consigned was not delivered. It is further agreed that the contract between the parties, which was for carriage at owner's risk, is to be found in the "Receive and forward" document addressed by the sender to the railway company. On the footing of that agreement the goods were received, and in it the obligations on forwarding are to be found. The important part of the agreement for the purposes of the present case is as follows: After providing for non-liability "for all loss, damage, misdelivery, delay, or detention," except where these are caused by the wilful misconduct of the railway servants, the contract proceeds:

"But nothing in this agreement shall exempt the company from any liability they might otherwise incur in the following cases of non-delivery, pilferage, or misdelivery (that is to say):—

1. Non-delivery of any package or consignment fully and properly addressed, unless such non-delivery is due to accidents to trains or fire. 2. Pilferage from packages of goods protected otherwise than by paper or other packing readily removable by hand provided the pilferage is pointed out to a servant of the company on or before delivery. 3. Misdelivery where goods fully and properly addressed are not tendered to the consignee within twenty-eight days after dispatch. Provided that the company shall not be liable in the said cases of non-delivery, pilferage, or misdelivery on proof that the same has not been caused by negligence or misconduct on the part of the company or their servants."

It could not be disputed that the words "nothing . . . shall exempt from liability" means and can only mean that in the cases not so exempted, liability is assumed and undertaken by the company in the specified instances of non-delivery, pilferage, or misdelivery.

Was this, then, a case of "non-delivery"? That, of course, depends on what "delivery" means. I hold it to be free from doubt that delivery means delivery of all and every part of the goods received. These goods, all and every part thereof, received by the carrier, must be handed over to the consignee. Any other rule would be contrary, in my humble opinion, to the most elementary notions as to the carriage of goods. It will not do to say, delivery is satisfied if I give the substantial part of what I got. It might as well be maintained that the obligations of payment were satisfied when the substantial part of the account was paid. Business could not be conducted on so loose a footing. Accordingly, if this be the case with regard to delivery, namely, that it means delivery of the whole and every part of the goods consigned, then the negation of that, namely, the case of non-delivery arises when such delivery does not occur. When a part is not delivered, I cannot see how it can be affirmed that the whole and every part has been delivered. In the realm of logic it is inadmissible that a universal affirmative can stand alongside a partial negative. When a partial negative is postulated the universality of the affirmative is destroyed. And in the realm of business the proposition would be repudiated that when a consignment of goods, separately ticketed, addressed, and numbered as here—it may be carcases as in this case, or it may be articles of great value, such as statuary or pictures—fails to reach the consignee in full, then a case of non-delivery has not occurred. As LORD WRENBURY says, "I am unable to agree that a delivery of twenty-nine is a delivery of thirty." I do not see my way to introduce or to sanction in the legal construction of this contract a proposition which is inadmissible in logic and would be repudiated in the ordinary practice of business.

The view that the case of non-delivery does not arise unless there is non-delivery of the entire aggregate of the consignment is defended by a reference to the word consignment—a single substantive. But that substantive either means the act of consigning or the goods consigned; and here it clearly means the latter. The fact that a "package" is also mentioned and that pilferage therefrom (if securely packed) is provided for, points, by way of contrast, to package being one thing—a unity—forwarded as such, and out of which unity pilfering may take place. But

it is not so with a consignment: the consignment may have great variety: it may be forwarded in several lots, in several trucks, or in several trains, and yet may be all under one consignment note covering and meant to cover each and every part of the goods consigned. Accordingly, in the case of a consignment, what is meant by short delivery? Short delivery simply means that there has been delivery of one part of the goods consigned and non-delivery of the other part of the goods consigned. The obligation was to deliver all and every part; where part is delivered, quoad that part the contract has been obeyed, and liability is not incurred. Similarly the liability was in respect of all and every part; where part is not delivered, quoad that part the contract has not been obeyed and liability is incurred.

Much was made in argument of condition 3, annexed to the contract. That condition, in my opinion, strikingly confirms the view just taken of the rights of parties.

"3. No claim in respect of goods, for loss or damage during the transit, for which the company may be liable, will be allowed unless the same be made in writing within three days after delivery of the goods in respect of which the claim is made, such delivery to be considered complete at the termination of the transit, as specified in condition 6, or in the case of non-delivery of any package or consignment within fourteen days after dispatch."

I am clearly of opinion that the loss or damage here mentioned is loss or damage upon the goods delivered. It is to be observed that the claim is "in respect of goods"—not in respect of a consignment in the aggregate; and that the loss or damage is "during the transit"—which must, I think, mean that the damage takes place to part or the whole of the goods in the course of their passage from the consignor to the consignee. But any doubt on this point appears to be removed by this, that the claim is to be intimated "within three days after delivery of the goods in respect of which the claim is made, such delivery to be considered complete at the termination of the transit." The meaning of this appears to me to be that after all the goods are to hand the merchant makes up and within three days presents his claim for any loss or damage that he may have found the goods delivered may have suffered. The whole of this—the claim in respect of loss or damage which must be claimed for within three days of delivery—is entirely apart from the separate case, "the case of non-delivery," the claim in respect of which is to be made within fourteen days of dispatch. Nothing could more clearly show, I venture to think, the differentiation of the case of non-delivery from the case of loss or damage, which loss or damage can only be claimed after delivery. In my humble opinion, both upon this condition and upon the other parts of the contract, "the case of non-delivery" of a consignment has occurred and is the subject of claim when a portion of the goods consigned has not been delivered. I am accordingly, of opinion that the appeal should be disallowed.

LORD PARMOOR.—The respondent, who is a meat salesman, claimed damages in the county court from the appellants for the non-delivery of certain carcasses of frozen mutton, which formed parts of three consignments delivered by him to the appellants for carriage from Avonmouth to Lawrence Hill Station, Bristol, to be delivered thence to his order. The learned county court judge found as a fact that the carcasses which had not been delivered formed an appreciable part of each of the three consignments. This finding is sufficient to raise the legal points involved in the appeal and is not open to review. The question in debate before your Lordships depends on the construction of the owner's risk consignment note on which the consignments were received and forwarded by the appellants.

Up to the year 1854 railway companies had power to act as carriers over their railways, but there was no obligation upon them. When railway companies did undertake to act as carriers it was not unusual for them to attempt to limit their liability by general conditions contained in public notices. In 1854 a new obligation was imposed on railway companies and a duty was imposed on them, according

to their respective powers, to afford all reasonable facilities for the receiving, forwarding, and delivery of traffic upon the several railways and canals belonging to, or worked by, such companies, and for the return of carriages, trucks, boats, and other vehicles. By s. 7 of the Act, railway companies were made liable for the loss of, or for any injury done to, animals or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of the company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability, every such notice, condition, or declaration being declared to be null and void. It was, however, provided that nothing contained in the Act should be construed to prevent railway companies from making such conditions with respect to the receiving, forwarding, and delivering of animals or goods as should be adjudged by the court or judge before whom any question relating thereto should be tried to be just and reasonable. No question arises in the present appeal as to whether the terms of the owner's risk consignment note are just and reasonable, but this question has been raised in many cases, and it has been decided that it is a matter wholly for the decision of the court or judge, although it may involve questions of fact. It is further provided that the special contract shall not be binding upon or affect any party unless the same is signed by him or by the person delivering such animals or things for carriage. In the present case the special contract was signed by the respondent.

Since 1854 goods have been largely carried by railway companies under owner's risk consignment notes, the traders being willing to limit the liability of the railway company in return for being charged at a lower rate. In the present case the consignment note is in the usual modern form, and may be found in text-books on railway law. Their Lordships were informed that this form had been generally adopted by the railway companies in order to obtain uniformity and to avoid discrimination between different railway systems. The consignment note commences with the notice that there are two rates of carriage at either of which the goods may be consigned at the sender's option: one, the ordinary rate, when the company take the ordinary liability of a railway company; and the other a reduced rate, adopted when the sender agrees to relieve the company and certain other companies or persons from all liability for loss, damage, misdelivery, delay, or detention, except (1) upon proof that such loss arose from wilful misconduct on the part of the company's servants, (2) in the case of such non-delivery, pilferage, or misdelivery as was thereunder mentioned. It was said that No. 2 had been added at the instance of the traders, and there is no doubt that owner's risk consignment notes have been held just and reasonable, although they protected the railway companies from all liability for loss or damage except upon proof that such loss or damage had arisen from wilful misconduct on the part of the company's servants, so long as the sender had the choice of a reasonable alternative ordinary rate. The note then contains the usual direction to the railway company to receive and forward the goods at the reduced rate in consideration whereof the respondent agrees to relieve the railway company and certain other companies and persons from all liability for loss, damage, misdelivery, delay, or detention (including detention of traders' trucks), except upon proof that such loss, damage, misdelivery, delay, or detention arose from wilful misconduct on the part of the company's servants. If the note had stopped at this point I think that the word "loss" is applicable both to a case of non-delivery or short delivery, and that the respondent could not have recovered unless he could prove that the loss had arisen from wilful misconduct on the part of the company's servants. I agree with the opinion expressed by LUSH, J., that from the point of view of the consignee there is no difference between goods being lost and goods being not delivered. Then follows the paragraph:

'But nothing in this agreement shall exempt the company from any liability they might otherwise incur in the following cases of non-delivery.

pilferage, or misdelivery—that is to say: Non-delivery of any package or consignment fully and properly addressed, unless such non-delivery is due to accident to trains or fire. Provided that the company shall not be liable on proof that the same has not been caused by negligence or misconduct on the part of the company or their servants."

An attempt was made at the trial to prove that the non-delivery had not been caused by the negligence or misconduct of the company or their servants, but this failed. The consignment was fully and properly addressed and the non-delivery was not due to accident to trains or fire.

The case, therefore, turns on the meaning of the words "non-delivery of any package or consignment." In its ordinary sense "consignment" means the entirety or aggregate of the goods comprised in a consignment note. A consignment is not delivered to the consignee if an appreciable part of the goods comprised in the consignment note have been lost during the transit. The present case illustrates this principle. The consignment was not delivered to the respondent since there was a failure to deliver certain carcasses which on the finding of the county court judge were an appreciable part of the consignment. There was only a partial delivery and the respondent framed his claim on this basis. I am unable to hold that the ordinary meaning of consignment is not applicable where the subject-matter is non-delivery, or that in this contract it has any other than its ordinary meaning, the entirety of the goods comprised in the consignment note. No doubt, there may be non-delivery of part only of a consignment just as there may be delivery of part only of a consignment, and in my opinion, on the finding of the county court judge, there has been a non-delivery of part of a consignment in the present case. If this is the correct meaning of the term "consignment," then the question arises whether, to use the words of BRAY, J., "the non-delivery of a consignment includes non-delivery of part of a consignment," or, in other words, whether the condition should be read "non-delivery of any package or consignment or part of consignment." I cannot think it is right to interpolate the words "part of a consignment" unless the interpolation is necessitated either by the special context or by the terms of the consignment note regarded as a whole. With all respect to the learned judges who have decided in favour of the respondent, it appears to me that neither the special context nor the terms of the consignment note, regarded as a whole, support the interpolation in the contract of the words "part of a consignment." It is admitted that "package" does not include part of a package having regard to condition No. 2, which exempts pilferage from packages of goods protected otherwise than by paper or other packing readily removable by hand, provided the pilferage is pointed out to a servant of the company on or before delivery. If package does not include part of a package, it would seem to be inconsistent that in the same context consignment should be construed as including part of a consignment. The words "fully and properly addressed" which follow "consignment" are not applicable to part of a consignment any more than they would be applicable to part of a package; but in any case I am unable to hold that there is anything in the special context which can justify the interpolation of the words "part of a consignment" which the contracting parties have not used.

I should come to the same conclusion having regard to the general terms of the contract in the consignment note. Apart from condition No. 3 of the general conditions, to which I propose to refer later, I think it is difficult to read consistently exceptions No. 1 and No. 2 if the non-delivery of a consignment includes non-delivery of part of a consignment. This difficulty was evidently present to the mind of LUSH, J. Exception No. 1 includes under this head loss both in the case of non-delivery and of short delivery, and if exception No. 2 has the same ambit, then short delivery as well as non-delivery is in substance removed from the operation of exception No. 1. I do not overlook the limitation that a consignment must be fully and properly addressed and that the non-delivery must not be

due to accident to trains or fire, but in ordinary practice a consignment is fully and properly addressed, and the losses due to accident to trains or fire would be by no means co-extensive with the losses in respect of short delivery, for which, under exception No. 1, the consignee has no claim except upon proof that the loss arose from wilful misconduct on the part of the company's servants.

Much reliance was placed in the argument on behalf of the respondent on the terms of condition No. 3 of the general conditions, and there is no doubt that this argument had much weight both in the Divisional Court and the Court of Appeal. I think that, as a matter of construction, if there is any inconsistency between the special terms of the consignment note and the general conditions on the back of the note, the special terms should prevail, but I am unable to find any inconsistency. Condition No. 3 is a rule of procedure which limits the time within which a claim must be made in respect of goods, for loss or damage during transit. It must be made within three days after delivery of the goods in respect of which the claim is made. Take the instance of a claim for loss from short delivery. It must be made within three days after the short delivery of the goods in respect of which it is made, this being the time at which the short delivery would come to the notice of the trader. It is not necessary in the present case to consider when the short delivery was complete, but the condition provides that delivery is to be considered complete at the termination of the transit as specified in condition No. 6. Condition No. 3 further provides "or in the case of non-delivery of any package or consignment within fourteen days after dispatch." A provision of this character is obviously necessary where there has been a non-delivery of a package or consignment, or, in other words, where there has been a loss of the whole package or consignment. In my opinion, the words "package or consignment" have the same meaning in condition No. 3 of the general conditions as in condition No. 1 on the face of the consignment note, and I think that in both cases "consignment" is used in its ordinary sense of the entirety of the goods comprised in the consignment note. If there had been a non-delivery of an inappreciable part of a consignment, I think that the principle de minimis would apply, but on this point the finding of the county court judge is conclusive. In my opinion the appellants succeed.

EARL LOREBURN.—The order of this House will be: The parties agreeing to dispense with a new trial and agreeing as to costs, judgment to be entered for the appellants, who have agreed to pay the respondent his cost here and below.

Solicitors: *L. B. Page; Billing & Co., for Fairfax Spofforth, Bristol.*

[*Reported by W. E. REID, Esq., Barrister-at-Law.*]

PUDDEPHATT v. LEITH

[CHANCERY DIVISION (Younger, J.), April 13, 14, 18, 1916]

[Reported [1916] 2 Ch. 168; 85 L.J.Ch. 543; 114 L.T. 1159;
60 Sol. Jo. 568]

Costs—Set-off—Judgments in separate proceedings—Set-off resulting in defeat of solicitor's lien.

The court has a discretion to allow costs ordered to be paid by a party to an action to be set-off against a debt for which that party has obtained judgment against the same opponent in a separate action in another Division of the court, notwithstanding that the set-off may defeat a solicitor's lien for costs in the action in which the set-off is allowed. *Primâ facie* a set-off should not be refused because of a solicitor's lien if, as between the parties themselves, it would be fair and just and no fraud or imposition has been practised on the solicitor by collusion between them.

David v. Rees (1), [1904] 2 K.B. 435, *Reid v. Cupper* (2), [1915] 2 K.B. 147, *Edwards v. Hope* (3) (1885), 14 Q.B.D. 922, *Hall v. Ody* (4) (1799), 2 Bos. & P. 28, per LORD ELDON, C.J., and *Wright v. Mudie* (5) (1823), 1 Sim. & St. 266, considered.

Blakey v. Latham (6) (1889), 41 Ch.D. 518, and *Bake v. French* (7), [1907] 1 Ch. 428, not followed.

Notes. The provisions of the R.S.C. as to costs considered in this case have all been repealed and replaced by the Supreme Court Costs Rules, 1959, r. 18 of which replaces (in different, but similar, terms) R.S.C., Ord. 65, r. 27 (21). R.S.C., Ord. 65, r. 14, has been repealed, but not replaced. These changes do not appear to affect the validity of the principles stated in this case.

Considered: *Knight v. Knight*, [1925] All E.R.Rep. 598. Referred to: *Mason v. Mason and Cottrell*, [1933] All E.R.Rep. 859; *Welch v. Royal Exchange Assurance* (No. 2), [1939] 3 All E.R. 305; *Re Debtor* (No. 21 of 1950), *Ex parte Petitioning Creditors v. Debtor*, [1951] 1 All E.R. 600.

As to allowance by the court of a set-off despite a solicitor's lien, see 31 HALSBURY'S LAWS (2nd Edn.) 250; and for cases see 42 DIGEST 282-287.

Cases referred to:

- (1) *David v. Rees*, [1904] 2 K.B. 435; 73 L.J.K.B. 729; 91 L.T. 244; 52 W.R. 579; 20 T.L.R. 577; 48 Sol. Jo. 603, C.A.; Digest (Practice) 945, 4852.
- (2) *Reid v. Cupper*, [1915] 2 K.B. 147; 84 L.J.K.B. 573; 112 L.T. 573; 31 T.L.R. 103; 59 Sol. Jo. 144, C.A.; 42 Digest 284, 3194.
- (3) *Edwards v. Hope* (1885), 14 Q.B.D. 922; 54 L.J.Q.B. 379; 53 L.T. 69; 33 W.R. 672, C.A.; 42 Digest 284, 3192.
- (4) *Hall v. Ody* (1799), 2 Bos. & P. 28.
- (5) *Wright v. Mudie* (1823), 1 Sim. & St. 266; 1 L.J.O.S.Ch. 136; 57 E.R. 107; 42 Digest 285, 3204.
- (6) *Blakey v. Latham* (1889), 41 Ch.D. 518; 60 L.T. 624; 37 W.R. 569; 42 Digest 284, 3193.
- (7) *Bake v. French*, [1907] 1 Ch. 428; 76 L.J.Ch. 299; 96 L.T. 496; 51 Sol. Jo. 326; 42 Digest 286, 3216.
- (8) *Taylor v. Popham, Monke v. Taylor* (1808), 15 Ves. 72; 33 E.R. 682; 42 Digest 287, 3221.
- (9) *Re Harrauld, Wilde v. Walford* (1884), 53 L.J.Ch. 505; 51 L.T. 441, C.A.; 42 Digest 287, 3228.
- (10) *Newbiggin-by-the-Sea Gas Co. v. Armstrong* (1879), 13 Ch.D. 310; 49 L.J.Ch. 231; 41 L.T. 637; 28 W.R. 217, C.A.; 42 Digest 354, 4030.
- (11) *Meynall v. Morris* (1911), 104 L.T. 667; 55 Sol. Jo. 480; 40 Digest (Repl.) 468, 538.

(12) *Pringle v. Gloag* (1879), 10 Ch.D. 676; 48 L.J.Ch. 380; 40 L.T. 512; 27 W.R. 574; 42 Digest 284, 3191.

Also referred to in argument:

Hassell v. Stanley, [1896] 1 Ch. 607; 65 L.J.Ch. 494; 74 L.T. 375; 44 W.R. 405; 40 Sol. Jo. 356; 42 Digest 285, 3196.

Throckmorton v. Crowley (1866), L.R. 3 Eq. 196; 40 Digest (Repl.) 435, 273.

Collett v. Preston (1852), 15 Beav. 458; 51 E.R. 615; 42 Digest 285, 3208.

Summons by a defendant in a Chancery action for liberty to set off costs ordered to be paid by the defendant to the plaintiff against a debt, for which the defendant had been given judgment against the plaintiff in a separate King's Bench action.

The facts are set out in the judgment.

Order 65, r. 14 (since repealed and not replaced) provided:

"A set-off for damages or costs between parties may be allowed, notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought."

Order 65, r. 27, sub-r. 21 (now Supreme Court Costs Rules, r. 18) provided:

"In any case in which, under the last preceding regulation, or any other rule of court or by the order or direction of the court or judge, or otherwise, a party entitled to receive costs is liable to pay costs to any other party, the taxing officer may tax the costs such party is so liable to pay, and may adjust the same by way of deduction or set-off, or may, if he shall think fit, delay the allowance of the costs such party is entitled to receive until he has paid or tendered the costs he is liable to pay; or such officer may allow or certify the costs to be paid, and direct payment thereof, and the same may be recovered by the party entitled thereto in the same manner as costs ordered to be paid may be recovered."

H. E. Wright for the defendant.

Beebee for the plaintiff.

Cur. adv. vult.

Apr. 18, 1916. **YOUNGER, J.**, read the following judgment.—This is a summons by the defendant asking that he may be at liberty to set off the sum of £75 11s., being the taxed costs ordered by the judgment in this action to be paid by him to the plaintiff, against the sum of £299 7s. 2d. ordered to be paid by the plaintiff to him by a judgment in the King's Bench Division, dated Dec. 2, 1915, in an action in which he was plaintiff, and the present plaintiff was defendant.

The two actions arose out of the same transaction—a transaction of a loan of £2,500 by the defendant to the plaintiff, the repayment of which, with interest at the rate of 5½ per cent. per annum, was secured to the defendant by an agreement under seal dated Feb. 14, 1913, whereby the plaintiff transferred to the defendant by way of mortgage 2,500 fully paid shares of £1 each in a company called the London Cosmopolitan Mining Co., Ltd. That mortgage was preceded by what *SARGANT, J.*, has held to be a collateral agreement in the form of a letter, addressed by the defendant to the plaintiff, in which the defendant said that the plaintiff's voting rights in virtue of the shares held in mortgage by him during the period of the loan would be untouched though the shares would be in his name and his voice might give the vote; that he would give no such vote without consulting the plaintiff; and that he would vote in all cases where a vote was necessary in respect of those shares as the plaintiff wished him to do. The plaintiff has paid no interest at all upon the loan, and on Nov. 12, 1915, there was due to the defendant in respect of arrears of interest the sum of £289 18s. 2d. On that day the defendant issued a writ against the plaintiff in the King's Bench Division claiming that amount, and on a summons under Ord. 14 judgment was on Dec. 2, 1915, given for £290 17s. 2d., with £8 10s. for costs. That judgment has not been satisfied, in whole or in part, and another half-year's interest has since become due on the mortgage. In the meantime, in November last, a general meeting of the company

was approaching, and the defendant threatening and intending to vote as he thought fit in respect of the shares, and to disregard, as he had done once before, the plaintiff's expressed wishes on the subject, she on Nov. 26, 1915, commenced this action in the Chancery Division, claiming an injunction to restrain the defendant from voting upon a poll at any meeting of the company in respect of the 2,500 shares otherwise than in accordance with her directions. The plaintiff moved for an injunction accordingly; the motion was heard by SARGANT, J., on Dec. 11, 1915; it was treated as the trial of the action, and by an order of that date the learned judge granted the plaintiff an injunction in substance as claimed, ordered the defendant to pay the plaintiff her costs of the action, but gave liberty to the defendant to apply to set off such costs when taxed against the amount recovered by him against the plaintiff under the judgment in the King's Bench Division above referred to: ([1916] 1 Ch. 200). These costs have now been taxed at the sum of £75 11s., and in pursuance of the liberty so reserved to the defendant the present application is made. It should, however, be stated, as both parties agree, that the learned judge when giving that liberty in no way expressed any opinion as to what the result of the application would be, if and when it was made. It will be observed that the plaintiff, if she had been so minded, might quite appropriately have raised the issue in this action by way of counterclaim in the King's Bench action. There can, I think, be no doubt that had she done so, and had the issues on either side in that way been determined in one proceeding, as they have now been in two, the set-off asked for would have been a matter of course. It is, however, contended that the fact that the two questions have been disposed of in different actions and in different divisions, and not in one action and in one division, displaces any right to set-off which might otherwise have existed, and owing to the present state of the authorities, so far at least as the Chancery Division is concerned, the point, strange as it may seem, is one of extreme nicety, and it has been elaborately argued by counsel for the defendant, and by counsel for the plaintiff.

It is perhaps not too much to say that the difficulty is due to the decision of the Court of Appeal in *David v. Rees* (1), to the effect that the provisions of Ord. 65, r. 14, with regard to set-off of costs between parties are confined to cases in which the judgments for costs sought to be set off against each other are in the same action or proceedings, and do not extend to cases in which the judgment for costs are in distinct and independent litigations. The Court of Appeal in *Reid v. Cupper* (2) has stated very clearly the grounds for questioning the correctness of that decision; but it has at the same time intimated that it is bound by it, and accordingly it can only now be reconsidered in the House of Lords. The Court of Appeal, however, in the same case has definitely laid it down that, notwithstanding the view that Ord. 65, r. 14, does not allow a set-off of costs in separate proceedings, still *Edwards v. Hope* (3) shows that the common law courts at least had a discretion to allow the set-off by the practice previous to the Reg. Hil. Term, 1853, r. 63, that that discretion was restored at least to the common law divisions of the High Court of Justice on the repeal of these rules, and that in the case before it the discretion of the learned judge, SCRUTTON, J., had been rightly exercised in favour of the set-off. (I will in a later portion of this judgment give my reasons for saying that the judgment of the Court of Appeal went even further than I have so far indicated. Counsel for the plaintiff, however, agreed that it went at least as far as that.) Further, it is made clear by both *Edwards v. Hope* (3) and *David v. Rees* (1) that not only does the discretion, where it exists, extend to the setting-off of costs against costs, but it extends also, in a proper case, to the setting-off of debt or damages against costs, and that, indeed, was the particular set-off allowed in the last-named case. Moreover, so far as the old courts of common law were concerned, the allowance of a set-off was not confined to cases where both actions were in the same court. In *Hall v. Ody* (4), a common pleas case, notable for a characteristic outburst on the part of LORD ELDON referred to later, it was stated that a set-off had even been allowed by that court between costs in a court of

equity and costs in a court of law. It seems quite clear, therefore, that if in this case the application to set off had been made in the King's Bench action by the defendant there, instead of, as it is, in the Chancery action by the defendant to that action, there would have been an ample discretion to allow it, if the court thought it right so to do.

Is then the same discretion denied to the Chancery Division? The reason for saying that it is based on the practice of the old Court of Chancery in this matter prior to the Judicature Act, as that practice has been interpreted since the Act, chiefly by two decisions, one of KAY, J., and the other of PARKER, J. I need, perhaps, hardly say that the objection to allowing a set-off is not really usually entertained as an objection between party and party; it is as between the solicitor of the party against whom the set-off is asked and the party claiming it, for the set-off is or may be destructive of the solicitor's lien for costs. And the practice of the old Court of Chancery, and incidentally of the other courts, turning as it did on this very point, is conveniently summarised by SIR JOHN LEACH in *Wright v. Mudie* (5) (1 Sim. & St. at p. 267):

"It is clear upon the authorities that the practice of the Common Pleas, as stated in the case of *Hall v. Ody* (4), that the lien of the attorney for his costs is subject to the equitable claims of the parties as between themselves is not adopted by the Court of King's Bench; and LORD ELDON, then Chief Justice of the Common Pleas, expressly states it to be contrary to the practice of the Court of Chancery. In *Taylor v. Popham* (8) LORD ELDON states the rule of this court thus: 'That where in a cause costs may have been given in different proceedings on both sides, there the lien of the solicitor is only on the balance of costs which may be due to his client. That case is not an authority for setting off against each other the costs of different causes in this court; and still less, for setting off here against costs in the King's Bench, when it is clear that that court would not permit the set-off of costs there against the costs here.' "

The same principle is laid down by LORD ELDON in *Hall v. Ody* (4) as follows (2 Bos. & P. at p. 29):

"Finding it to be the practice of this court (the Common Pleas) that an attorney shall not take his costs out of the fund which by his diligence he has recovered for his client, where the opposite party is entitled to a set-off, it does not become me to say more than that I find it to be the settled practice with much surprise, since it stands in direct contradiction to the practice of every other court as well as to the principles of justice. In the Court of Chancery the same parties are often concerned in many suits, and I never knew the idea entertained of arranging the funds till the respective attorneys were paid their costs. However, as the attorney in this case has acted with a knowledge of the settled practice of the court, he can have no right to claim the advantage of a more just principle; and it will only remain for the court to consider whether the practice of the Court of King's Bench should not be adopted here for the future."

It will be noticed that the practice is not in either judgment treated as one resting on a discretion to be exercised in each case, but as a definite rule of procedure. It will, however, also be noticed that the practice is treated as being the same as in the King's Bench. In that state of things KAY, J., dealt with the question in *Blakey v. Latham* (6). First on the general principle he says (41 Ch.D. at p. 521):

"The rule now is settled by Ord. 65, r. 14, which is as follows: 'A set-off for damages or costs between parties may be allowed, notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought.' That gives the court a complete discretion, but the doubt seems to have been whether that applied to costs in different actions. I do not know

why it should not apply to costs in different actions. The set-off for damages must apply to different actions, because damages cannot be given to the plaintiff and the defendant in the same action; and therefore as regard damages the rule *primâ facie* means different actions, and why in the case of costs it should not also mean different actions I do not know."

And later, but not referring to the way in which the old King's Bench practice had been interpreted in *Edwards v. Hope* (3), he said (*ibid.* at p. 523):

"Before this rule which gives the court discretion [*i.e.*, Ord. 65, r. 14], there was a right acknowledged in the Court of Chancery that the solicitor who has a lien upon the costs recovered against the other side could by that lien intercept the costs ordered to be paid to the other party,"

and accordingly he refused the set-off asked for, greatly as he deplored the result. Again in *Bake v. French* (7) PARKER, J., after deciding that Ord. 65, r. 14, did not even allow a set-off of costs payable in a consolidation action against costs receivable under an order made prior to consolidation in one of the actions which had been consolidated, proceeded as follows ([1907] 1 Ch. at p. 436):

"I must therefore deal with this motion on the footing that the consolidation does not affect the matter, and inasmuch as the rules of court I have referred to have no application to independent proceedings, I must consider the question, What would have been the practice prior to the making of those rules? It seems to me that the practice of the court, independently of those rules, was not to allow any set-off of costs in independent proceedings otherwise than subject to what is called, in the reported cases, 'the solicitor's lien for costs.' This appears, I think, from the cases of *Wright v. Mudie* (5) and *Re Harrauld* (9)."

He, like KAY, J., treated the matter as one of strict rule and not of discretion at all.

The result, therefore, prior at least to *Reid v. Cupper* (2) and so far as authority goes, is that while the practice in the King's Bench, and in the old Court of Chancery, was in this matter the same, still, curiously enough, the King's Bench Division had apparently a discretion in every proper case to ignore the solicitor's lien and allow the set-off, but the Chancery Division had none. Further, the King's Bench Division exercised its discretion as it did by its approval of the principles enumerated by KAY, J., in *Blakey v. Latham* (6), to which he, in the Chancery Division, felt himself powerless to give effect. And all this involved the extraordinary result that the Court of Appeal on an appeal from the King's Bench Division would or might allow a set-off, and on an appeal from the Chancery Division it would, under exactly similar circumstances, be compelled to refuse it. Such a state of things, the result of counsel for the plaintiff's argument, if correct would, I think, be intolerable.

The question is whether I am compelled by the authority of *Blakey v. Latham* (6) and *Bake v. French* (7) to hold that it exists. I think that *Reid v. Cupper* (2) shows that I am not. It appears from the judgments of all the lords justices, but specially from that of PICKFORD, L.J., that this practice with regard to set-off was really discretionary in all courts. PICKFORD, L.J., in *Reid v. Cupper* (2) says ([1915] 2 K.B. at pp. 155, 156):

"With regard to the second point—namely, that under those circumstances the case has to rest upon the old jurisdiction as to costs—I agree; but with regard to the second part of the proposition, that, according to the old jurisdiction of the courts, this lien must be allowed, I do not agree. I think the result of the old practice was that the courts had a discretionary power to allow this set-off, and a discretion as to the terms upon which they would allow it. The Court of King's Bench Division decided to exercise its discretion in one particular way, the Court of Common Pleas laid down a different and directly opposite rule. The Court of Chancery exercised its discretion in

the same way as the Court of King's Bench, and the Court of Exchequer exercised its discretion according to circumstances. The different courts exercised their discretion in different ways."

Now that judgment gets rid of all difficulty, and puts, if I may very respectfully say so, the whole matter upon a logical and consistent foundation. PICKFORD, L.J., adds:

"In *Edwards v. Hope* (3) the Court of Appeal expressly decided the point that the courts, in exercising the old jurisdiction, exercised it with discretion as to the terms on which it was to be exercised."

That is to say, LORD ELDON's views have now been displaced by those of KAY, J., as to what is the best and most salutary rule of practice in this matter. That rule was always the rule of the old Court of Common Pleas, and, accordingly, the principle laid down by SIR GEORGE JESSEL in *Newbiggin-by-the-Sea Gas Co. v. Armstrong* (10) becomes applicable.

On every ground, therefore, and notwithstanding the decision in *Blakey v. Latham* (6) and *Bake v. French* (7), I think I have a discretion in this case, and the only question that remains for determination is, how I ought to exercise it. In my opinion I ought to exercise it in favour of the set-off, notwithstanding the plaintiff's solicitor's lien. I have pointed out that the plaintiff's case in this action might have been raised by way of counterclaim in the King's Bench action. If it had, the set-off would have been a matter of course for reasons similar to those stated by EVE, J., in *Meynall v. Morris* (11). I cannot think that the result should be affected by a mere accident of procedure. Moreover, I am struck by the fact that both actions arise out of the same transaction, and although I recognise that the plaintiff's own default in the performance of her obligations under the contract cannot have seemed to SARGANT, J., sufficiently serious to disentitle her to relief in Chancery, I may still, I think, have regard to the fact that the judgment was obtained by the defendant in the King's Bench Division before the injunction was awarded, and, therefore, that the reason for refusing the set-off in *Edwards v. Hope* (3) does not apply. But beyond all these considerations I should wish to base this exercise of my discretion on broader grounds. Order 65, r. 14, reversing as it did the rule which had obtained in the courts of common law for nearly fifty years, and the recent judgment of the Court of Appeal to which I have referred go to show that the old views as to the sanctity of a solicitor's lien no longer obtain. As ROOKE, J., said in *Hall v. Ody* (4) (2 Bos. & P. at p. 29):

"The attorney looks in the first instance to the personal security of his client, and if beyond that he can get any farther security into his hands, it is a mere casual advantage."

And SIR GEORGE JESSEL in *Pringle v. Gloag* (12) says (10 Ch.D. at p. 680):

"If a solicitor says, 'Unless I have a lien I cannot get paid,' the answer is, he should see before he undertakes a particular business for a client that that client is able to pay him for it; a solicitor is not compelled to work for an insolvent client."

In other words, the views of KAY, J., and not those of LORD ELDON, on this subject now hold the field, and it is well, I think, that they should. And the result, I think, is that *prima facie* a set-off should not, owing to such a lien, be refused if as between the parties themselves it would be fair and just, and if no fraud or imposition has been practised upon the solicitor by collusion between them. That in the present case the set-off would not be fair and just as between the parties was not even suggested by counsel for the plaintiff, and accordingly I think that the set-off ought to be allowed for the amount of £75 11s., less only the costs of this summons, the defendant's costs of which will be taxed and deducted in the first instance from the £75 11s. referred to in the summons.

Solicitors: *Field, Roscoe & Co.; Hatchett-Jones & Co.*

[Reported by M. H. TRUELOVE, Esq., Barrister-at-Law.]

JOHN RUSSELL & CO., LTD. v. CAYZER, IRVINE & CO., LTD.

[HOUSE OF LORDS (Viscount Haldane, Lord Sumner, Lord Parmoor and Lord Wrenbury), June 2, 1916]

[Reported [1916] 2 A.C. 298; 85 L.J.K.B. 1152; 115 L.T. 86; 60 Sol. Jo. 640]

Practice—Service—Service out of jurisdiction—Action “properly brought” against defendant served within jurisdiction—Writ issued in England against two defendants in Scotland—Acceptance by one defendant of service of writ on agent within jurisdiction—Service of writ on other defendant out of jurisdiction—Validity—R.S.C., Ord. 11, r. 1 (g).

By Ord. 11, r. 1 (g), service out of the jurisdiction of a writ of summons may be allowed where “any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.”

Where all the defendants to an action are out of the jurisdiction of the court, the action is not “properly brought against some . . . person duly served within the jurisdiction” within the meaning of R.S.C., Ord. 11, r. 1 (g), merely because some of the defendants have accepted service within the jurisdiction.

An action was brought against two defendants, both companies registered in Scotland. One defendant accepted service of the writ on an agent in England. On an application for leave to serve the other defendant out of the jurisdiction under R.S.C., Ord. 11, r. 1 (g),

Held: leave must be refused because the action was not “properly brought” within the meaning of r. 1 (g).

Per VISCOUNT HALDANE: The root principle of the English law about jurisdiction is that the judges stand in the place of the Sovereign in whose name they administer justice.

Notes. Referred to: *Tyne Improvement Comrs. v. Armement Anversois Société Anonyme, The Brabo*, [1949] 1 All E.R. 294.

As to service out of the jurisdiction, see 30 HALSBURY'S LAWS (3rd Edn.) 323-328; and for cases see DIGEST (Practice) 336 et seq.

Case referred to:

(1) *Clokey v. London and North Western Rail. Co.*, [1905] 2 I.R. 251; 39 I.L.T. 42; Digest (Practice) 266, 40.

Also referred to in argument:

Copin v. Adamson (1875), 1 Ex.D. 17; 45 L.J.Q.B. 15; 33 L.T. 560; 24 W.R. 85, C.A.; 11 Digest (Repl.) 509, 1246.

Massey v. Heynes (1888), 21 Q.B.D. 330; 57 L.J.Q.B. 521; 59 L.T. 470; 36 W.R. 834, C.A.; Digest (Practice) 308, 349.

Tharsis Sulphur and Copper Co., Ltd. v. Société des Métaux (1889), 58 L.J.Q.B. 435; 60 L.T. 924; 38 W.R. 78; 5 T.L.R. 618, D.C.; 13 Digest (Repl.) 354, 1612.

Witted v. Galbraith, [1893] 1 Q.B. 577; 62 L.J.Q.B. 248; 41 W.R. 395; 37 Sol. Jo. 354; 4 R. 362; sub nom. *Witted v. Pembroke Galbraith & Co.*, 68 L.T. 421, C.A.; Digest (Practice) 357, 705.

Montgomery, Jones & Co. v. Liebenthal & Co., [1898] 1 Q.B. 487; 67 L.J.Q.B. 313; 78 L.T. 211; 46 W.R. 292; 14 T.L.R. 201; 42 Sol. Jo. 232, C.A.; Digest (Practice) 314, 390.

Appeal from a decision of the Court of Appeal dated Feb. 21, 1916, reversing an order of ROWLATT, J., in chambers.

The plaintiffs shipped goods at Liverpool on the steamship M., owned by the first defendants, Glasgow United Shipping Co., Ltd., for carriage to Calcutta. The goods were insured under a bill of lading which contained the usual exceptions,

including restraint of princes. At Madras the *M.* was requisitioned by the Indian Government, and her cargo was discharged. The second defendants, C., I. & Co., Ltd., without the knowledge or consent of the cargo-owners, loaded the goods on one of their own steamers going to Calcutta, but she was sunk by the German cruiser *Emden* and all her cargo lost. The first intimation which the plaintiffs received of their loss was by a letter written by the second defendants. The plaintiffs brought this action, which was in fact a test action, to have the rights of all the shippers in the same position as themselves determined, in England, against the first defendants for breach of contract and for conversion of the goods entrusted to them for carriage, and against the second defendants for trespass to the goods. Both the defendant companies were registered in Scotland and were out of the jurisdiction. The first-named defendant raised no objection to the jurisdiction and accepted service on an agent in England. The plaintiffs then applied *ex parte* for leave to issue a concurrent writ, with liberty to serve the same out of the jurisdiction on the second defendants under Ord. 11, r. 1 (g).

The second defendants, on being served, applied that the writ should be set aside.

ROWLATT, J., in chambers refused the application, but the Court of Appeal (SWINFEN EADY, PICKFORD, and BANKES, L.JJ.) allowed the application on the ground that the action was not "properly brought" within the meaning of the rule.

Adair Roche, K.C., and R. A. Wright for the plaintiffs.

Maurice Hill, K.C., and Stuart Bevan, for the second defendants, were not called on to argue.

VISCOUNT HALDANE stated the facts, and continued: The real question is whether the action is one which is properly brought against some other person duly served within the jurisdiction within the meaning of this rule [i.e., R.S.C., Ord. 11, r. 1 (g), the relevant part of which is printed above].

I do not think that the case is one in which any of the authorities which have been cited are decisive. The whole question is one as to the construction of the rule, and, in order to construe the rule, it is necessary to see on what jurisdiction depends apart from the rule. It is quite true that jurisdiction can be given by accepting service—that is to say, by consent. The root principle of the English law about jurisdiction is that the judges stand in the place of the Sovereign in whose name they administer justice, and that, therefore, whoever is served with the King's writ, and can be compelled consequently to submit to the decree made, is a person over whom the courts have jurisdiction. In other countries that is different; in Scotland jurisdiction is to a considerable extent made dependent on the presence within the jurisdiction of property of the defender who may be outside the jurisdiction. But we are concerned with the rule based on the English jurisprudence, and that jurisprudence is *primâ facie* as I have stated. It has been extended by the rules which have been made as to service out of the jurisdiction. These rules have been made with scrupulous care because there arose some time ago a conflict between the Scottish courts and the English courts about jurisdiction, and the rules were framed with a view of preventing such conflicts from arising again. Under r. 1 (e), where a contract is made outside the jurisdiction and a breach takes place within the jurisdiction, an action may be brought and service out of the jurisdiction allowed against the defendant, provided he is not a defendant ordinarily domiciled or resident in Scotland or Ireland. I cite that merely for the purpose of showing how carefully these things have been dealt with in the rules, and not for any other reason, because I think we have nothing to do with it directly here. The whole question in the present case arises under r. 1 (g), to which I have referred, and the question is whether the action has been properly brought within the meaning of the rule which I have read.

Although, as I have pointed out, the acceptance of service confers jurisdiction, it does not necessarily make it a duty of the court to decide the case. The sphere of jurisdiction and the sphere of the right which the acceptance of service confers

upon the court are not coterminous. For example, the court may decline jurisdiction on the ground that it is contrary to its duty to entertain it. If the action relates to matrimonial status, then, according to well-settled principles of private international law—well settled, at any rate, so far as this country is concerned—the courts will now refuse to interfere unless the parties are domiciled—the husband, at any rate—in this country. If the action relates to land abroad, similarly the courts decline jurisdiction, because they cannot go into questions of title under foreign law. Again, if a foreign Sovereign is sued, although it might be possible to serve him within this country, the court would decline to regard the service as giving rise to jurisdiction, unless, indeed, the foreign Sovereign chose voluntarily to submit. These things show that jurisdiction and service are not coterminous, and, consequently, when an action is spoken of as properly brought, it may well be that something more than the mere question of rights arising out of the fact of service was in the contemplation of those who framed that rule. I think that "properly brought" refers to something more than the mere fact that one of the parties has been served, and in that way jurisdiction has been obtained over that person. It seems to me by its context to imply considerations affecting the other person out of the jurisdiction as well as the person out of the jurisdiction who has been served by leave. Consequently you have to look and ask yourself whether when the action was brought it was an action that was properly brought within the rule interpreted in that wider sense.

The action was brought when the writ was issued, and the writ was marked, as SWINFEN EADY, L.J., in his judgment in the Court of Appeal points out, as "Not for Service out of the Jurisdiction"; consequently there was no action "properly brought" against anybody out of the jurisdiction at that time, and it was not until a later stage, when the Glasgow Shipping Co., one of the defendants, came in and accepted service that there was an action brought at all against them. I do not think that in the wider meaning of "properly brought" the rule has been complied with as regards Cayzer, Irvine & Co. It seems to me that the application is therefore one which the courts have no jurisdiction to entertain; they certainly have none at common law; and, if I am right in my construction of the words "properly brought," they have none under this rule. I am therefore of opinion that the appeal fails and should be dismissed with costs.

LORD SUMNER.—I also think that the appeal fails. It is not enough for the plaintiff to be able to point out when he applies to the court or judge under Ord. 11, r. 1 (g), for leave to make a person out of the jurisdiction a party, that there is then in existence an action at the time when the person out of the jurisdiction is not a party to it at all which can be said to be "properly brought" in this sense, that the other person who is the defendant to it cannot say or complain that it has been improperly brought by reason of the fact that some irregularity in the procedure or some objection which he could have taken have been waived by him. It seems to me that the words "properly brought" enure to the protection of the person out of the jurisdiction who is proposed to be served with process, that his protection is not to be found exclusively in the words "a necessary or proper party," and that, in the language of PICKFORD, L.J., in the court below, the persons who are already defendants in the action, although they may submit to the jurisdiction, and, if so, cannot themselves raise any objection, cannot by that procedure affect the rights of third parties. The party out of the jurisdiction, in my view, is entitled to that protection before he is brought into a proceeding to which he would normally remain a stranger, that the procedure laid down in the rules and orders shall have been followed, and not merely that that procedure should have been put in force against someone whose action does not bind him thanks to the consent of that prior defendant.

It is unnecessary to express any opinion as to the effect of the words "duly served within the jurisdiction," but, if I had a doubt as to the construction of the words "properly brought," I should certainly have expected to find that the

words "duly served" could be so construed as to give the party out of the jurisdiction the same protection.

LORD PARMOOR.—I concur. I think that the words "properly brought" clearly enure to the protection of the person out of the jurisdiction, and in other respects I should like to adopt what was said by PICKFORD, L.J., with whose judgment I entirely agree.

LORD WRENBURY.—In this case the appellants, John Russell & Co., Ltd., brought an action against two defendants, describing them both as "of Glasgow, in Scotland"; they were, therefore, both parties resident out of the jurisdiction. I doubt myself whether such a writ ought to be sealed without leave. I find that in a case in Ireland—*Clokey v. London and North Western Rail. Co.* (1)—PALLES, C.B., in giving judgment, said this ([1905] 2 I.R. at p. 257):

"In England the rule is that if the defendant's address as given in the writ is a foreign one, the clerk in the Record and Writ Office will not seal the writ unless an order giving liberty to issue it is produced."

That was said after certain cases in England had been cited to the court. I have not had the opportunity of referring to them and seeing how far they justify the observations made by the Chief Baron. I have simply forbore from doing so because it is not necessary to pursue it in this case, inasmuch as the writ in point of fact was sealed. I express my doubt whether such writ ought to be sealed without leave. The writ, however, was sealed, and what happened was that one of the two Scottish defendants, the Glasgow Shipping Co., accepted service and entered an appearance. The question for determination is whether under those circumstances Ord. 11, r. 1 (g), can be brought into operation so as to bring the other defendants who are out of the jurisdiction within the jurisdiction of the court. That turns upon the proper construction of the words of Ord. 11, r. 1 (g): Was this an action "properly brought" against some person other than Cayzer, Irvine & Co. "duly served within the jurisdiction"? Those words, to my mind, do not mean founded upon a good cause of action. Many an action properly brought may turn out to be founded upon no good cause of action. It may break down on the facts; it will nevertheless have been properly brought in the sense that a good cause of action was alleged. "Properly brought" in this rule means, I think, or at any rate includes, brought with a due observance of the process of the court against a person who could properly be served in that court under the process of the court, and not because he chooses voluntarily to submit himself to the jurisdiction of the court. That, of course, has not happened here. The exact question for determination is this: Can one defendant by consent by submitting to the jurisdiction confer jurisdiction as against another defendant? In my opinion he cannot. I think the action mentioned in Ord. 11, r. 1 (g), as one "properly brought" means an action brought by a plaintiff against a defendant by virtue of the user of the process of the court, not by user of the process with the addition of a voluntary submission by the defendant to the jurisdiction of the court.

That being so, it seems to me that the case is not within the rule and that, therefore, this appeal fails.

Appeal dismissed.

Solicitors: Ballantyne, Clifford & Hett; Coward & Hawksley, Sons & Chance.

[Reported by W. E. REID, Esq., Barrister-at-Law.]

Re MELLISH. DAY v. WITHERS

[CHANCERY DIVISION (Neville, J.), March 30, April 5, 1916]

[Reported [1916] 1 Ch. 562; 85 L.J.Ch. 433; 114 L.T. 991]

Will—Class gift—Ascertainment of class—Time—Gift, at death of survivor of two life-tenants of income, to persons entitled as on intestacy of first life tenant.

A testator gave a fund in trust to pay the income to G. for life and then to G.'s wife, E., for life, and at the death of the survivor to the persons who at the decease of such survivor should be of the blood of G. and of kin to him, and who under the statutes of distribution of intestates' effects would be entitled to his personal estate if he were dead unmarried and intestate. In the event E. survived G. for many years.

Held: the class representing the next-of-kin of G. was an artificial class, to be ascertained as at the death of G. if G. had died at the same date as E.

Re McFee, McFee v. Toner (1) (1910), 103 L.T. 210, and *Re Helsby, Neate v. Bozie* (2) (1914), 112 L.T. 539, followed.

Bullock v. Downes (3) (1860), 9 H.L.Cas. 1, distinguished.

Notes. Approved: *Hutchinson v. National Refuges for Homeless and Destitute Children*, [1920] All E.R.Rep. 701. Referred to: *Re Gansloser's Will Trusts, Chartered Bank of India, Australia and China v. Chillingworth*, [1951] 2 All E.R. 231.

As to classes to be ascertained at time shown by will, see 34 HALSBURY'S LAWS (2nd Edn.) 266, 267, as to ascertainment when the class is described by reference to Statutes of Distribution, see *ibid.* 319, 320; and for cases see 44 DIGEST 879-886.

Cases referred to:

- (1) *Re McFee, McFee v. Toner* (1910), 79 L.J.Ch. 676; 103 L.T. 210; 44 Digest 881, 7384.
- (2) *Re Helsby, Neate v. Bozie* (1914), 84 L.J.Ch. 682; 112 L.T. 539; 44 Digest 886, 7426.
- (3) *Bullock v. Downes* (1860), 9 H.L.Cas. 1; 3 L.T. 194; 11 E.R. 627, H.L.; 44 Digest 876, 7328.
- (4) *Re Sturge and Great Western Rail. Co.* (1881), 19 Ch.D. 444; 51 L.J.Ch. 185; 30 W.R. 456; sub nom. *Sturge v. Sturge, Sturge to Great Western Rail. Co.*, 45 L.T. 787; 44 Digest 881, 7383.

Originating Summons.

By his will, dated in 1880, James Mellish gave the sum of £1,200 to his trustees in trust to invest and pay the income to his son George Mellish during his life, and after his death to pay the income to the latter's wife, Emma Mellish, during her life

"And from and immediately after the death of the survivor of them upon trust for the person or persons who at the decease of such survivor as aforesaid shall be of the blood of my said son George Mellish and of kin to him and who under the statutes of distribution of intestates' effects would be entitled to his personal estate if he were dead unmarried and intestate, such persons if more than one to take in the portions prescribed by the same statutes.

James Mellish died on Mar. 23, 1880, leaving George Mellish, two other sons, and three daughters surviving. George Mellish died on June 16, 1882. Emma Mellish survived him and died on Sept. 30, 1915.

At her death the trustees of the will of James Mellish had to ascertain the class of persons who were entitled to share in the gift over of the £1,200. Three

alternative suggestions were put forward: (i) That the class of next-of-kin should be ascertained once and for all at the death of George Mellish; (ii) that it should be then ascertained, but only those should share who were living at the death of Emma Mellish; (iii) that the class was an artificial class, to be ascertained at the death of "such survivor." In the event of the last alternative being adopted, nephews and nieces of George Mellish, born since his death, would be included. This summons was accordingly taken out to determine the issue.

Greenland for the trustees of James Mellish's will.

Baden Fuller, Bovill, and Bompas for the various defendants.

Cur. adv. vult.

Apr. 5, 1916. **NEVILLE, J.**, read the following judgment.—If an ultimate gift after failure of other limitations is in any form equivalent to this, "to my next-of-kin according to the statutes as though I had died intestate and unmarried," it appears to me fairly obvious that the testator intends to designate those who were next-of-kin at his death, and this is in accordance with the rule laid down in *Bullock v. Downes* (3). Even in this case it is to be observed that the gift does not take effect by operation of the statutes, which can only apply if the testator did die intestate. Some of the reasoning in the reported cases, based on the necessity of bringing yourself within the statutes, seems to me overstrained, for in any hypothetical intestacy the gift is merely referential. On the other hand, it appears to me that if the testator says in effect "to those who at the date of the event upon the happening of which the gift over takes effect or at any other future date are my next-of-kin according to the statutes as if I had then died intestate and unmarried," he is indicating what has been called an artificial class, to be ascertained at the date of the happening of the event. The rule in *Bullock v. Downes* (3) is expressly stated to be *prima facie*, and I do not think it precludes the court from giving effect to what it finds to be the intention of the testator expressed by the words of the will. It appears to me also that when the testator, as in this case, resorts to an elaborate explanation with regard to what he intends, it is probably with a view to expressing something different from what would result from a bare reference to his next-of-kin according to the statutes, and, if what he does mean is reasonably plain, there is nothing in *Bullock v. Downes* (3) to prevent effect being given to it.

The testator, in the will which I have to construe, gave a sum of £1,200 out of his residue to trustees on trust to invest and to pay the income to his son George Mellish for life, and after his death to his wife for life, and after the death of the survivor of them on trust for

"the person or persons who at the decease of such survivor as aforesaid shall be of the blood of my said son George Mellish and of kin to him and who under the statutes of distribution of intestates' estates would be entitled to his personal estate if he were dead unmarried and intestate, such persons if more than one to take in the proportions prescribed by the same statutes."

Three constructions of these words have been suggested: (i) That the class of next-of-kin is to be ascertained once and for all at the death of George Mellish; (ii) that the class is to be ascertained at the death of George Mellish, but those only take who are living "at the decease of such survivor"; and (iii) that the class is a so-called artificial class to be ascertained "at the decease of such survivor." I think the meaning of the words used is tolerably plain. The testator appears to me to be referring to a class of persons living at the death of George Mellish, composed of persons who not only fulfil the condition "of the blood of George Mellish and of kin to him," but also that of being persons who would take under the statutes upon the death of George Mellish unmarried and intestate at the date when the gift takes effect, and the testator adds that the persons fulfilling these conditions,

should there be more than one, are to take in the proportion prescribed by the same statutes. I think the context here requires the words "if he were dead" to be interpreted "if he had then died." The words used in *Bullock v. Downes* (3) were as follows:

"Such persons of the blood or next-of-kin to me as would by virtue of the statutes have become and been then entitled thereto in case I had died intestate."

The only words there which it seems to me could possibly take the case out of the *prima facie* rule are the words "and been then entitled," and, having regard to the context, these words appear to me to refer rather to the survivors of a class than to any limitation of the class itself which had been previously determined: They were not deemed adequate, however, to limit the gift to the survivors of the original class.

I have been referred to a decision by HALL, V.C., in *Re Sturge and Great Western Rail. Co.* (4), which was followed by JOYCE, J., in *Re McFee, McFee v. Toner* (1), and a later decision of EVE, J., in *Re Helsby, Neate v. Bozie* (2), and I am unable to distinguish any one of these cases from the case before me in any sense favourable to the application of the rule in *Bullock v. Downes* (3). The words of the will in the last case were,

"such one or more of the persons who at the time of my daughter's decease shall be my next-of-kin according to the statutes of the distribution of intestates' effects,"

and it was held that an artificial class to be ascertained at the daughter's death was intended. These cases are binding on me, and I must follow them. They are in accordance with the view which I should myself take of the construction of the present will. I must, therefore, declare that the class is to be ascertained at the date of the death of George Mellish, as if he had died at the date of the death of his wife, Emma Mellish.

Solicitors: *Loughborough, Gedge, Nisbet & Drew*, for *Pearless, Sons & De Rougemont*, East Grinstead.

[Reported by G. HAYES, ESQ., Barrister-at-Law.]

ASIATIC PETROLEUM CO., LTD. v. ANGLO-PERSIAN OIL CO., LTD.

[COURT OF APPEAL (Swinfen Eady and Bankes, L.JJ.), March 6, 13, 14, 1916]

[Reported [1916] 1 K.B. 822; 85 L.J.K.B. 1075; 114 L.T. 645;
32 T.L.R. 367; 60 Sol. Jo. 417]

Discovery—Production of document—Production contrary to public interest—Document not official document—Correspondence relating to contract between company and government Department in wartime.

The rule protecting documents from discovery on the ground that disclosure would be injurious to the public interest is not limited to State papers, reports, minutes, and other official documents or correspondence. It applies, for instance, to correspondence between a company and its agent abroad relating to a contract, made in wartime, between the company and a government Department. The foundation of the rule is that the information cannot be disclosed without injury to the public interest, and not that the documents are confidential or official, which alone is no reason for their non-production. If the production of the document would be injurious to the public service the general public interest must be considered paramount to the individual interest of the suitor.

Notes. In this case the court itself inspected the documents, but the House of Lords has since ruled in *Duncan v. Cammel Laird & Co.*, [1942] 1 All E.R. 587 at p. 593, that where a minister of the Crown claims privilege, the court will accept his statement and ought not to examine the documents to see if his claim is well founded. See also the Crown Proceedings Act, 1947, s. 28 (6 HALSBURY'S STATUTES (2nd Edn.) 66).

Considered: *Robinson v. State of South Australia* (No. 2), [1931] All E.R.Rep. 333; *Spigelman v. Hocken*, *Goldblatt v. Hocken* (1933), 150 L.T. 256. Referred to: *Rowell v. Pratt*, [1938] A.C. 101; *Duncan v. Cammel Laird & Co.*, [1942] 1 All E.R. 587.

As to protection of documents from discovery on the ground of public interest, see 12 HALSBURY'S LAWS (3rd Edn.) 53-55; and for cases see 18 DIGEST (Repl.) 139-144.

Cases referred to:

- (1) *Smith v. East India Co.* (1841), 1 Ph. 50; 11 L.J.Ch. 71; 6 Jur. 1; 41 E.R. 550, L.C.; 18 Digest (Repl.) 142, 1276.
- (2) *Hennessy v. Wright* (1888), 21 Q.B.D. 509; 57 L.J.Q.B. 530; 59 L.T. 323; 53 J.P. 52; 4 T.L.R. 597, D.C.; 18 Digest (Repl.) 141, 1268.
- (3) *Beatson v. Skene* (1860), 5 H. & N. 838; 29 L.J.Ex. 480; 2 L.T. 378; 6 Jur.N.S. 780; 8 W.R. 544; 22 Digest (Repl.) 386, 4148.

Appeal by the plaintiffs from an order of SCRUTTON, J., at chambers.

The plaintiffs' claim was for damages (i) for alleged breach of a contract by the defendants to supply to the plaintiffs a cargo of crude oil to be loaded f.o.b. on board the plaintiffs' steamship *Cardium* at Abadan in the Persian Gulf; and (ii) for having ordered the *Cardium* when she arrived at Abadan on Feb. 7, 1915, to receive the cargo to proceed to Tarahan without having loaded the cargo. By their defence the defendants stated that as to the alleged non-delivery of crude oil the contract if made was a contract expressly or by implication for the supply of crude oil brought to Abadan by means of a pipe laid from the oil-producing districts of Persia to the defendants' tanks at Abadan, and to the knowledge of the plaintiffs the whole of the crude oil, from time to time received by the defendants at Abadan, was obtained from the said districts by means of the said pipe line; that the defendants were to the plaintiffs' knowledge under contract to supply to divers persons, including the Admiralty, large quantities of crude oil or its derivatives to an extent that could only be fulfilled so long as a constant supply of crude oil was being delivered through the said pipe line; that accordingly it was an implied

term and/or the substratum of the contract that the pipe line should continue to exist in a condition fit to carry and deliver crude oil; and that on or about Feb. 5, 1915, and prior to the date for the delivery of the crude oil which had been sold by the defendants to the plaintiffs, the pipe line was cut by native tribes, believed to have been incited thereto by the King's enemies, and the defendants' supplies of crude oil were totally cut off during all material times, and the contract accordingly became impossible of performance and its substratum was destroyed. Further, or in the alternative, as to the alleged non-delivery, the defendants produced from crude oil delivered at Abadan large quantities of oil fuel for the use of His Majesty's Fleet, and the said crude oil and its derivative fuel oil was war material or warlike stores; and upon the interruption of the pipe line the defendants were directed by the Admiralty to reserve for the use of the Admiralty the whole of the crude oil then at Abadan, as the same might be required for conversion into fuel oil, the said directions having been given under the Defence of the Realm Acts and Regulations. The said non-delivery was due to the interruption of the pipe line and/or to the directions of the Admiralty. As to the alleged diversion of the steamship *Cardium*, the defendants denied that they caused the steamship to proceed to Tarahan, and alternatively, with a denial of liability, they brought into court £2,300 as sufficient to satisfy the plaintiffs' claim in respect thereof. The defendants by their secretary made an affidavit of documents, para. 4 of which was as follows :

"The defendants have also in their possession two documents . . . (i) a contract made between the defendant company and the Board of Admiralty; (ii) copy of a letter from the defendant company to their agents in Persia in the month of February, 1915, dealing with the progress of the campaign in Persia, and the policy, views, and intentions of the authorities, including the said Board of Admiralty, in relation thereto. I am informed by Mr. J. C. Clarke of the Navy Contracts Department of the Admiralty and believe that the said documents have been read and considered by the Secretary of the Admiralty, and the said Mr. J. C. Clarke has on behalf of the said Secretary of the Admiralty instructed the defendant company not to produce or disclose the said documents on the grounds, having regard to their confidential nature, of the interest of the State and of the possible assistance to the enemy should the contents thereof become known. In consequence of the said instructions the defendant company object to produce the said documents."

Paragraph 5 was as follows :

"With regard to the documents referred to in part 3 of the said schedule . . . the defendant company object to produce and claim the right to seal up or otherwise cover up the portions indicated in the said part 3 of the said schedule. I am informed by the said Mr. J. C. Clarke and believe that the said documents have been read and considered by the Secretary of the Admiralty, and the said Mr. J. C. Clarke has on behalf of the said Secretary of the Admiralty instructed the defendant company not to produce or disclose the said portions of the said documents on the grounds that the said portions relate to the progress of the said campaign in Persia and the policy, views, and intentions of the authorities, including the said Board of Admiralty, in relation thereto, and to the position of the said Board with regard to their supplies of fuel oil, and that production or disclosure of such portions of the said documents would accordingly be detrimental to the interests of the State and be of possible assistance to the enemy should the same become known."

The documents referred to in part 3 of the schedule were three cablegrams dated respectively Feb. 7, 8, and 10, 1915, from Messrs. Strick, Scott & Co., who were the defendants' agents in Persia to the defendant company. The plaintiffs applied to SCRUTTON, J., for an order that the defendants should give inspection of the documents referred to in paras. 4 and 5 of the affidavit of documents to the plaintiffs and their solicitors, and permit them to peruse the same and to take copies

thereof. The secretary of the defendant company made an affidavit in opposition which, so far as material, stated as follows :

"2. The defendant company are large refiners of oil with a refinery at Abadan, in the Persian Gulf, and are the owners of a pipe line for conveying crude oil from the Persian oilfields to Abadan, and as such refiners produce large quantities of fuel oil suitable for the use of His Majesty's fleet. 3. In 1914 the Board of Admiralty, being desirous of ensuring an adequate supply of fuel oil for His Majesty's fleet in times of war independent of the goodwill of neutral countries, procured that by a public and general statute (Anglo-Persian Oil Co. (Acquisition of Capital) Act, 1914 (4 & 5 Geo. 5, c. 37) the Treasury should be empowered to subscribe for share or loan capital of the company out of the public funds, and the Treasury accordingly did so subscribe the amount of £2,000,000, and the interest of the Board of Admiralty in the company and its business is directly represented by two directors nominated by the Treasury. 4. At or about the time of the passing of the Act the Board of Admiralty entered into a contract with the defendant company for the supply of fuel oil in peace and in war, and this contract is one of the documents which I have been directed by the secretary of the Admiralty to decline to produce. 5. The other documents, the whole or part of which I have been directed to refuse to produce, all passed at or about the time when the pipe line of the defendant company had been broken by hostile natives, and at the time when the campaign in Persia in the same neighbourhood was in progress—namely, in February, 1915, and by reason of the interest of the Board of Admiralty in the maintenance of a supply of fuel oil as aforesaid, and by reason of the close association of the defendant company with the Board the defendant company from time to time receive confidential information from the Board as to the progress of the campaign, and as to the hopes and intentions of the authorities in reference thereto, and such information is given to the defendant company for the purpose of assisting them in maintaining the supply of fuel oil and to enable the defendant company to keep their local agents in Persia properly instructed. 6. The letter from the defendant company to their agents in Persia, referred to in para. 4 of the affidavit of documents, discloses upon the face of it that it is in part a copy of confidential cablegrams sent to the India Office by their official representatives in Persia, and disclosed by the India Office to the defendant company, and in part comments by the defendant company upon the information therein contained. 7. The only portions of the cablegrams from Strick, Scott & Co. to the defendant company dated Feb. 7 and 10, 1915, respectively and not disclosed set out the actual quantity of fuel oil available upon the said dates for the purpose of the Board of Admiralty."

SCRUTTON, J., made an order that the application be adjourned to the judge at the trial, and he indorsed the summons as follows :

"I desire to state that having seen the documents, I think the government may be right in the view that they ought not to be produced to others, and I will not take the responsibility of ordering them to be produced against the wishes of the government."

The plaintiffs appealed by leave.

Roche, K.C., and *Stuart Bevan* for the plaintiffs.

Sir John Simon, K.C., and *O'Hagan* for the defendants.

SWINFEN EADY, L.J.—This is an appeal from an order of SCRUTTON, J., adjourning to the judge at the trial an application by the plaintiffs for the production of certain documents. The defendants resist the application on the ground that their production would be against the public interest. [His LORDSHIP then referred to the pleadings and the Act of 1914.] The first document of which

production is asked is the contract between the Board of Admiralty and the defendant company, but counsel for the plaintiffs do not now press for production of it. The other documents are a letter dated Feb. 12, 1915, from the defendant company to their agents in Persia, and three cablegrams, dated Feb. 7, 8, and 10, from the defendants' agents in Persia to the defendants. The plaintiffs are especially desirous of having the letter produced, and although they ask for production of the cablegrams, they do not attach so much importance to them. It will be observed that all these documents passed within a few days of the cutting of the pipe line, which is alleged to have taken place on Feb. 5. In the affidavit of the secretary of the defendant company in opposition to the application for inspection the letter is dealt with in this way. [HIS LORDSHIP then read paras. 5 and 6 of the affidavit.] In his original affidavit of documents the secretary of the defendant company said that the letter and the cablegrams had been considered by the secretary of the Admiralty. [HIS LORDSHIP then read para. 4 of the affidavit, and said that a similar statement was made in para. 5 as to the cablegrams.] The proper officer of the Admiralty has, therefore, expressed an opinion to Mr. Clarke, who has informed the defendants of it, that these documents cannot be produced without prejudice to the public service, and that in the public interest an order for their production ought not to be made.

It was urged by the plaintiffs that the rule protecting documents from discovery, on the ground that disclosure would be injurious to the public interests, was limited to State papers, reports, minutes, and other official documents or correspondence, and could not be held to extend to a letter from the defendants to their agents in Persia, or to cablegrams from the agents to the defendant company. Although the instances in which documents have been held to be protected from discovery on the broad principle of State policy and public convenience have usually been cases of public official documents of a political or administrative character, yet the rule is not limited to these documents. The foundation of the rule is that the information cannot be disclosed without injury to the public interests, and not that the documents are confidential or official, which alone is no reason for their non-production: see *Smith v. East India Co.* (1); *Hennessy v. Wright* (2). If the production of the document would be injurious to the public service, the general public interest must be considered paramount to the individual interest of the suitor: see *Beatson v. Skene* (3) (5 H. & N. at p. 853). The learned judge from whom the present appeal is brought has himself perused the documents and expressed an opinion upon them [as to this see Notes, ante p. 637] and refused to order production at this stage. We see no reason for overruling the discretion thus exercised. The question of production will arise again at the trial. Before that date the Board of Admiralty, or the Secretary of the Admiralty, will doubtless carefully consider—and should be prepared at the trial to say—whether any further discovery of the documents in question can be given without injuriously affecting the public interest, or whether some inspection cannot properly be given, limited as to the persons to whom given, and upon satisfactory assurances with regard to the information being treated as confidential and not to be further disclosed. But this is a matter for the Board of Admiralty or the Secretary to consider.

BANKES, L.J.—I agree.

Appeal dismissed.

Solicitors: *Waltons & Co.; Ashurst, Morris, Crisp & Co.*

[Reported by EDWARD J. M. CHAPLIN, ESQ., Barrister-at-Law.]

Re SUAREZ. SUAREZ v. SUAREZ

[COURT OF APPEAL (Swinfen Eady, Warrington and Scrutton, L.JJ.), November 19, 20, December 5, 1917]

[Reported [1918] 1 Ch. 176; 87 L.J.Ch. 173; 118 L.T. 279;
34 T.L.R. 127; 62 Sol. Jo. 158]

Constitutional Law—Diplomatic privilege—Waiver—Need for consent of foreign Sovereign—Waiver by submission to jurisdiction of English courts—Termination of privilege—Period of grace.

The exemption from legal process accorded to the minister accredited to the British Court of any Sovereign or State may be waived by the Sovereign or head of the State or by the minister himself with the permission of the Sovereign or head of State. Waiver may be effected by the minister submitting to the jurisdiction of the English courts.

The exemption ceases on the termination of the appointment of the minister to the British Court, but it will continue for a reasonable time thereafter in order that the minister may wind-up the affairs of the legation and transfer them to his successor.

Constitutional Law—Diplomatic privilege—Termination—Evidence—Foreign Office letter.

A letter under the hand of an assistant secretary of the Foreign Office

Held: to be sufficient evidence of the fact stated therein, namely, that at the date of the letter a named person had ceased to be the minister of a foreign State accredited to the British Court, and that, accordingly, his name had been removed from the diplomatic list.

Notes. Considered: *Dickinson v. Del Solar*, [1929] All E.R.Rep. 139. Referred to: *Engelke v. Musmann*, [1928] All E.R.Rep. 18; *R. v. A.B.*, [1941] 1 K.B. 454.

As to diplomatic privilege, see 7 HALSBURY'S LAWS (3rd Edn.) 267 et seq.; and for cases see 11 DIGEST (Repl.) 628 et seq. For Diplomatic Privileges Act, 1708, see 4 HALSBURY'S STATUTES (2nd Edn.) 591.

Cases referred to:

- (1) *Triquet v. Bath* (1764), 3 Burr. 1478; 1 Wm. Bl. 471; 97 E.R. 936; 11 Digest (Repl.) 632, 555.
- (2) *Viveash v. Becker* (1814), 3 M. & S. 284; 105 E.R. 619; 11 Digest (Repl.) 633, 573.
- (3) *Novello v. Toogood* (1823), 1 B. & C. 554; 2 Dow. & Ry.K.B. 833; 1 L.J.O.S.K.B. 181; 107 E.R. 204; 11 Digest (Repl.) 632, 561.
- (4) *Taylor v. Best* (1854), 14 C.B. 487; 8 State Tr.N.S. 317; 23 L.J.C.P. 89; 22 L.T.O.S. 287; 18 Jur. 402; 2 W.R. 259; 2 C.L.R. 1717; 139 E.R. 201; 11 Digest (Repl.) 629, 517.
- (5) *Magdalena Steam Navigation Co. v. Martin* (1859), 2 E. & E. 94; 28 L.J.Q.B. 310; 34 L.T.O.S. 30; 5 Jur.N.S. 1260; 7 W.R. 598; 121 E.R. 36; 11 Digest (Repl.) 628, 513.
- (6) *The Parlement Belge* (1880), 5 P.D. 197; 42 L.T. 273; 28 W.R. 642; 4 Asp.M.L.C. 234, C.A.; 11 Digest (Repl.) 628, 516.
- (7) *Mighell v. Sultan of Johore*, [1894] 1 Q.B. 149; 63 L.J.Q.B. 593; 70 L.T. 64; 58 J.P. 244; 10 T.L.R. 115; 9 R. 447, C.A.; 11 Digest (Repl.) 615, 435.
- (8) *Barbuits Case* (1737), Cas. temp. Talb. 281; 25 E.R. 777, L.C.; 11 Digest (Repl.) 634, 582.
- (9) *Wilson v. McIntosh*, [1894] A.C. 129; 63 L.J.P.C. 49; 70 L.T. 536; 6 R. 429, P.C.; 38 Digest (Repl.) 887, *993.
- (10) *Tatham v. Parker* (1855), 1 Sm. & G. 506; 1 Eq. Rep. 257; 22 L.J.Ch. 903; 25 L.T.O.S. 22; 1 Jur.N.S. 992; 3 W.R. 347; 65 E.R. 221; 21 Digest 603, 1903.

- (11) *Hyde v. Hyde* (1888), 13 P.D. 166; 57 L.J.P. 89; 59 L.T. 529; 36 W.R. 708; 4 T.L.R. 586, C.A.; 21 Digest 600, 1855.
- (12) *Allen v. Allen* (1885), 10 P.D. 187; 54 L.J.P. 77; 33 W.R. 826; 21 Digest 597, 1807.
- (13) *R. v. Wigand*, [1913] 2 K.B. 419; 109 L.T. 111; sub nom. *Re Wigand, R. v. Wigand*, 82 L.J.K.B. 735; 29 T.L.R. 509, D.C.; 21 Digest 597, 1809.
- (14) *Musurus Bey v. Gadban*, [1894] 2 Q.B. 352; 63 L.J.Q.B. 621; 71 L.T. 51; 42 W.R. 545; 10 T.L.R. 493; 38 Sol. Jo. 511; 9 R. 519, C.A.; 11 Digest (Repl.) 629, 523.
- (15) *Foster v. Globe Venture Syndicate, Ltd.*, [1900] 1 Ch. 811; 69 L.J.Ch. 375; 82 L.T. 253; 44 Sol. Jo. 314; 22 Digest 143, 1298.
- (16) *New Zealand Shipping Co., Ltd. v. Société des Ateliers et Chantiers de France*, [1917] 2 K.B. 717; 87 L.J.K.B. 13; 117 L.T. 71; 33 T.L.R. 545; 14 Asp.M.L.C. 108, C.A.; affirmed [1918-19] All E.R.Rep. 552; [1919] A.C. 1; 87 L.J.K.B. 746; 118 L.T. 731; 34 T.L.R. 400; 62 Sol. Jo. 519; 14 Asp.M.L.C. 291, H.L.; 17 Digest (Repl.) 275, 809.
- (17) *President and Governors of Magdalen Hospital v. Knotts* (1879), 4 App. Cas. 324; 48 L.J.Ch. 579; 40 L.T. 466; 43 J.P. 460; 27 W.R. 602, H.L.; 32 Digest 440, 1105.
- (18) *South African Republic v. Compagnie Franco-Belge du Chemin de Fer du Nord*, [1898] 1 Ch. 190; 77 L.T. 555; 46 W.R. 151; 14 T.L.R. 65; 42 Sol. Jo. 66; 1 Digest (Repl.) 53, 398.
- (19) *Re Tuck, Murch v. Loosemore*, [1906] 1 Ch. 692; 75 L.J.Ch. 497; 94 L.T. 597; 22 T.L.R. 425, C.A.; 16 Digest 50, 534.

Also referred to in argument :

- Gye v. Felton* (1813), 4 Taunt. 876; 128 E.R. 577; 42 Digest 656, 652.
- United States v. Benner* (1830), 1 Baldwin, 240.
- Knill v. Dumergue*, [1911] 2 Ch. 199; 80 L.J.Ch. 708; 105 L.T. 178; 27 T.L.R. 525; 55 Sol. Jo. 648, C.A.; 8 Digest (Repl.) 565, 170.
- Foster v. Usherwood* (1877), 3 Ex.D. 1; 47 L.J.Q.B. 30; 37 L.T. 389; 26 W.R. 91, C.A.; 16 Digest 118, 167.
- Re Aylmer, Ex parte Bischoffsheim* (1887), 20 Q.B.D. 258; 57 L.J.Q.B. 168; 36 W.R. 231; 4 T.L.R. 174, C.A.; 16 Digest 119, 169.
- Duke of Brunswick v. King of Hanover* (1844), 6 Beav. 1; 6 State Tr.N.S. 33; 13 L.J.Ch. 107; 2 L.T.O.S. 306; 8 Jur. 253; 49 E.R. 724; affirmed (1848), 2 H.L.Cas. 1; 9 E.R. 993, H.L.; 1 Digest (Repl.) 60, 438.
- Re Lumley, Ex parte Cathcart*, [1894] 2 Ch. 271; 63 L.J.Ch. 435; 42 W.R. 401; 38 Sol. Jo. 398; 7 R. 179; sub nom. *Re Lumley, Hood Barrs v. Cathcart*, 70 L.T. 780, C.A.; 16 Digest 75, 922.
- Willcock v. Terrell* (1878), 3 Ex.D. 323; 39 L.T. 84, C.A.; 8 Digest (Repl.) 565, 173.
- Miller v. Miller* (1870), L.R. 2 P. & D. 54; 39 L.J.P. & M. 38; 22 L.T. 418; 18 W.R. 585; 21 Digest 596, 1781.
- Gordon v. Gordon*, [1903] P. 141; 72 L.J.P. 33; 89 L.T. 73; on appeal [1904] P. 163; 73 L.J.P. 41; 90 L.T. 597; 52 W.R. 389; 20 T.L.R. 272; 48 Sol. Jo. 297, C.A.; 16 Digest 65, 750.
- Re Deakin, Ex parte Cathcart*, [1900] 2 Q.B. 478; 69 L.J.Q.B. 797; 83 L.T. 39, C.A.; 21 Digest 595, 1779.
- Gowan v. Wright* (1886), 18 Q.B.D. 201; 56 L.J.Q.B. 131; 35 W.R. 297; 3 T.L.R. 258, C.A.; 21 Digest 417, 8.
- R. v. Inhabitants of Hipswell* (1828), 8 B. & C. 466; 2 Man. & Ry.M.C. 474; 2 Man. & Ry.K.B. 474; 7 L.J.O.S.M.C. 4; 108 E.R. 1116; 34 Digest 522, 4410.

Appeal by the defendant from an order made by EVE, J., on a summons under the Courts (Emergency Powers) Acts, 1914-1916 [repealed], for the leave of the court to proceed to execution or otherwise for the enforcement of the payment of the sum of £16,269 4s. 9d. directed to be paid into court by the defendant by an

order of Jan. 30, 1917, and that the plaintiff might be at liberty to issue a writ or writs of sequestration against the property and effects of the defendant.

The facts are stated in the judgments.

Frank Russell, K.C., and Greenland for the defendant.

Maugham, K.C., and Beebee (for *Cyril Harker*, serving with His Majesty's forces) for the plaintiff.

Cur. adv. vult.

Dec. 5, 1917. The following judgments were read.

SWINFEN EADY, L.J.—This is an appeal from an order of *EVE, J.*, giving leave to issue a writ of sequestration against the defendant *Pedro Suarez* for not paying into court £16,269 4s. 9d., a portion of trust moneys received by him, which by an order dated Jan. 30, 1917, he was ordered to pay into court, and which by a supplemental order dated Mar. 7, 1917, he was ordered to pay into court on or before Mar. 14, 1917. The defendant *Pedro Suarez* contends that as a former minister of the Republic of Bolivia he was and is exempt from civil process. The answer to that by the plaintiff is that his diplomatic position has long since ceased to exist, and that, while he was minister, by the direction or with the consent of his government he expressly waived his diplomatic privilege, voluntarily came in under the present proceedings, and took advantage of them to obtain an order against the plaintiff to account.

The facts of the case are not in dispute. The defendant *Pedro Suarez* is a defaulting administrator who received large sums of money forming part of the estate of one *Francisco Suarez*, deceased, and absconded. The judge below stated that he was not to be believed on his oath. Indeed, his counsel frankly stated that the appeal had not any merits, but nevertheless that he was entitled to succeed in point of law. It appears that *Francisco Suarez* died intestate on Feb. 10, 1897, possessed of considerable property. Whether he was domiciled here is a matter in dispute, an inquiry as to domicile not having yet been answered. On Feb. 23, 1900, letters of administration to his estate were granted to the defendant as the attorney of and for the use and benefit of the plaintiff *Nicholas Suarez* and the defendant *Pedro Suarez*. Each claims to be one of the next-of-kin of *Francisco Suarez*, and as such entitled to a share of his personal estate. In the month of January, 1914, the plaintiff *Nicholas Suarez* was desirous of having the estate administered by the court, and ascertaining definitely of what it consisted and who were the parties entitled to a share of it. It would appear that the defendant *Pedro Suarez* then also took the view that such a course was desirable. Accordingly, on Jan. 26, 1914, the plaintiff issued an originating summons asking for an account and that the personal estate might be administered by the court. A copy of this summons was sent to the defendant's solicitors on the same day, and in answer they wrote as follows:

"Jan. 28, 1914.—Dear Sirs,—Re *Francisco Suarez* (deceased).—We have yours of the 26th inst. inclosing copy of originating summons issued by you in this matter. Our client *Colonel Suarez* is perfectly willing to have the estate administered by the court; in fact, he was considering taking the same step himself, and if you will let us have the originating summons we will indorse thereon our acceptance of service.—Yours truly, *HYLAND, ATKINS, AND ROGER.*"

Accordingly, the originating summons was sent to them, and they wrote upon it the following memorandum:

"We accept service of this summons on behalf of *Pedro Suarez*, and undertake to enter an appearance thereto in due course. Dated Jan. 29, 1914.—*HYLAND, ATKINS, AND ROGERS*, 81, Cannon Street, E.C."

In due course they entered an appearance. The originating summons came on for hearing before *Joyce, J.*, on July 10, 1914, when *Mr. Tomlin, K.C.*, appeared

for the defendant Pedro Suarez. The hearing of the summons was adjourned until July 14, 1914, at the desire of the defendant's counsel, to enable him to take the personal instructions of the defendant as to claiming privilege as minister for the Republic of Bolivia. On July 14, 1914, Mr. Tomlin, K.C., stated to the court that the defendant Pedro Suarez waived his privilege, and the order for administration was accordingly made on that date. The judge added as co-defendant one Hugo Boger, directed the usual accounts and inquiries, and gave the conduct of the accounts and inquiries thereby directed to the new defendant Hugo Boger.

The plaintiff appealed from this order, so far as it gave the conduct to Boger, and the defendant Pedro Suarez gave notice to the plaintiff and the defendant Boger, pursuant to R.S.C., Ord. 58, r. 6, of his intention to contend that the order of Joyce, J., should be varied by the insertion therein of a direction that an account be taken of the personal estate of Francisco Suarez, deceased, come to the hands of the plaintiff as agent for the defendant Pedro Suarez, the administrator of Francisco Suarez, or otherwise, or the hands of any other person or persons, by the order or for the use of the plaintiff as such agent or otherwise, and of a submission by the plaintiff to account as aforesaid, or, in the alternative, in the event of the plaintiff refusing to submit to account, that the action might be dismissed with costs. The appeal and cross-contention were disposed of on July 30, 1914, when the order of Joyce, J., was varied and effect given to the contentions of each party. Boger was to be at liberty to attend in chambers upon the taking of the accounts and inquiries, but did not have the conduct of them, and, the plaintiff by his counsel submitting to account, an additional account was directed—namely, an account of the personal estate of the intestate come to the hands of the plaintiff as the attorney of the defendant Pedro Suarez, or to the hands of any other person or persons, by the order or for the use of the plaintiff. I gather that the defendant, after obtaining letters of administration, had appointed the plaintiff his attorney to collect moneys due to the estate abroad. The position, therefore, was that the defendant had appeared voluntarily without the summons having been served upon him, that he expressly waived any diplomatic privilege on the hearing of the summons, and that he came in under the proceedings and took the benefit of them, and himself claimed and obtained an order for the plaintiff to account. It was not disputed that the defendant had waived his privilege, so far as he could do it, but one contention raised was that he could only do it with the consent of his government, and it had not been shown that he did obtain this consent.

The first answer to this argument is that while he was minister credit must be given to his acts, and it must be assumed that in the course which he took he was acting in accordance with the instructions of his government. But the further answer is that he did in fact obtain the authority of his government, and his solicitors so informed the plaintiff in writing. In January, 1915, questions arose whether the defendant should waive his privilege in respect of another proceeding, and on Jan. 29, 1915, the defendant's solicitors wrote to the plaintiff's solicitors that the plaintiff was prepared to write to the President of Bolivia and ask him whether in such other proceeding the President would consent to waiver of privilege. This letter in terms referred to the fact that the president had authorised the defendant to waive his privilege in the administration action. This letter, so far as material, is as follows:

"81, Cannon Street, E.C., Jan. 29, 1915.—Messrs. Darley, Cumberland & Co.—Dear Sirs,—Suarez v. Suarez.—Your client is misinformed. The president of Bolivia authorised Colonel Suarez to waive his privilege in the case of the administration of Francisco Suarez' estate, but he has not done so in any other matter. Colonel Suarez informs us that the view of the Diplomatic Corps is that they cannot themselves waive the privilege, which attaches to their respective countries, the consent of whose ruler or head they must obtain, and we believe this is the correct view under international law. . . .—Yours truly, HYLAND, ATKINS, AND ROGER."

The accounts were taken under the administration order. The defendant Pedro filed accounts, made affidavits, and was cross-examined upon them. The result was that large sums appeared to be due from him. By a subsequent order an inquiry as to domicile was added. The defendant lodged one sum of £3,698 in court, in pursuance of an order against him to that effect, and he also voluntarily lodged £19,500 Consols in court. A surcharge was brought in against him and proceeded upon, and at the conclusion of his cross-examination before Eve, J., he submitted to be surcharged on his accounts as administrator with the sum of £16,269 4s. 9d.; by an order made by Eve, J., on Jan. 30, 1917, the defendant was ordered to pay that sum into court, with a provision that no steps were to be taken to enforce the order if the amount was paid into court by the instalments there mentioned, the first of which was payable on or before Feb. 21, 1917, and the last of which was payable on or before July 20, 1917. No part of this amount has been paid into court by the defendant, although he was personally present in court when the order was made. On Mar. 5, 1917, the defendant was personally served with an order to attend before the master on Mar. 9, 1917, for examination as to his means. On Mar. 7, 1917 (the defendant being then in default in respect of the first instalment) an order was made for the defendant to pay into court the £16,269 4s. 9d. on or before Mar. 14, 1917. The next day, Mar. 8, 1917, he left this country, and there is no evidence that he has since returned, and he has not made any further payment into court. On the same Mar. 8 the defendant's solicitors forwarded to the plaintiff's solicitors a copy of a letter they had received from their client in the following terms:

"81, Cannon Street, E.C., Mar. 7, 1917.—Messrs. Nelson, Son, and Plews, 81, Budge Row, E.C.—Dear Sirs,—As you are aware, during the last three years I have been trying to obtain evidence from Bolivia with regard to the cases, and that all the documents that have been sent to me from there have gone astray. In view of this I have requested the Bolivian government to grant me leave to go personally and obtain all the documents and particulars I require. This leave has been granted me, allowing me three months, commencing from the 1st inst., and as the time is so very short, and as it is necessary to avail myself of the first steamer going out, I am unable to attend the court on Friday, the 9th inst. I should, therefore, be greatly obliged to you if you would express my regrets to the master, assuring him that it is quite unavoidable. As time at my disposal is so very short, I shall not be able, as I had intended, to make out a written statement in regard to my financial standing, but I will endeavour to send it to you from Bolivia.—Yours faithfully, PEDRO SUAREZ."

The three months' leave mentioned in this letter would expire on June 1. It does not appear that this leave was ever extended. On Sept. 21, 1917, Sir Walter Langley, Assistant Under-Secretary at the Foreign Office, wrote to the plaintiff's solicitors that he was directed by Mr. Secretary Balfour to inform them that His Majesty's chargé d'affaires at La Paz had ascertained and reported by telegraph that the Bolivian government had terminated the appointment of Colonel Suarez as Bolivian minister at the Court of St. James', and that his name had accordingly been removed from the diplomatic list. Thus the defendant no longer possesses any diplomatic privilege, and does not appear to have been in England since Mar. 8, 1917. It is not a case in which a claim is made for a reasonable time to wind-up the affairs of the legation. The defendant has not made any affidavit on this application, and it is not suggested that ample opportunity has not already been given him to wind-up the business of the legation. Why, therefore, should not a writ of sequestration be issued to compel obedience to the orders of the court?

It was contended on behalf of the defendant that, by virtue of the Diplomatic Privileges Act, 1708, s. 3, the proceedings taken against him were null and void, and that a minister could not waive his privilege and any purported waiver was ineffective. It must, however, be remembered that s. 3 of the statute of 1708

was merely declaratory of the common law, as its language shows. The recitals in the Act (since repealed by the Statute Law Revision Act, 1867) show the circumstances under which the Act was passed. They are well known, and need not be repeated here. Section 3 provides: "And to prevent the like insolences for the future, be it further declared," not "enacted." It has been frequently pointed out by many eminent judges that s. 3 of the Act was declaratory of the common law, and must, therefore, be construed according to the common law, of which the law of nations must be deemed a part. It was so pointed out by LORD MANSFIELD in *Triquet v. Bath* (1) (3 Burr. at p. 1480), by LORD ELLENBOROUGH in *Viveash v. Becker* (2), by ABBOTT, C.J., in *Novello v. Toogood* (3), by JERVIS, C.J., and WILLIAMS, J., in *Taylor v. Best* (4), by LORD CAMPBELL in *Magdalena Steam Navigation Co. v. Martin* (5), and in *The Parlement Belge* (6) (5 P.D. at p. 213). The exemption from process accorded by the law of nations to Sovereigns and to ambassadors and foreign ministers, being for their benefit, may be waived by or with the permission of the Sovereign in accordance with the maxim *quilibet potest renunciare juri pro se introducto*.

In *Mighell v. Sultan of Johore* (7) it was pointed out by the Court of Appeal that a foreign Sovereign might submit to the jurisdiction, LORD ESHER adding ([1894] 1 Q.B. at p. 159): "Everybody knows and understands that." The time when he can be said to elect whether he will submit to the jurisdiction is when the court is being asked to exercise jurisdiction over him—for example, when he enters an appearance to a writ. If a Sovereign can submit to the jurisdiction, why cannot an ambassador or other foreign minister with the consent of his Sovereign? Indeed, it may be for the benefit of such a one to come in and have some question determined in the courts of the country to which he is accredited. In the present case, if the defendant had been honest, the proceedings might have established his right to a share of a large fund.

It was held by the Court of Common Pleas in 1854, in *Taylor v. Best* (4), that a minister might waive his privilege, and the court there refused to set aside proceedings taken against M. Drouet, a public minister accredited by the King of the Belgians to the Court of St. James'. His attorney had given an undertaking to appear in the action, had duly entered an appearance, and had pleaded, and, after notice of trial, had obtained a rule for a special jury and the court refused his application to stay or set aside the proceedings. The doubt raised in that case—and stated by MAULE, J., to be—whether an ambassador or public minister can be brought into court against his will by process not immediately affecting either his person or his property, and have his rights and liabilities ascertained and determined, was afterwards settled in favour of the ambassador in *Magdalena Steam Navigation Co. v. Martin* (5). But the actual decision in *Taylor v. Best* (4), that a minister may, with the consent of his Sovereign, waive his privilege, notwithstanding the provisions of the statute of Anne, has never been questioned from that time to the present. It was affirmed by LORD CAMPBELL in *Magdalena Steam Navigation Co. v. Martin* (5) when he said, speaking of a public minister (2 E. & E. at p. 111):

"If he has done nothing to forfeit or waive his privilege, he is for all juridical purposes supposed still to be in his own country."

The contention on behalf of the defendant in the present case was founded upon a dictum of LORD TALBOT in *Barbuit's Case* (8). But the passage referred to merely means, as the context shows, that, the privilege being for the sake of the princes by whom an ambassador is sent, the ambassador cannot renounce such privilege and protection without the consent of the government which sent him: see also *Wilson v. McIntosh* (9). This point, therefore, fails. It was further urged on behalf of the defendant that, as the order of Mar. 7, 1917, fixing a definite date for payment was never served upon him, it was irregular to issue a writ of sequestration. In support of this contention reliance was placed upon the terms of Ord. 42, r. 6, which provides for the issue of a writ of sequestration, after due service of a

judgment or order. The plaintiff, however, was not proceeding under that rule, which provides for the issue of a sequestration as of course and without obtaining any order for the purpose. The plaintiff's application for leave to issue a writ of sequestration was made under Ord. 42, rr. 4 and 24. The court may dispense with service of the order altogether if it is satisfied that the defaulter knows of the order and is keeping out of the way. The object of requiring service is to establish that the person ordered to do something has been fully informed of what he is required to do. The court has full jurisdiction to dispense with service of an order in proper cases. Here the defendant was personally present in court when the order of Jan. 30, 1917, was made, and indulgence was shown him at his request by giving him an opportunity of paying by instalments at fixed dates, all long since expired, and no payment whatever has been made. The defendant is in contempt, and, by keeping away, prevents any attachment of his person. A writ of sequestration is a process of execution against the estate which is said to have been first issued by Lord Keeper BACON, and was resorted to by reason of the infirmity of the process of contempt, which is merely personal. The proceedings on a writ of sequestration are in rem and not in personam: see *Tatham v. Parker* (10), 1 Sm. & G. at p. 514. There are many reported instances of the court ordering the issue of a writ of sequestration when the defendant keeps out of the way and so prevents personal service of any order being effected upon him: see *Hyde v. Hyde* (11); *Allen v. Allen* (12); and *R. v. Wigand* (13). In my opinion, the order of EVE, J., was quite right and this appeal fails.

WARRINGTON, L.J.—This is an appeal by the defendant Pedro Suarez from an order dated Oct. 23, 1917, giving leave to issue a writ of sequestration by reason of his failure to comply with an order of Jan. 30, 1917, that he should lodge in court £16,269 odd, part of the estate of an intestate in his hands as administrator, and a subsequent order, dated Mar. 7, 1917, directing lodgment on or before a fixed date or afterwards within four days after service.

The first question is whether at the date of the order of Oct. 23, 1917, the defendant was entitled to claim the privilege against legal process of a minister of a foreign State. He had been the accredited minister in this country of the State of Bolivia. But on Sept. 21 the Foreign Office, by letter under the hand of one of the assistant secretaries, informed the plaintiff's solicitors that His Majesty's chargé d'affaires at La Paz had ascertained and reported by telegraph that the Bolivian government had terminated his appointment as Bolivian minister at the British Court, and that his name had, accordingly, been removed from the diplomatic list. In my opinion, that letter is for the purposes of the present matter sufficient evidence of the fact that at the date of that letter the defendant had ceased to hold the office of minister. The privilege may, however, continue for a reasonable time after the minister ceases to hold office in order that he may wind-up the affairs of the legation and transfer them to his successor: *Musurus Bey v. Gadban* (14). In the present case, however, it is idle to suggest that on this ground the privilege still subsisted on Oct. 23. The four-day order was made in the presence of the defendant's solicitors on Mar. 7. On Mar. 5 he had been personally served with an order to attend on Mar. 9 to be examined as to his means. On Mar. 8 he disappeared, and the plaintiff has heard nothing of him since. It is, in my opinion, clear that if it could be said in this case that there was any period of grace at all, it had come to an end long before Oct. 23, and that he did not then enjoy any privilege from process. But it is said that by virtue of the Diplomatic Privileges Act, 1708, all the proceedings on which the order appealed from was made were void by reason of the existence of the privilege at the date of their institution; that the privilege cannot be waived; and that, therefore, there was no jurisdiction to make the order appealed from. On the facts there is no question that the defendant deliberately, and after consideration for which opportunity was afforded him with the consent of his own government, submitted to the jurisdiction.

Further, he obtained on appeal a modification in his favour of the original judgment. He complied with it by carrying in and verifying the necessary accounts. He paid and transferred moneys and Consols into court, and, on the order for payment of the £16,269 odd into court being made, he obtained the indulgence of being allowed to pay by instalments.

The evidence in point of fact of the ambassadorial privilege is clear. That in law an action which the privilege would have rendered impossible of prosecution may be continued effectually if the privilege is not insisted on was decided in 1854 by the Court of Common Pleas in *Taylor v. Best* (4). The same point is assumed in the judgment of LORD CAMPBELL, L.C., in *Magdalena Steam Navigation Co. v. Martin* (5), decided in 1859. The dictum of LORD TALBOT in *Barbuit's Case* (8) is, properly understood, not adverse to this view. The context shows that LORD TALBOT is referring only to waiver with the consent of the ambassador's government. The decision in *Taylor v. Best* (4) has never been overruled or questioned on this point, and, in my opinion, even if we thought it wrong, this court ought not after this length of time to overrule it. But I see no reason to doubt that the decision was correct. There can, I think, be no question that independently of the statute the privilege of being free from process in this country, whether it be that of a Sovereign of another State or of an ambassador of such a Sovereign, was capable of being waived, and that proceedings could validly be prosecuted if the privileged defendant submitted to the jurisdiction. It has frequently been pointed out by judges of great eminence that the third section of the statute of Anne on which the present question turns is merely declaratory of previously existing law. It appears by the preamble that the object was to preserve sacred and inviolable privileges which ambassadors and other public ministers have at all times been possessed of. Under these circumstances it would be a strange result if the effect of the statute were to alter the nature of the ambassadorial privilege to introduce a distinction between the case of a Sovereign himself and his ambassador, and to render absolutely void as against the latter every action although it may be his desire, and indeed to his advantage, to submit to the jurisdiction. In my judgment, the statute should be construed so as to maintain the privilege as it existed when it passed, and to render void only those writs and processes which are "sued forth or prosecuted" against the will of the privileged person.

Some reliance was placed on an expression of DAVEY, L.J., in *Musurus Bey v. Gadban* (14) ([1894] 2 Q.B. at p. 361) to the effect that there is a total want of jurisdiction to entertain an action against a person enjoying the privilege. The learned lord justice was not in that case considering the effect of waiver at all, but only the question whether the immunity of an ambassador from action prevented the Statute of Limitations from running during the continuance of such immunity. The statement of the learned lord justice has no bearing on the present question. I am of opinion, therefore, that the action was effectually prosecuted, and that the court, notwithstanding the ambassadorial character of the defendant, had jurisdiction to make all the orders it made up to and including those over which the order for the issue of the writ of sequestration was founded. The last-mentioned order itself, being the order appealed from, was made when the privilege no longer existed, and was, in my opinion, properly made.

But a technical objection is taken on the ground that no time was fixed for payment by the order of Jan. 30, and that the order of Mar. 7 was not served. That objection would have been a good one if a writ of sequestration were issued under Ord. 42, r. 6. But, in my opinion, the absence of service does not prevent the court from directing the issue of the writ in a proper case: see *R. v. Wigand* (13). On the whole, in my opinion, the appeal fails and must be dismissed.

SCRUTTON, L.J.—Pedro Suarez appeals from an order of EVE, J., dated Oct. 23, 1917. He objects to the order on two grounds: First, that he was when the proceedings were commenced the public minister of the Republic of Bolivia accredited to this country, and, therefore, any process against him was null and

void. Secondly, that the first order for payment into court does not specify a time for payment, and the second order, which does specify a time, was not served on him. To his claim of ministerial privilege it is replied that he was not when the order appealed from was made, the public minister of Bolivia, and that while he was such minister he submitted to the jurisdiction with the assent and on the instructions of the Republic of Bolivia.

Counsel for Pedro Suarez frankly opened his case as one entirely destitute of any merits that were not technical. It appears that when it was proposed to administer the estate of Francisco Suarez, an originating summons was issued on Jan. 26, 1914, by Nicholas Suarez, Pedro Suarez being a defendant, and on Jan. 28 Pedro Suarez' solicitors, in stating their willingness to accept service of the summons, wrote that Pedro Suarez was willing to have the estate administered by the court, and in fact he was considering taking some such step himself. On Jan. 29, 1915, his solicitors wrote that the President of Bolivia had authorised Pedro Suarez to waive his privilege in the case of the administration of Francisco Suarez. In these proceedings it was ascertained that Pedro Suarez had in his hands a large sum of money belonging to the estate. On Jan. 20, 1917, he was ordered to pay £16,269 into court, the order not to be enforced if on named dates he paid in specified instalments of this sum. He did not pay the first instalment, and he was, on Mar. 7, 1917, ordered to pay the whole sum into court within four days. On May 8, 1917, he left the country, concealing his whereabouts from the court. On Sept. 21, 1917, the Foreign Office, from whom this court obtains conclusive information as to the status of foreign dignitaries and their accredited representatives to this country: *Mighell v. Sultan of Johore* (7); *Foster v. Globe Venture Syndicate, Ltd.* (15); informed the court that the Bolivian government had terminated the appointment of Colonel Suarez as Bolivian minister at the British Court. It is, therefore, at a time when he had been six months absent from this country, and at least a month after his appointment as minister has ceased, that he claims a privilege as minister, having waived that privilege when he was minister. His counsel said quite accurately that his case had no merits in fact. But it was said that, however lacking in merits he was, he was in 1914 a public minister, and that the statute of 1708 had prescribed that all writs and processes which shall hereafter be sued forth whereby the person of any public minister of any foreign State may be imprisoned or his goods be seized "shall be deemed and adjudged to be utterly null and void to all intents, constructions, and purposes whatsoever." The whole proceedings were said to be null and void.

There are large numbers of cases in which similar words have been construed by the courts. This court in *New Zealand Shipping Co., Ltd. v. Société des Ateliers et Chantiers de France* (16) held that in cases of contract the court supports an agreement, which by its express terms is void in certain events, by refusing to allow a person who has by his own act brought one of those events to pass to allege an invalidity caused by his own wrong. And where a lease is void on breach of a covenant the court has not allowed the person who broke the covenant to allege the invalidity his breach of contract has created. The effect of this is to make the contract not void, but voidable at the option of the innocent party. In numerous statutes, for a bewildering variety of reasons, the courts have held transactions to be valid which the legislature has apparently enacted to be invalid for all purposes whatsoever, while in other cases they have held that the words void for all purposes have what appear to be their plain and ordinary meaning. The cases are collected in MAXWELL ON THE INTERPRETATION OF STATUTES (5th Edn.) pp. 337-348. But one of the reasons where the courts have declined to make a transaction void is that there is a personal estoppel against a party interested in and alleging invalidity. This is the reason given by LORD CAIRNS in *President and Governors of Magdalen Hospital v. Knotts* (17) (4 App. Cas. at p. 333) for the numerous cases in which it has been held that leases made by statute utterly void could yet not be invalidated by the corporation during the life of the head of the college by whom they were made. I am content to decide this case on that

ground, for, if ever there were a case where a man should be prevented from alleging the invalidity of a process, it is where he has assented to its issue, taken part in the proceedings for three years, thus gaining time, and only alleged its invalidity when he is otherwise not entitled to the protection of an ambassador or protected from a writ.

But, on many of the general questions argued before us, I have felt and still feel considerable doubts. I desire to say, first, that, in my opinion, the nature and extent of the effect of appearing to a process which was null and void when it was issued may require close consideration in future cases. The effect of the Sovereign's appearing has been very carefully limited—see *South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord* (18)—and I should desire to reserve my liberty to consider how exactly a writ issued without the consent of an ambassador, and, therefore, apparently a nullity: see *Musurus Bey v. Gadban* (14); is made an effective writ by the consent of the defendant, and the extent to which it becomes effective. In the present case I think the facts prevent the defendant from raising this point. Secondly, I am not at all satisfied, in view of the way the greater part of the reasoning in *Taylor v. Best* (4) has been treated in subsequent cases: see *Magdalena Steam Navigation Co. v. Martin* (5) and *Musurus Bey v. Gadban* (14); that *Taylor v. Best* (4) can be treated in a case where it has to be considered as a satisfactory authority for anything. The first point taken by the defendant, in my opinion, fails. On the second point, the writ of sequestration is founded on contempt of an order, and cannot be issued without leave of the court unless an order naming a time for the performance of an act has been served on the defendant and disobeyed. But in this case the writ is issued with the leave of the court, and EVE, J., has found that Pedro Suarez knew about the two orders for payment, and has left the country to evade service of the second order and payment of the sum in question. I should come to the same conclusion. The latter finding, that Pedro Suarez is evading service within the decision of the Court of Appeal in *Re Tuck, Murch v. Loosemore* (19), is enough to justify the issue of the writ. The appeal, in my opinion, fails and must be dismissed with costs.

Appeal dismissed.

Solicitors: *Nelson, Son & Plews; Darley, Cumberland & Co.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

R. v. KENNAWAY

[COURT OF CRIMINAL APPEAL (Viscount Reading, C.J., Darling and Avory, JJ.),
October 16, 1916]

[Reported [1917] 1 K.B. 25; 86 L.J.K.B. 300; 115 L.T. 720; 81 J.P. 99;
25 Cox, C.C. 559; 12 Cr. App. Rep. 147]

Criminal Law—Forgery—Will—"Forgery of will of either dead or living person"
—*Forgery of will of fictitious person—Forgery Act, 1913* (3 & 4 Geo. 5, c. 27),
ss. 1 (2) (b), 2 (1) (a), 4 (1).

The appellant in company with other persons evolved a scheme for the purpose of inducing someone to advance money on the security of a fictitious legacy in a forged will. He ascertained the name of a person who had died within the preceding three months and used that person's death certificate to obtain probate of a will written by him and purporting to be that of the deceased person. The address at which the deceased was stated to have resided was wrongly described both in the will and in the affidavit for probate. The appellant was convicted under s. 2 (1) (a) of the Forgery Act, 1913, which made it a felony to forge the will of either a dead or a living person.

Held: the fact that the deceased had never resided at the address stated in the will did not make it the will of a fictitious person, and, therefore, s. 2 of the Act applied and the appellant was rightly convicted of felony, his offence not being merely that of forging a document under s. 4 of the Act, which was a misdemeanour.

Per CURIAM: Even if the will had been that of a fictitious person its forgery might still have been a felony under s. 2 (1) (a).

Criminal Law—Evidence—Cross-examination of prisoner as to character—Cross-examination as to previous offence—Corroboration of evidence of accomplices—Criminal Evidence Act, 1898 (61 & 62 Vict., c. 36), s. 1 (f).

At the trial of the appellant on a charge of forging a will two accomplices gave evidence for the prosecution to the effect that he had forged the will in pursuance of a scheme by which they were to induce someone to advance money on the security of a fictitious legacy in the will. They also stated that when they had asked the appellant to act as one of the executors of the will he had refused on the ground that he had put through a will eighteen years previously and was afraid of detection if he took too ostensible a part in the present scheme. The appellant was cross-examined for the purpose of showing that eighteen years previously he had forged a will in order to obtain money in the same way as was suggested in the present case.

Held: the cross-examination of the appellant as to the previous forgery was admissible as tending to corroborate the evidence of the accomplices.

Notes. Penal servitude and hard labour were abolished by s. 1 of the Criminal Justice Act, 1948 (28 HALSBURY'S STATUTES (2nd Edn.) 351).

As to forgery of a will, see 10 HALSBURY'S LAWS (3rd Edn.) 843, and cases there cited. As to admissibility of evidence of similar offences, see *ibid.*, pp. 443, 444, and for cases see 14 DIGEST (Repl.) 420 et seq.

Appeal on a point of law against the conviction of the appellant before A. T. LAWRENCE, J., at the Central Criminal Court of forgery.

The appellant was accused of having forged the will of one Jane Augusta Leete, described as of Elmfield, Bath. There had been in fact a person of the name of Jane Augusta Leete who formerly resided at No. 27, Wilberforce Road, Finsbury Park, and had lately died. Under the forged will legacies were purported to be left to alleged relations of the deceased, and in pursuance of a conspiracy an attempt was made to induce persons to advance money on the security of the

fictitious legacies in the forged will. The appellant was convicted of forgery under s. 2 (1) (a) of the Forgery Act, 1913, and sentenced to ten years' penal servitude.

E. A. Swan (H. W. Wickham with him) for the appellant.

R. D. Muir and H. D. Roome for the Crown.

The judgment of the court was delivered by

VISCOUNT READING, C.J.—The appellant Gerald Kellaway was convicted of forging a will which purported to be the will of the late Jane Augusta Leete, and also of uttering a forged document which purported to be the will of the same lady. The prosecution at the trial showed that there was an elaborate conspiracy between four persons, including the appellant. Two of the conspirators were named Bruce and Vaughan, and they were tried before DARLING, J., at the Central Criminal Court and convicted. After passing sentence upon these two men, the judge advised them to assist in bringing to justice a third person, who was evidently, as the judge had reason to think, a very expert and skilful hand and working behind these two men. If they did so assist, the judge intimated that their sentences might be affected.

The result was that the appellant and another man named Horne were tried at the Central Criminal Court before A. T. LAWRENCE, J. The prosecution called Bruce and Vaughan as witnesses and avowedly accomplices in the crime. They gave evidence to the effect that the crime was not meant to defraud the estate of the deceased person Jane Augusta Leete, but was carried out for the purpose of inducing someone to advance money on the security of a fictitious legacy in the forged will. It is clear from the evidence given at the trial that the method carried out was, first, to ascertain the name of some person who had died within the preceding three months, so as to get over any difficulty about probate of the will, and, secondly, to forge a will which purported to be the will of that person and included a provision for legacies purporting to be in favour of the accused. Then, being in possession of the forged will, it was suggested that they should endeavour to persuade someone to advance money to the supposed legatees or for their benefit. It was further shown that estate duty was paid upon an estate which never in fact existed, and that an attempt was made to obtain an advance of money upon the security of a fictitious legacy. The case put forward for the prosecution was that the appellant actually affixed to the will the signatures of the supposed testatrix and of the two witnesses. The handwritings in each case were necessarily different, but the allegation was that all the signatures were written by the appellant. In the course of the evidence given by Bruce and Vaughan it was stated that the appellant when asked refused to act as one of the supposed executors. Bruce said that he refused because of a will which he had "put through" eighteen years ago, and that he said that the risk of discovery was too great. Vaughan gave evidence to the same effect. In cross-examining the appellant counsel for the Crown questioned him for the purpose of showing that eighteen years ago a document was in existence which purported to be the will of one Fanny Fisher and was in his handwriting and written by him to enable him to obtain an advance of money in the same way as was suggested in the present case. This evidence was admitted as tending to corroborate the evidence given by the accomplices.

The appeal is based upon two grounds. First, it is said that the appellant could not be convicted of forgery as a felony, but only as a misdemeanour, and that he could not, therefore, be sentenced to more than two years' imprisonment. It is not argued that no offence was committed, but the offence is said to be a misdemeanour and not a felony. This argument was founded on the provisions of ss. 1 (2) (b), 2 (1) (a), and 4 (1) of the Forgery Act, 1913. It is said that, as the will in question purported to be that of Jane Augusta Leete, of Elmfield House, Bath, and as Jane Augusta Leete, deceased, actually resided at No. 29, Wilberforce Road, Finsbury Park, the Jane Augusta Leete whose supposed will was proved was a fictitious person, and that, therefore, the penalty prescribed by s. 2 (1) of

the Forgery Act, 1913, did not apply, the person whose will was forged being neither a dead nor a living person within s. 2 (1) (a), but wholly fictitious. That point can be conclusively answered. Counsel for the appellant must first show that the alleged will in question is the will of a fictitious person. In the opinion of the court it is not. The alleged will was put forward as that of Jane Augusta Leete, the person who had lately died. The certificate of death of this person was obtained and used by the appellant and his accomplices and in the affidavit for probate the testatrix was described as "of No. 29, Wilberforce Road, Stoke Newington, formerly of Elmfield House, Bath." This point, therefore, in our opinion, fails. But we think it desirable to say that the court was not impressed with the suggestion that, supposing there had been no such person as Jane Augusta Leete, of Elmfield House, Bath, s. 2 (1) (a) of the Forgery Act, 1913, would not apply to the case.

The second point submitted to us was that the cross-examination as to the will of Fanny Fisher was inadmissible as being contrary to the provisions of s. 1 of the Criminal Evidence Act, 1898, which relates to questions put to accused persons tending to show that they have committed other offences or are of bad character. We need not repeat what this court has said more than once—namely, that evidence which is otherwise admissible can be given against an accused person although it may show that he had committed an offence other than the offence charged or was of bad character. In the present case evidence of the fact that the appellant had committed a forgery eighteen years ago would have been inadmissible. But the evidence given by Bruce and Vaughan related to their conversation with the appellant about the reasons which he gave for not acting as executor, and contained the statement by the appellant that he had done the same thing eighteen years ago, and that he was afraid of detection if he took any ostensible part in the new scheme. It is impossible to say that evidence that the appellant had in fact done this same thing eighteen years ago is not some evidence which tends to corroborate the testimony of the accomplices, and to show that the appellant was guilty of the charge preferred against him. To put it quite shortly, it amounted to this, that it was part of the scheme that the appellant should not act as executor because he had once before done the same thing, and might, therefore, be more easily detected. For these reasons the court thinks that the learned judge rightly admitted this evidence as tending to corroborate the testimony of the accomplices, and the second point fails. The appeal will therefore be dismissed.

Appeal dismissed.

Solicitors: *Wilson, Lambert & Midgley; Director of Public Prosecutions.*

[Reported by R. F. BLAKISTON, Esq., *Barrister-at-Law.*]

Re DANIEL. DANIEL v. VASSALL

[CHANCERY DIVISION (Sargant, J.), June 5, July 3, 1917]

[Reported [1917] 2 Ch. 405; 87 L.J.Ch. 69; 117 L.T. 472; 33 T.L.R. 503;
61 Sol. Jo. 646]

Sale of Land—Contract—Breach—Breach by vendor—Damages—Measure—Property subject to mortgage—Inability to convey because of refusal of mortgagee to release property and insufficiency of funds to pay off mortgage—Title accepted by purchaser ready to complete—Purchaser entitled to general damages for loss of bargain, but not in addition thereto to costs of investigating title.

The vendor, who had contracted to sell property which was subject to a mortgage, died before the title had been accepted by the purchaser. After the vendor's death the title was approved by the purchaser who was then ready to complete the purchase, but owing to the mortgagees' refusal to release the property and the inability of the executors to pay off the mortgage out of the vendor's insolvent estate the vendor's executors were unable to complete. On a claim for breach of the contract against the vendor's estate,

Held: (i) the vendor's incapacity to complete did not arise from a defect in the title, but merely from inability to convey; in that circumstance the absence of wilful misconduct or bad faith by the vendor was irrelevant, and so also was the lack of means to redeem the mortgage; and, therefore, the purchaser was not limited to claiming the costs of investigating the title, but was entitled to general damages for loss of his bargain.

Engell v. Fitch (1) (1869), L.R. 4 Q.B. 659 and *Day v. Singleton* (2), [1899] 2 Ch. 320, considered.

Bain v. Fothergill (3) (1874), L.R. 7 H.L. 158, distinguished.

(ii) the purchaser was not entitled to the costs of investigating the title in addition to general damages, since, if the contract had been completed, the purchaser would have had to pay those expenses.

Notes. Applied: *Braybrooks v. Whaley*, [1919] 1 K.B. 435. Considered: *Wallington v. Townsend*, [1939] 2 All E.R. 225. Followed: *Thomas v. Kensington*, [1942] 2 All E.R. 263. Distinguished: *J. W. Cafés, Ltd. v. Brownlow Trust, Ltd.*, [1950] 1 All E.R. 894. Referred to: *Curtis Moffat v. Wheeler* (1929), 98 L.J.Ch. 374.

As to damages for breach of contract to sell land, see 34 HALSBURY'S LAWS (3rd Edn.) 333 et seq.; and for cases on damages for breach of contract by the vendor see 40 DIGEST (Repl.) 284 et seq.

Cases referred to:

- (1) *Engell v. Fitch* (1869), L.R. 4 Q.B. 659; 10 B. & S. 738; 38 L.J.Q.B. 304; 17 W.R. 894, Ex.Ch.; 40 Digest (Repl.) 285, 2369.
- (2) *Day v. Singleton*, [1899] 2 Ch. 320; 68 L.J.Ch. 593; 81 L.T. 306; 48 W.R. 18; 43 Sol. Jo. 671, C.A.; 40 Digest (Repl.) 258, 2161.
- (3) *Bain v. Fothergill* (1874), L.R. 7 H.L. 158; 43 L.J.Ex. 243; 31 L.T. 387; 39 J.P. 228; 23 W.R. 261, H.L.; 40 Digest (Repl.) 287, 2392.
- (4) *Flureau v. Thornhill* (1776), 2 Wm. Bl. 1078; 96 E.R. 635; 40 Digest (Repl.) 284, 2358.

Also referred to in argument:

Esdaile v. Stephenson (1822), 1 Sim. & St. 122; 57 E.R. 49; 40 Digest (Repl.) 215, 1754.

Savory v. Underwood (1854), 23 L.T.O.S. 141; 40 Digest (Repl.) 132, 1020.

Wedgwood v. Adams (1843), 6 Beav. 600; 49 E.R. 958; subsequent proceedings (1844), 8 Beav. 103; 50 E.R. 41; 42 Digest 468, 364.

Townsend v. Champernown (1827), 1 Y. & J. 449, 538; 148 E.R. 784; 40 Digest (Repl.) 175, 1381.

Tarn v. Turner (1888), 39 Ch.D. 456; 57 L.J.Ch. 1085; 59 L.T. 742; 37 W.R. 276; 4 T.L.R. 735, C.A.; 35 Digest 684, 4257.

Summons taken out in an administration action to determine whether purchasers of real estate could recover general damages against the estate of the deceased vendor for the failure of his executors to perform the contract of sale, their failure being due to inability to obtain a release of the property by the mortgagees or to pay off the mortgage, or whether the purchasers were restricted to recovering the costs of investigating title to the property.

Maugham, K.C., and *F. K. Archer* for the purchasers.

Fairfax Luxmoore for the executors of the vendor.

R. H. Hodge for the plaintiff.

Cur. adv. vult.

July 3, 1917. **SARGANT, J.**—This summons raises the interesting question whether a purchaser of real estate towards whom his vendor has failed to perform his contract by reason of inability to obtain a release of the property by a mortgagee is entitled to general damages for loss of bargain, or is limited to the costs incurred in investigating title. The vendor here has died since the contract, a judgment has been pronounced for the administration of the estate, and the master has just made his first general certificate.

One of the claims before the master was that of the Bristol Tramways and Carriage Co., Ltd., in respect of the failure of the vendor to perform a contract dated Nov. 5, 1912, for the sale of a house called Sion Spring House, situate at Clifton, Bristol, and adjoining an hotel called the St. Vincent's Rocks Hotel. In addition to a claim for a deposit of £50 and interest thereon, which has since been satisfied by the release to them of the deposit, the company claimed a sum of £113 14s. 6d. in respect of costs, charges, and expenses incurred by the company in and about the purchase and also a sum of £500 for general damages. The master has allowed a sum of £97 1s. 2d. in respect of costs incurred by the company, but has taken the view that general damages are not recoverable at all, and has therefore not dealt with the evidence as to the amount, if any, of such general damage. The company are now applying to the court to vary that part of the certificate which relates to their claim by allowing their claim for general damage.

The contract was actually made with a Mr. Wood as purchaser, but the benefit of the purchase was soon transferred to the company, and they have throughout been recognised and treated as the purchasers. It fixed the purchase price at £1,000, of which a sum of £50 was paid as a deposit, and named Dec. 21, 1912, as the day for completion. Some delay took place in the matter, and the title had not been approved before the vendor's death, which occurred on Dec. 11, 1912. But by the middle of May, 1913, the company had accepted the title and had agreed with the vendor the form of conveyance, and the matter was ready for completion. At this juncture, however, difficulties arose in consequence of the requirements of the mortgagees of the vendor, who held a mortgage for £5,000, comprising both the property sold and the St. Vincent's Rocks Hotel. These properties were, to some extent, connected or intermixed physically. And though the vendor had had a quite reasonable expectation that his mortgagees would release the property sold on payment of the purchase price of £1,000, yet when the mortgagees came to consider the actual terms of the conveyance they declined to join and release except with certain reservations and stipulations which the company were not bound, and were not prepared, to accept. The company accordingly called on the vendor's executors to complete the purchase as arranged, and, if necessary for that purpose, to pay off the mortgagees and obtain a release of the property. But this the vendor's executors were unable to do having regard to the position of the vendor's estate, which was probably insolvent. The company accordingly on

June 15, 1914, gave formal notice to the executors requiring them to complete the matter within one month, and on their failure to do so gave a further notice terminating the contract and claiming the return of the deposit of £50 and damages to the extent already mentioned.

Under these circumstances it is, of course, not denied that there has been a breach, on the part of the vendor and his estate, of the contract he entered into; and it is conceded on the part of his executors that if a similar case had arisen on a sale of pure personal estate there would have been a liability to pay general damages for the failure to procure a release of the personal estate sold from any mortgage or lien on that personal estate, whether charged thereon solely or in common with other personal estate. But it is contended on the part of the vendor's executors that the case is within the rule in *Flureau v. Thornhill* (4) as expounded in *Bain v. Fothergill* (3) and followed in other cases, of which the most important for the present purpose is *Day v. Singleton* (2). That the present case is not within the exact terms of the decision in *Flureau v. Thornhill* (4) is clear, for that decision merely covers cases in which the incapacity of the vendor arises from a defect in his title, while here the incapacity is due, not to any defect in title, but to the refusal of the mortgagee to release and to the pecuniary inability of the vendor and his estate to pay the mortgage off. Nor do I think that the case is within the spirit of the rule in *Flureau v. Thornhill* (4). For, as is pointed out by LORD LINDLEY, M.R., in *Day v. Singleton* (2) it is an anomalous rule based upon and justified by difficulties in showing a good title to real property in this country. There is no special difficulty in obtaining a release of real estate that is in mortgage. All that is required in general, and all that was requisite here, was to pay off the mortgage or a sufficient part of it to satisfy the mortgagees, and but for the lack of pecuniary means the vendor and his estate were in a position to force the concurrence of the mortgagees. This being so, a further remark of LORD LINDLEY in the same passage becomes apposite, namely, that the anomalous rule in question "ought not to be extended to cases in which the reasons on which it is based do not apply." But it was urged by counsel for the executors of the vendor that *Day v. Singleton* (2) was, like the somewhat similar case of *Engell v. Fitch* (1), a case of wilful default or bad faith, that the decision in each of these cases was really based on this fact, and that it is only in such cases that a vendor is liable. I cannot, however, think that this is so. It seems to me that these cases establish that contracts for the sale of real estate, like other contracts for sale, cast on vendors a general liability for damages for non-fulfilment of contract, subject only to an exception in a very special and limited class of cases, and that unless a case is brought within that special class the general rule applies. In *Day v. Singleton* (2) the question of the vendor's conduct was material, because, on the view taken by the court, it prevented the case from falling within the special class by reason of the failure being due, in fact, not to inability to make title, but to deliberate abstention from doing so. But if the case, as here, is outside the special class of exception for another reason—namely, because it is a case merely of inability to convey—the question of conduct is immaterial, and the vendor is liable for non-fulfilment of contract, wholly irrespective of misconduct.

The question, indeed, seems to me to be covered by the following passage in the judgment of LORD HATHERLEY in *Bain v. Fothergill* (3) (L.R. 7 H.L. at p. 209), namely,

"The vendor in [*Engell v. Fitch* (1)] was bound by his contract, as every vendor is bound by his contract, to do all that he could to complete the conveyance. Whenever it is a matter of conveyancing, and not a matter of title, it is the duty of the vendor to do everything that he is enabled to do by force of his own interest, and also by force of the interest of others whom he can compel to concur in the conveyance."

Here I think that the vendor could "complete the conveyance," and could compel the mortgagees to join in the conveyance within the meaning of that passage; and that mere pecuniary inability to do so forms no better defence than it ordinarily does to a claim for a breach of contract. Can it be doubted, for instance, that in *Engell v. Fitch* (1), if the omission of the vendor to bring an action to dispossess the actual occupier had been due to lack of means, the decision would nevertheless have been precisely the same? At one time I entertained a doubt whether some difference might not be caused in the present case by the fact that the mortgagees' refusal to release arose out of difficulties arising from or connected with the fact of the property sold being real estate, and being physically intermixed with the rest of the property subject to the mortgage. But ultimately I have come to the conclusion that this doubt is unfounded. It is clear that the mortgagees' reluctance to convey in the way contracted for would have been overcome if they had been paid a sufficient part of their mortgage money to leave the remainder well secured notwithstanding that the hotel had not obtained the reservations and stipulations they were seeking. And even if this were not so, it was always open to the vendor's executors, apart from their pecuniary disabilities, to pay the mortgagees off altogether. Accordingly I hold that the vendor and his estate are liable for general damages.

The parties have expressed a desire that I should not send the case back to the master to assess the damages, but that I should deal with it myself, and they are both agreed upon this, that the time for estimating the damages was the time when the breach occurred and the contract was broken off, so that I have to consider what the real value of the property was at the time when the contract was broken. Now, the purchasers originally put the damage at £500 on the ground of the special value of the purchase to the company, but they have since found that that ground is quite insupportable in law, and I think that there is a good deal of doubt on the evidence which they have brought forward for the purpose of showing that the damages to an ordinary purchaser, apart from the special value to them, nevertheless remain at this original sum of £500. I have also to take this into consideration, that the deceased vendor himself was an estate agent, and that he had held the property for a long time, quite vacant, except for one unsatisfactory tenant, and that the rent asked was only £80, and I do not think the property can be worth more than £80; and I also have to take this into account, that his present partner considers that £1,000 was the real value, so that there is considerable *prima facie* evidence in favour of holding the sum of £1,000 to have been the true value. On the other hand, there is a great deal of evidence given which shows that the value to an ordinary purchaser considerably exceeded the sum of £1,000, although I am not prepared to say that it exceeded the sum of £1,000 by that sum which had been originally fixed on the basis of the special damage to the purchasers. Although I recognise that it is rather difficult in this case to arrive at the sum without any cross-examination of the persons who have given these fluctuating estimates of value, yet I think that the weight of evidence on the whole is in favour of the property having really been worth more than £1,000, and the fact that the vendor with his special knowledge sold at the sum of £1,000 is probably attributable to the fact that he was undoubtedly in a difficulty shortly before his death, and that he was sacrificing this property, having got tired of holding it so long, at less than its real value. Weighing one thing with another, I have come to the conclusion that the value of the property on the whole was very much nearer £1,000 than the sum of £1,500. I put the value at £1,125, and accordingly I allow the company's claim at £125. That being so, of course they cannot have, in addition to the £125, the costs of investigating the title—that is, £87 odd, which the master allowed them. I do not think that was contended for by counsel for the purchaser; and indeed such a claim could not be supported, for this reason, that the basis of the estimate of the loss is the difference between the value of the property if it had been conveyed to them in accordance with the

contract and the price given for the property, which difference I have put at £125. If they had had the property conveyed to them, of course they would have had to incur all the expense in investigating the title that they did actually incur. Therefore it is impossible to give them that sum in addition to the sum by way of general damages. Accordingly I propose to allow the proof of the company, the purchasers, in the administration of the estate at £125, and I give them their costs as between party and party of their claim and of their summons to vary. The costs of the claim will not, of course, now be limited to the sum of £6 6s. fixed by the master, because he fixed that on the basis that the evidence of value was not relevant. So that the sum of £6 6s. will be struck out, and the costs will be taxed generally of the claim and of the summons to vary, and the executors will have their costs as between solicitor and client as against the estate.

Solicitors: *Stanley, Wasbrough, Doggett & Baker; Rider, Heaton, Meredith & Mills, for Osborne, Ward, Vassall & Co., Bristol; Pilgrim & Phillips.*

[*Reported by L. MORGAN MAY, Esq., Barrister-at-Law.*]

Re HICKLIN. PUBLIC TRUSTEE v. HOARE

[CHANCERY DIVISION (Astbury, J.), June 21, 1917]

[Reported [1917] 2 Ch. 278; 86 L.J.Ch. 740; 117 L.T. 403; 33 T.L.R. 748; 61 Sol. Jo. 630]

Estate Duty—Property out of which duty payable—Property not passing to executor as such—Residuary fund passing in default of appointment—Charge to be borne rateably by pecuniary and residuary legacies—Incidence of expenses of payment of duty, legacy duty on pecuniary legacies, distribution of balance of fund, and withdrawal fee of Public Trustee—Finance Act, 1894 (57 & 58 Vict., c. 30), s. 9 (1).

The testator devised and bequeathed his real and residuary personal estate to trustees on trust for sale and directed that the income of the residuary trust fund be paid to his wife for life and thereafter be held on trust as the wife might appoint. In default of appointment the trustees were to hold the fund on trust to pay certain pecuniary legacies and to divide the residue among residuary legatees. The testator died in 1909. By her will made in 1911 the wife exercised her power of appointment over a small portion of the fund, leaving the remainder to pass in default of appointment. On the wife's death in 1915 estate duty became payable on the residuary trust fund, and the question arose, in regard to the unappointed portion of the fund, whether the pecuniary legacies should bear a rateable portion of the duty or whether the whole duty should be borne by the ultimate residue.

Held: the estate duty charged by s. 9 (1) of the Finance Act, 1894, on property such as the present unappointed fund, which did not pass to the executor as such, must be borne rateably by all the beneficiaries of the fund, and, accordingly, the estate duty was a charge on the pecuniary legacies as well as on the ultimate residue.

Berry v. Gaukroger (1), [1903] 2 Ch. 116, applied.

Held further: the costs and expenses incidental to (a) the payment of that estate duty, (b) the payment of legacy duty on the pecuniary legacies, and (c) the distribution of the balance of the fund were ordinary costs of distribution, and, therefore, must be borne by the ultimate residue; and that the withdrawal

fee payable to the Public Trustee (who was the sole trustee of the testator's will) on the final distribution of the trust fund was also an ordinary cost of distribution falling on the ultimate residue.

Notes. Legacy duty was abolished by the Finance Act, 1949, s. 27.

Considered: *Re Fuch's Will Trusts, Westminster Bank, Ltd. v. Chew*, [1944]

1 All E.R. 338. Referred to: *Re Cassel's Will Trusts, Public Trustee v. A.-G.*, [1946] 1 All E.R. 704.

As to by whom estate duty is payable on property not passing to the executor as such, see 15 HALSBURY'S LAWS (3rd Edn.) 131, para. 269; and for cases see 21 DIGEST 27 et seq. For the Finance Act, 1894, s. 9 (1), see 9 HALSBURY'S STATUTES (2nd Edn.) 369.

Cases referred to:

(1) *Berry v. Gaukroger*, [1903] 2 Ch. 116; 72 L.J.Ch. 435; 88 L.T. 521; 51 W.R. 449; 19 T.L.R. 445; 47 Sol. Jo. 490, C.A.; 21 Digest 27, 155.

(2) *O'Grady v. Wilmot*, [1916] 2 A.C. 231; 85 L.J.Ch. 386; 32 T.L.R. 456; 60 Sol. Jo. 456; sub nom. *Re O'Grady, O'Grady v. Wilmot*, 114 L.T. 1097; 21 Digest 31, 186.

Also referred to in argument:

Porte v. Williams, [1911] 1 Ch. 188; 80 L.J.Ch. 127; 103 L.T. 798; 55 Sol. Jo. 45; 21 Digest 27, 149.

Re Bentley, Public Trustee v. Bentley, [1914] 2 Ch. 456; 84 L.J.Ch. 54; 111 L.T. 1097; 43 Digest 1035, 4761.

Adjourned Summons.

Benjamin Hicklin, by his will, dated Oct. 29, 1908, after giving a legacy to his wife, Mary Hicklin, and certain specific gifts, directed his trustees to stand possessed of all his real and his residuary personal estate, on trust for sale and conversion and out of the monies thereby arising to pay his funeral and testamentary expenses and certain small bequests. The will then continued:

"And I direct my trustees to invest the residue of my residuary trust funds and to pay the income thereof to my said wife for and during her life and from and after her decease upon trust to stand possessed thereof for such person or persons for such estates and upon and subject to such (if any) powers, conditions, and restrictions, and generally in such manner as my said wife Mary Hicklin shall by deed or will appoint."

In default of or subject to any exercise of the power of appointment the testator gave a sum of £8,000 upon trusts which ceased in 1913, and, subject thereto, he gave large pecuniary legacies to seven persons, making no reference to the payment of duties thereon, and other smaller legacies which he directed to be paid "free of duty." He then directed his trustees to pay and divide all the remainder of his residuary trust funds amongst those of a number of persons named in the will who might survive him and attain the age of twenty-one. The testator died in 1909, his wife surviving him. All the pecuniary and residuary legatees whose interests were subject to the wife exercising her power of appointment survived the testator and the wife, and of the latter all attained the age of twenty-one years. By a will and codicil made in 1911, the wife appointed certain small sums in exercise of her power, but without affecting or altering the legacies given to the pecuniary or residuary legatees. She stated in her will that she did not wish to make any further exercise of the power. She died in 1915. In July, 1916, the plaintiff, the Public Trustee, was appointed sole trustee of the testator's will. Upon the death of the wife a claim for estate duty was made in respect of the whole testator's residue, as property passing at her death over which she had a power of disposal. This summons was taken out to determine whether each of the seven pecuniary legacies should bear a rateable portion of the duty, or whether the whole should be borne by the ultimate residue in exoneration of the pecuniary legacies. The question

was also asked whether the costs and expenses of administration, and in particular the fees and withdrawal fee payable to the Public Trustee upon distribution, should be borne by both classes rateably or by the residue only.

Dill for the Public Trustee.

Harman for the pecuniary legatees.

Hunt for the residuary legatees.

ASTBURY, J., stated the facts and continued: Under the Finance Act, 1894, s. 2 (1) (a) there became payable on the death of the widow estate duty on the unappointed fund, as property of which she was at the date of her death competent to dispose. Her executor became liable to pay this estate duty under s. 6 (2) of the Act of 1894, and, under s. 9 (1), the rateable part of the whole duty payable on the death of the widow, in proportion to the value of any property which did not pass to her executor as such, and which includes this unappointed fund, is made a first charge upon the property in respect of which the duty is leviable. If the widow had had no power of appointment, then, under s. 8 (4), which provides:

“Where property passes on the death of the deceased, and his executor is not accountable for the estate duty in respect of such property, every person to whom any property so passes for any beneficial interest in possession, . . . shall be accountable for the estate duty,”

the pecuniary legatees would have become liable, under sub-s. (4), to account for their proportionate parts of the duty. I do not think that *O'Grady v. Wilmot* (2) really throws any light on the question that I have to decide.

If the matter were free from authority, I think there would be much to be said for this proposition—that, there being estate duty payable in respect of this unappointed fund, which is made a first charge upon the fund by s. 9 (1), that incumbrance ought, having regard to the way in which the testator has given the fund, to be discharged out of the fund as a whole, and that thereafter the pecuniary legacies would be payable, leaving the remainder of the fund to be distributed as part of the testator's ultimate residue. It is not necessary for me to consider that further, because, in the view that I take of the decision of the Court of Appeal in *Berry v. Gaukroger* (1), I am not at liberty to deal with the matter on that footing. In that case the testator, who died before the Act, gave his real and personal property to trustees upon trust for conversion, and to pay his debts, funeral and testamentary expenses, and legacies, and to invest the residue, and out of the income to pay his widow an annuity of £500. Then he directed that after her death the trustees should hold the trust fund upon trust to pay thereout certain legacies, amounting in the aggregate to £9,000, and then to divide the residue among certain persons named in the will. Except that there was no power of appointment given to his widow, the trusts in that case are similar to the ones with which I have to deal. The widow died after the Act came into operation. Estate duty became payable upon so much of the fund as had been set apart to answer annuities and as representing real estate, and the Court of Appeal held that the pecuniary legatees must bear a proportionate part of the duty and that the whole did not fall upon the ultimate residue under the testator's will.

It is perfectly true that all the members of the court decided the case, in one respect, on the language of s. 8 (4), of the Finance Act, 1894. The property in that case being property for which the widow's executor was not accountable, every person to whom it passed was made accountable under that section in the way that I have read. **VAUGHAN WILLIAMS, L.J.**, decided the case solely on the ground of that personal liability. **ROMER, L.J.**, took, I think, the same view, but he went further. After stating that the words “any property” in s. 8 (4), included the pecuniary legatees in that case, he said ([1903] 2 Ch. at p. 133):

“that being so, I think that under s. 9 (1) the duty assessable as against these legacies became a first charge on the legacies, as against the legatees; and,

as above observed, I find nothing in the Act or the will which would justify the court in freeing the pecuniary legatees from this charge by making the residuary legatees indemnify them from it."

The language of that sentence is not free from difficulty, and it has been suggested by counsel before me that all that ROMER, L.J., meant was that the pecuniary legacies, being property within s. 8 (4), and the legatees being, therefore, under an obligation to pay the duty, the charge in s. 9 (1), was not a charge which in any way overrode that liability. But I think the language must be read as going further than that. His words are: "I think that under s. 9 (1), the duty assessable as against these legacies"—not merely the duty payable by the legatees, but the duty assessable as against the legacies—"became a first charge on the legacies as against the legatees." COZENS-HARDY, L.J., after basing his judgment on s. 8 (4), said (*ibid.* at p. 135):

"The only other question is whether there is anything in the language of the will sufficient to exempt the legatees from this liability to contribute"

—that is, the liability to contribute under the rule that he had previously dealt with. Then he says:

"I can find nothing in the use of the word 'legacy' to justify this conclusion. The charge created by the Finance Act under s. 9 (1), was, of course, not in contemplation by the testator, who died many years before the Finance Act. It is a fresh burden, and it must be borne rateably, according to the beneficial interest of the parties in the fund."

I can only read that sentence as meaning that there is a charge (as there undoubtedly is) created by s. 9 (1), and that in the case before him, where there were pecuniary legacies payable out of this fund, and the balance was divisible as has been mentioned, that the burden was a burden which fell upon all the interests in the fund, and must be borne accordingly. It has been contended that that decision ought to be regarded as based solely upon the facts of that particular case, and upon s. 8 (4) which was operative. That section is not operative in the present case, and it has been contended that I ought to hold that this duty is an incumbrance upon this trust fund, which has now become divisible, and that it ought to be discharged in relief of the pecuniary legatees upon that fund at the expense of the residue. As I have said, if it were not for the decision and the passages which I have read in *Berry v. Gaukroger* (1), I think there would be sound reason in coming to that view. But, giving the case and the expressions of ROMER and COZENS-HARDY, L.J.J., the best attention I can, I do not think it would be respectful for me to come to a conclusion which, so far as I can understand their view, would be contrary to the conclusions at which they arrived. I, therefore, hold that the charge created by s. 9 (1), is a charge on the legacies and on the residue, and that it must be borne rateably by the several interests accordingly.

The second question is, first, how ought to be borne the costs and expenses of and incidental to (a) the payment of the estate duty which is payable proportionately by the various parties interested, (b) the payment of legacy duty on the pecuniary legacies, and (c) the distribution of the balance of the fund, and, secondly, how the withdrawal fee payable under the Public Trustee Act, 1906, and the rules and orders made thereunder ought to be borne. With regard to the first three items, although the estate duty and the legacy duty are duties payable in respect of the interests given to the pecuniary legatee, I think that, as the whole estate is now being wound-up and distributed, they are ordinary costs of distribution, and as the testator has given pecuniary legacies out of this fund, and has directed the ultimate residue only to be held for the residuary legatees, I think the latter must bear and pay these costs as ordinary costs of distribution, and that no proportion thereof ought to fall on the pecuniary legatees. I have come to the same conclusion with regard to the withdrawal fee payable to the Public Trustee under the Public

Trustee (Fees) Order, 1912, which provides that upon the withdrawal of any capital from the trust, a fee, as therein mentioned, shall be payable, and the Public Trustee Act, 1906, s. 9 (2), provides that any expenses which might be paid out of trust property by the Public Trustee shall be paid in like manner, and in addition to such expenses. Here the trustee is distributing, or about to distribute, the total fund. I think that the withdrawal fee, just as the other expenses, is an expense which he must incur as such trustee in making this final distribution, and that it must fall upon the residue.

Order accordingly.

Solicitors: *Finnis, Downey, Linnell & Chessher*, for *S. W. Page & Sons*, Wolverhampton; *Cecil J. Mercer*.

[*Reported by G. HAYES, Esq., Barrister-at-Law.*]

Re KNIGHT'S SETTLED ESTATES

[CHANCERY DIVISION (Neville, J.), November 15, 1917]

[Reported [1918] 1 Ch. 211; 87 L.J.Ch. 111; 118 L.T. 170;
62 Sol. Jo. 141]

Settled Land—Tenant for life—Incumbrance created by settlor—Sale with consent of incumbrancer—Power to shift incumbrance overreached by sale and attached to proceeds of sale—Settled Land Act, 1882 (45 & 46 Vict., c. 38), s. 5, s. 20 (2).

A tenant for life who desires to sell part of the settled land which is subject to an incumbrance created by the settlor so that the incumbrance should not attach to the proceeds of sale has power to do so under s. 5 of the Settled Land Act, 1882, and with the consent of the incumbrancer, to shift the incumbrance to any other part of the settled land not sold in exoneration of the part sold and the proceeds of sale, notwithstanding that by a conveyance under s. 20 (2) of that Act, although the incumbrance on the land is discharged the incumbrance itself is not overreached but attaches to the proceeds of sale.

Notes. Section 5 and s. 20 (2) of the Settled Land Act, 1882, have been replaced by s. 69 and s. 72, respectively, of the Settled Land Act, 1925, see 23 HALSBURY'S STATUTES (2nd Edn.) 153, 158. The words in s. 5 of the Act of 1925 "... whether capable of being overreached on the exercise by the tenant for life of his powers under this Act or not) ..." would appear to confirm the decision in this case.

As to the power of the tenant for life to shift incumbrances created by the settlement, see 34 HALSBURY'S LAWS (3rd Edn.) 569, and for cases see 40 DIGEST (Repl.) 888.

Cases referred to in argument:

Re Earl of Strafford and Maples, [1896] 1 Ch. 235; 65 L.J.Ch. 124; 73 L.T. 586; 44 W.R. 259; 40 Sol. Jo. 130, C.A.; 40 Digest (Repl.) 838, 3152.

Hampden v. Earl of Buckinghamshire, [1893] 2 Ch. 531; 62 L.J.Ch. 643; 68 L.T. 695; 41 W.R. 516; 37 Sol. Jo. 455; 2 R. 419, C.A.; 40 Digest (Repl.) 809, 2870.

Re Mundy and Roper's Contract, [1899] 1 Ch. 275; 68 L.J.Ch. 135; 79 L.T. 583; 47 W.R. 226; 43 Sol. Jo. 151, C.A.; 40 Digest (Repl.) 866, 3384.

Adjourned Summons.

Edward Knight by his will, dated Feb. 17, 1876, settled certain freehold estates in strict settlement, and thereby charged the Neatham Manor Farm of 525 acres

and Neatham Mill, in the county of Southampton, forming part of the settled estates, with a jointure rentcharge in favour of Florence Knight, the wife of the testator's son, Montague George Knight, the first tenant for life under his will. The testator died on Nov. 5, 1879. Montague George Knight died on July 17, 1914, without ever having had any issue, and in the events which happened Lionel Charles Edward Knight, the plaintiff, succeeded as tenant for life of the estates settled by the will. The plaintiff, with the object of providing money for payment of estate duty which became payable on the death of the late tenant for life, Montague George Knight, desired to sell the Neatham Manor Farm and Neatham Mill, the part of the settled estates which he was able to sell most advantageously. Not wishing that the jointure rentcharge should attach to the proceeds of sale, and desiring to use those moneys without limitation as capital money arising under the Settled Land Acts, the plaintiff took out this summons, to which the present trustees of the will were made defendants, to determine whether on a sale of the Neatham Manor Farm and Neatham Mill or part thereof he had power as tenant for life under s. 5 of the Settled Land Act, 1882, with the consent of the jointress, to charge the jointure rentcharge on other parts of the settled estates in exoneration of the part sold, notwithstanding that the said jointure rentcharge either would or might be overreached by the conveyance by the plaintiff to a purchaser at such sale.

H. Johnston for the plaintiff.

F. E. Farrer for the trustees.

P. F. Wheeler for the jointress.

NEVILLE, J.—A short but very important question is raised upon this summons under s. 5 of the Settled Land Act, 1882, which provides that:

"Where on a sale, exchange, or partition there is an incumbrance affecting land sold or given in exchange or on partition, the tenant for life, with the consent of the incumbrancer, may charge that incumbrance on any other part of the settled land, whether already charged therewith or not, in exoneration of the part sold or so given, and, by conveyance of the fee simple or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, make provision accordingly."

In *WOLSTENHOLME'S CONVEYANCING AND SETTLED LAND ACTS* (9th Edn.) p. 343 [see now (12th Edn.) vol. 2, p. 1086], the note to s. 5 of the Settled Land Act, 1882, is as follows:

" 'Incumbrance,' within the meaning of this section, includes a charge having priority to the settlement, although no money has been actually raised under it, but not a charge created by, or in exercise of any power in, the settlement, on which no money has been actually raised. The last-mentioned charge is, but the other is not, overreached by the conveyance of the tenant for life under s. 20 (2). A substituted security on any other part of the settled land may be given under this section for any charge not overreached."

That note has found its way in different words into several other text-books, to which I have been referred, and they seem to be unanimous as to its accuracy. But in my opinion the view there expressed as to the operation of the section is erroneous, and it is easy to understand how such a mistaken view came to be accepted by the textwriters, because on a superficial consideration of the section one sees that if a tenant for life can, with the consent of an incumbrancer whose incumbrance has priority, transfer the charge so as to sell free from the incumbrance, why should he have to get the consent of an incumbrancer to transfer an incumbrance which is overreached by the sale and which attaches to the proceeds of sale? But on going a little deeper into the section it becomes clear that that view is erroneous, because it overlooks the fact that, although the incumbrance on the land is discharged by a conveyance under s. 20 (2) of the Settled Land Act, 1882,

the incumbrance itself is not overreached, but attaches to the proceeds of sale, and that the tenant for life may wish to transfer it to another part of the settled estates. Consequently, the power of the tenant for life to use the whole of the proceeds of sale will be hampered if he cannot, as here, use those moneys without limitation as capital money arising under the Act. There is great convenience given by the words used in s. 5 of this Act if they are given a wide interpretation so as to get rid of a charge on land to be sold or given in exchange or partition. I have carefully considered the section, and I can see nothing whatever in its language to justify the limiting of its operation as suggested by text-writers, and if their view is right a great benefit given to the tenant for life would be withheld from him. I hold on the construction of the section that an incumbrance, although over-reached by a sale and attaching to the proceeds of sale, is within the beneficial operation of the section. Therefore an incumbrance, though created by the settlement itself, is nevertheless within the meaning of the section. There will be a declaration that on a sale of the Neatham Manor Farm Estate the tenant for life may, with the consent of the jointress, charge the jointure rentcharge on other parts of the estates settled by the will of the testator.

Order accordingly.

Solicitors: *Andrew, Wood, Purves & Sutton*, for *G. Brook Night*, Farnborough; *Evans, Wadham & Co.*

[Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.]

RONDEAU, LEGRAND & CO. v. MARKS

[COURT OF APPEAL (Pickford and Bankes, L.J.J., and Sargant, J.), October 15, 1917]

[Reported [1918] 1 K.B. 75; 87 L.J.K.B. 215; 117 L.T. 651; 34 T.L.R. 8; 62 Sol. Jo. 24]

Husband and Wife—"Necessaries"—*Wearing apparel*—*Agreement that all apparel be provided by husband for wife and be his property*—*Validity.*

A husband is bound to provide his wife with necessary wearing apparel, but he is not bound to give it to her. Therefore, where a husband has provided his wife with wearing apparel in pursuance of an agreement between them that the property therein is to remain in the husband, the agreement is valid and the apparel is not liable to be taken in execution by a judgment creditor of the wife.

Decision of BAILHACHE, J., [1917] 2 K.B. 636, affirmed.

Notes. As to gifts between husband and wife, see 19 HALSBURY'S LAWS (3rd Edn.) 831 et seq.; and for cases see 27 DIGEST (Repl.) 145 et seq.

Cases referred to in argument:

Masson, Templier & Co. v. De Fries, [1909] 2 K.B. 831; 79 L.J.K.B. 24; 101 L.T. 476; 25 T.L.R. 784; 53 Sol. Jo. 744, C.A.; 27 Digest (Repl.) 102, 751.

Read v. Legard (1851), 6 Exch. 636; 20 L.J.Ex. 309; 17 L.T.O.S. 145; 15 Jur. 494; 155 E.R. 698; 27 Digest (Repl.) 80, 613.

Powell v. Hankey (1722), 2 P. Wms. 82.

Appeal from a judgment of BAILHACHE, J.

The following Case was stated by MASTER CHITTY for the opinion of the court in an interpleader issue referred to the master in respect of a claim by a husband to the property in his wife's clothing and articles of attire as against execution creditors on a judgment obtained by them against the wife. (i) The claimant (the husband of the judgment debtor) claimed all his wife's dresses, clothing, and

wearing apparel on the ground that, in July, 1914, he made an agreement that all dresses, articles of clothing, and wearing apparel which were to be used or worn by his wife were to be purchased by the claimant in his own name and on his credit, and that such dresses, articles of clothing, and wearing apparel when purchased were to be the absolute property of the claimant, and that he was to be entitled to dispose of them as and when and how he pleased, his wife having no right or title to them except to wear them during his pleasure. The master found the agreement proved, and that the dresses and wearing apparel were bought by the claimant and used by his wife on such terms. (ii) It was contended by the execution creditors that the alleged agreement was in fraud of creditors, contrary to public policy, void for want of consideration, invalid in law, and not such an agreement as the law would recognise as binding in effect. The question for the opinion of the court was whether such an agreement was valid in law or not.

BAILHACHE, J., held that the agreement was valid, and the execution creditors appealed.

Schiller, K.C., and J. D. Crawford for the execution creditors.

D. M. Hogg, K.C., and C. F. Lowenthal for the claimant.

PICKFORD, L.J.—I think the judgment of BAILHACHE, J., was right. If I may say so, I think that the only difficulty has been occasioned by the form in which the Case is Stated. Assume that the property in this case would have been the wife's but for this agreement, is this agreement to take it away from her a valid one? I do not think that is the question at all, and I do not think so for the reason that BAILHACHE, J., has given. There lies at the root of that assumption this proposition, that the obligation of a husband to provide clothing for his wife is an obligation to provide it by giving it to her and that he does not discharge his obligation without doing it, and, therefore, apart from any agreement such as has been mentioned in this case, as soon as the clothing has been bought, it becomes the property of the wife. I do not think that any such obligation exists. It clearly did not exist before the Married Women's Property Act, 1882, because all the clothing that the husband provided, including what was called paraphernalia, remained his property, and could be seized by his execution creditors. The Married Women's Property Act said that the wife might acquire property of her own, but I do not know that it ever said that property bought with her husband's money which did not become her property has ipso facto, as soon as that Act was passed, become her property.

I think that the husband discharged his obligation in law to the wife so long as he provided her clothes, either by giving them to her or by lending them to her. I agree with BAILHACHE, J., that in ordinary cases where a husband provides clothing for his wife the presumption is that he intends to give it to her, but I see nothing to prevent the husband and the wife from rebutting that presumption, and I see nothing to prevent the conversation by which they rebut that presumption from being called an agreement. It does not follow that, by calling it an agreement, you attach to it all the niceties of consideration and other matters. What happened in this case was that they "agreed," using the word in the ordinary and popular sense, that the provision for her should be by lending the clothes and not by giving them, and the fact that there was attached to the loan a right of the husband to re-possess himself of the property and clothing does not seem to me to divest him of his obligation to provide for his wife. If he took the property away and left her without any clothing at all, he would have an obligation to provide for her, it might be, by lending her other clothes, and providing her in just the same way as he provided her at first.

The only question we are asked is whether that agreement is valid in law or not. I can see nothing to say that it is not. I am dealing with it altogether apart from questions of consideration, or what might be necessary to take the property out of the wife, if it had ever been in her. I think that, where there is only an

obligation to provide either by giving or lending, as agreed between the parties, the agreement for lending is valid in law in this sense, that there is nothing to prevent the parties doing so. It has been argued that we must simply say whether or not this is such an agreement as could be enforced if not supported by consideration. I do not think that that is the intention of the case before us at all. I think the intention of the case is simply to ask the court whether what took place between the husband and the wife was operative, or constituted such a state of things that this property is now the property of the husband, and not of the wife. I think it did, and in that sense it is valid in law. I do not see any real difficulty except the one that has been raised by assuming, or asking us to assume, that, but for this agreement, the property was the wife's. What took place in this case was perfectly valid in law, and BAILHACHE, J.'s, judgment saying that it was valid in law is right.

BANKES, L.J.—I agree. This case has been argued as though this so-called agreement excluded the husband's common law obligation to provide his wife with necessary clothing. I do not so read or interpret the conversation which took place between this husband and wife. It seems to me that, if you use language other than the one in which they themselves clothed their statements, it amounts to this: The husband says to the wife, "I will provide all your clothes, and, as by so doing I shall be fulfilling and more than fulfilling my common law obligation, you must undertake not to pledge my credit," and she agrees. He then says, "You shall have no right of property in any of the clothes so provided, but you shall have a right to wear them only during my pleasure," and she agrees. Whether you treat that as an agreement in the strict legal technical sense that counsel for the execution creditors says we are obliged to take it, or whether you treat it as an agreement in a colloquial sense, as a statement to which both parties assent, seems to me immaterial. If it was necessary and we were bound to treat it as one of a legal agreement for which consideration was required, I think I can find in the statement, as I read it, sufficient consideration, there being a statement and an agreement with reference to clothes other than and beyond those which would be covered by the husband's common law obligations. But I feel myself entitled to take the view which BAILHACHE, J., took, that, when this Special Case asks whether such an agreement is valid in law, you are entitled to take the view that it was operative in the sense that it marked an arrangement between husband and wife as to the rights that she should exercise in respect of clothes provided for her, and was something short of a legal agreement which required consideration. I think on both grounds the appeal fails.

SARGANT, J.—I am of the same opinion. I think that the point raised by the Special Case can be interpreted by the contention mentioned in para. 2. There it is said, "It was contended by the execution creditors that the alleged agreement was in fraud of the creditors"—that is, in fraud of the wife's creditors—that it was "contrary to public policy; void for want of consideration," and so on. That obviously assumes that the property in the goods at some time or another was in the wife, and the contention is that the effect of the agreement was to raise some legal bar which prevented her dealing with the goods and rendered the agreement invalid. In fact, the goods, as was admitted by counsel for the execution creditors, were goods purchased by the husband, and, therefore, were *prima facie* the property of the husband. Whether this agreement is an agreement which can be enforced in every respect or not, it certainly is sufficient to prevent the ordinary presumption arising under which the clothes might be supposed to have been given to the wife by the husband, and, if the agreement is in any way invalid, the result merely is that the goods remain the property of the person who originally purchased them and provided them—namely, the husband.

But assume for a moment what I do not think is the case, that the wife might have complained of this agreement, and might have come and demanded to have other clothes provided for her which should be her absolute property. Does that

give the execution creditors of the wife any right at all to claim that these particular goods with regard to which this agreement was made are the property of the wife for the purpose of providing a fund for the payment of her debts? It seems to me that such a contention has only to be stated to be disposed of. I agree that this appeal should be dismissed.

Solicitors: *Cohen & Cohen; W. B. Glasier.*

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

HUMPHREYS v. MILLER

[COURT OF APPEAL (Swinfen Eady and Bankes, L.JJ., and A. T. Lawrence, J.), December 7, 11, 1916]

[Reported [1917] 2 K.B. 122; 86 L.J.K.B. 1111; 116 L.T. 668;
33 T.L.R. 115]

Landlord and Tenant—Furnished letting—Implied warranty of fitness of tenant to occupy.

On the taking of furnished apartments, there is no implied warranty by the incoming tenant that he is a fit and proper person to occupy the apartments, and is not suffering from any infectious or contagious disease.

Notes. Considered: *Collins v. Hopkins*, [1923] All E.R. Rep. 225.

As to warranty of fitness on the letting of a furnished house, see 23 HALSBURY'S LAWS (3rd Edn.) 577, 578; and for cases see 30 DIGEST (Repl.) 547.

Cases referred to:

- (1) *Smith v. Marrable* (1843), 11 M. & W. 5; Car. & M. 479; 12 L.J.Ex. 223; 7 Jur. 70; 152 E.R. 693; 31 Digest (Repl.) 195, 3266.
- (2) *Wilson v. Finch Hatton* (1877), 2 Ex.D. 336; 46 L.J.Q.B. 489; 36 L.T. 473; 41 J.P. 583; 25 W.R. 537; 31 Digest (Repl.) 196, 3268.
- (3) *Bird v. Lord Greville* (1884), Cab. & El. 317; 31 Digest (Repl.) 197, 3281.

Application by the plaintiff for judgment or a new trial of an action tried by DARLING, J., with a special jury.

The plaintiff, who let furnished lodgings, sued to recover damages for breach of warranty, fraudulent misrepresentation, and concealment against Miss I. K. Miller and Mr. A. W. Rendell, the executors of H. C. Miller, and Dr. Harbord. In July, 1914, Miss Miller engaged furnished lodgings in the plaintiff's house for herself and her father, and on Sept. 10 they entered into occupation of the lodgings and remained there until the death of Mr. Miller on Dec. 16. Dr. Harbord, who had previously been Mr. Miller's medical adviser, attended him from Sept. 21 until his death. As a result of letting the lodgings, some of the plaintiff's furniture had to be destroyed. The questions left to the jury, with the answers thereto, were as follows: (i) Was Mr. Miller when he entered or remained in the plaintiff's rooms liable to infect them or the furniture there with leprosy?—Yes. (ia) If so, did he or Miss Miller know it?—Yes, both. (ii) Is leprosy infectious or contagious so as to be in England communicable from a leper to another person?—Yes. (iii) Did Miss Miller and Dr. Harbord fraudulently misrepresent that Mr. Miller was a fit and proper person to occupy the plaintiff's rooms?—Yes. (iv) Did Miss Miller and Dr. Harbord conceal from the plaintiff the fact that Mr. Miller was to their knowledge a leper and suffering from a disease which made him unfit and dangerous to occupy the rooms?—Yes. (v) Did Dr. Harbord, acting as agent for Miss Miller

and Mr. Miller, state to Mrs. Humphreys that Mr. Miller was not suffering from any infectious or serious disease?—Yes. (vi) If so, were those statements untrue to the knowledge of either; if so, which?—Yes, to the knowledge of both. (vii) Did Mr. Miller, Miss Miller, and Dr. Harbord conspire together to conceal the state of Mr. Miller from the plaintiff and to make false statements to the plaintiff for that purpose?—Yes. (viii) Damages?—£250. DARLING, J., held (32 T.L.R. 524) that there was in law no implied warranty that an incoming tenant of furnished apartments was a fit and proper person to occupy them, and that there was no evidence of fraudulent misrepresentation or concealment. He gave judgment for the defendants. The plaintiff appealed.

Hemmerde, K.C., and *H. W. Liversedge* for the plaintiff.

McCall, K.C., and *Neilson* for the defendants Miller and Rendell.

Gordon Hewart, K.C., and *Craig Henderson* for the defendant Harbord.

SWINFEN EADY, L.J., stated the facts, and continued: Is there any warranty or condition that, when a person engages furnished rooms he shall not be suffering from any disease which may be contagious, or that he shall not be carrying disease? It is admitted that there is no authority that, on engaging such rooms, there is any such warranty. Such a proposition has never been heard of in the text-books. When a person lets furnished rooms, there is a warranty that the premises are reasonably fit for immediate occupation, and there is authority that a tenant would be entitled to repudiate the contract at once if it appears that the premises are not fit for immediate occupation. That is the result of the decisions in *Smith v. Marrable* (1); *Wilson v. Finch Hatton* (2), and *Bird v. Lord Greville* (3). In my opinion, there is no foundation in law for the argument that a warranty by the intending tenant ought to be implied in such circumstances. If any such warranty is to be imposed, it will have to be imposed by statute. There is nothing in the text-books to support such a proposition, nor is there any principle involved. I agree with the view of DARLING, J., and think that the appeal should be dismissed. [His LORDSHIP further held that there was no evidence of concealment against Miss Miller, nor of misrepresentation against Dr. Harbord.]

BANKES, L.J., and **A. T. LAWRENCE, J.**, concurred.

Appeal dismissed.

Solicitors: *Tippetts; Mason & Co.*; *Le Brasseur & Oakley*.

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

ORMISTON v. GREAT WESTERN RAIL. CO.

[KING's BENCH DIVISION (Rowlatt, J.), January 19, 1917]

[Reported [1917] 1 K.B. 598; 86 L.J.K.B. 759; 116 L.T. 479;
33 T.L.R. 171]*Railway—Liability for act of servant—Arrest of passenger—Authority by company—Regulation of Railways Act, 1889 (52 & 53 Vict., c. 57), s. 5 (2).*

A servant or officer of a railway company may arrest a passenger by virtue of his powers under s. 5 (2) of the Regulation of Railways Act, 1889, only if the passenger refuses to give his name and address after having failed to produce his ticket or to pay his fare. The law does not imply against a railway company that they have given authority to a servant to do that which they have no right to do themselves, and, therefore, no authority can be implied to make a company liable for the act of their servant in arresting a passenger save an authority to act in conformity with s. 5.

The plaintiff held a first-class season ticket between two stations on the defendants' railway. On July 31, 1916, he arrived at one of the stations and showed his ticket to the collector. As he proceeded towards the exit from the station, he was seized by a porter in the defendants' employment, who, in the presence of numerous persons, charged him with having travelled first class with a third-class ticket. The plaintiff sued the defendants, claiming damages for slander, assault, and false imprisonment.

Held: the action failed.

Notes. As to liability of corporations in tort and liability for the acts of a servant, see 9 HALSBURY'S LAWS (3rd Edn.) 87 et seq., and *ibid.*, vol. 25, pp. 535 et seq.; for cases see 13 DIGEST (Repl.) 317 et seq., and 34 DIGEST 123 et seq. As to offences in relation to tickets and fares, see 31 HALSBURY'S LAWS (3rd Edn.) 669 et seq.; and for cases see 8 DIGEST (Repl.) 119 et seq. As to slander imputing a crime, see 24 HALSBURY'S LAWS (3rd Edn.) 30; and for cases see 32 DIGEST 47, 48. For the Regulation of Railways Act, 1889, s. 5, see 19 HALSBURY'S STATUTES (2nd Edn.) 865.

Cases referred to:

- (1) *Michael v. Spiers and Pond, Ltd.* (1909), 101 L.T. 352; 25 T.L.R. 740; 32 Digest 48, 552.
- (2) *Hellwig v. Mitchell*, [1910] 1 K.B. 609; 79 L.J.K.B. 270; 102 L.T. 110; 26 T.L.R. 244; 32 Digest 48, 553.
- (3) *Poulton v. London and South Western Rail. Co.* (1867), L.R. 2 Q.B. 534; 8 B. & S. 616; 36 L.J.Q.B. 294; 17 L.T. 11; 31 J.P. 677; 16 W.R. 309; 8 Digest (Repl.) 127, 812.

Also referred to in argument:

- Goff v. Great Northern Rail. Co.* (1861), 3 E. & E. 672; 30 L.J.Q.B. 148; 3 L.T. 850; 25 J.P. 326; 7 Jur. N.S. 286; 121 E.R. 594; 8 Digest (Repl.) 126, 811.
- Edwards v. London and North Western Rail. Co.* (1870), L.R. 5 C.P. 445; 39 L.J.C.P. 241; 22 L.T. 656; 18 W.R. 834; 34 Digest 136, 1055.
- Allen v. London and South Western Rail. Co.* (1870), L.R. 6 Q.B. 65; 40 L.J.Q.B. 55; 23 L.T. 612; 35 J.P. 308; 19 W.R. 127; 11 Cox, C.C. 621; 34 Digest 135, 1048.
- Bayley v. Manchester, Sheffield and Lincolnshire Rail. Co.* (1873), L.R. 8 C.P. 148; 42 L.J.C.P. 78; 28 L.T. 366, Ex.Ch.; 8 Digest (Repl.) 124, 801.
- Moore v. Metropolitan Rail. Co.* (1872), L.R. 8 Q.B. 36; 42 L.J.Q.B. 23; 27 L.T. 579; 37 J.P. 438; 21 W.R. 145; 8 Digest (Repl.) 127, 813.
- Bank of New South Wales v. Owston* (1879), 4 App. Cas. 270; 48 L.J.P.C. 25; 40 L.T. 500; 43 J.P. 476; 14 Cox, C.C. 267, P.C.; 1 Digest (Repl.) 382, 488.
- Lambert v. Great Eastern Rail. Co.*, [1909] 2 K.B. 776; 79 L.J.K.B. 82; 101 L.T. 408; 73 J.P. 445; 25 T.L.R. 734; 53 Sol. Jo. 732; 22 Cox, C.C. 165, C.A.; 34 Digest 40, 162.

Webb v. Beavan (1883), 11 Q.B.D. 609; 52 L.J.Q.B. 544; 49 L.T. 201; 47 J.P. 489; 32 Digest 48, 550.

Knights v. London, Chatham and Dover Rail. Co. (1893), 62 L.J.Q.B. 378; 5 R. 399; 8 Digest (Repl.) 119, 762.

Action tried before ROWLATT, J., without a jury.

The plaintiff held a first-class season ticket on the defendants' railway between Westbourne Park Station and Hanwell Station, and, according to his evidence, on July 31, 1916, he passed through the ticket barrier at the Westbourne Park Station, showing his ticket to a ticket collector. Before he had arrived at the exit from the station, a porter employed by the defendants took him by the arm, saying, "I want you," dragged him back to the ticket collector, and, in the presence of a large number of persons, said: "You have been travelling first class with a third-class ticket." The ticket collector thereupon said: "He has a first-class ticket."

The plaintiff claimed to recover damages for assault, false imprisonment and slander.

By the Regulation of Railways Act, 1889, s. 5:

"(1) Every passenger by a railway shall, on request by an officer or servant of a railway company, either produce, and if so requested deliver up, a ticket showing that his fare is paid, or pay his fare from the place whence he started, or give the officer or servant his name and address; and in case of default shall be liable on summary conviction to a fine . . . (2) If a passenger having failed either to produce, or if requested to deliver up, a ticket showing that his fare is paid, or to pay his fare, refuses, on request by an officer or servant of a railway company, to give his name and address, any officer of the company or any constable may detain him until he can be conveniently brought before some justice or otherwise discharged by due course of law. (3) If any person—(a) Travels or attempts to travel on a railway without having previously paid his fare, and with intent to avoid payment thereof . . . he shall be liable on summary conviction to a fine not exceeding forty shillings, or, in the case of a second or subsequent offence, either to a fine not exceeding twenty pounds, or in the discretion of the court to imprisonment for a term not exceeding one month."

Alexander Neilson for the plaintiff.

Schiller, K.C., and *Barrington-Ward* for the defendants.

ROWLATT, J., said that the claim for slander could not succeed as the offence of travelling first with a third-class ticket with intent to avoid payment of the fare was punishable by fine only, and it was settled by *Michael v. Spiers and Pond* (1) and *Hellwig v. Mitchell* (2) that to accuse anyone of that class of offence was not actionable slander without special damage, and he continued: It is not a possible contention. That disposes of the question of slander.

I come to the question of assault. [His LORDSHIP stated the facts and continued:] The evidence of the plaintiff is that the porter came forward and took upon himself to assault the plaintiff in this way. In the first place counsel for the plaintiff asks me to say that that indicates some actual authority on the part of the defendants to arrest the plaintiff. The porter did technically arrest the plaintiff, but it is the most elementary thing in the world that the fact that a person does a thing is not evidence that he has authority to do it or delegate it to another person. There is no evidence that there was any actual authority to arrest the plaintiff, but there is, of course, a certain implied authority to servants of railway companies, and it is that that has to be examined upon the evidence that has been given.

First of all, in order to make clear the point that counsel for the defendants made, it is necessary to see what are exactly the powers of the defendants themselves,

because the principle is that they are not to be held to have impliedly given authority to their servants to do something which would be unlawful for them to do themselves. They might do it expressly, but that must be proved. The law does not imply against them that they have given authority to their servants to do things which they have no right to do themselves. What is the power of a railway company in these circumstances? By s. 103 of the Railways Clauses Consolidation Act, 1845, the offence was created of travelling without having previously paid the fare, and with intent to avoid payment. That includes without having paid the proper fare, and then by s. 104 it was provided that any person discovered in or after committing or attempting to commit any of the offences mentioned in s. 103, for there were other offences than that which I have shortly described, might be arrested by any servant of the company. That was the law under that Act, but in 1889 a curious statutory situation was brought about by reason of the enactment of s. 5 of the Regulation of Railways Act, 1889. I will not read that all through, because it does not add to the clarity of the argument, but in my view that section replaces ss. 103 and 104 of the Railways Clauses Consolidation Act, 1845, so far as it covers the same ground. It is an extraordinary thing that that section should have been put upon the statute book, and that it should not have been made clear by repeal or otherwise how ss. 103 and 104 were to stand in future. But the Statute Law Revision Act, 1892, a form of enactment which is not supposed to change any substantive law, did repeal all the earlier, and, for the purpose of this plaintiff, the relevant part of s. 103 of the Railways Clauses Consolidation Act, 1845. It left the definite offence, namely, not quitting a carriage, still governed by s. 103, and left s. 104, which was still necessary to give powers to arrest applicable to that offence which was left to be governed by s. 103, namely, not quitting the railway carriage, but in my view, and I think it was the view of those who drafted the Statute Law Revision Act in question, so far as not paying the fare is concerned, the code and the remedy for it that is contained in the Railways Clauses Consolidation Act, 1845, went, and an entirely new one was provided by s. 5 of the Act of 1889, and under that code there is no power to arrest for travelling without having previously paid the fare, and with intent to avoid payment thereof. The only power of arrest is to arrest a person for not having produce his ticket and refusing on request by an authority to give his name and address. It is that, and that alone, that the companies are empowered to arrest passengers for.

Therefore, according to the principle laid down in *Poulton v. London and South Western Rail. Co.* (3), the defendants only impliedly gave authority to their servants to arrest people for not giving their name and address on the request of an officer or servant of the railway company after not producing a railway ticket or paying their fare. They gave them authority to arrest for that. That means that they gave them authority to arrest them upon an allegation that they have refused to give their name and address upon request. It does not mean that they only give them authority to do it when they are right, so that the defendants are not responsible if the arrest is not justified, because there is no authority; it does not mean that, but it means that the defendants only give the porter authority to act for them in determining whether a man shall be arrested, and arresting a man when the accusation against him is such as gives power to the defendants themselves to arrest, namely, that he has not given his name and address. The evidence in this case, it is to be observed, negatives on the part of the plaintiff that suggestion. This porter emerged from the crowd and proceeded to arrest him for an irrelevant cause. He simply came forward and seized him by the arm for travelling in a class superior to that for which he had a ticket. He might as well have purported to arrest him for travelling without a hat, or any other trivial cause, so far as the law is concerned. He had no authority to do that on behalf of the defendants. The defendants did not put him there to decide whether or not the plaintiff had travelled or whether there was a case against the man for travelling without a proper ticket, and arresting him for that purpose. They might have put

him there to decide whether a man had failed to give his name and address, but that was not the point at all. He arrested him for a cause that was wholly outside any implied authority he could possibly have. On those grounds it seems to me that the point taken by counsel for the defendants is one to which there is no answer, and that the action must fail and be dismissed with costs.

Judgment for defendants.

Solicitors: *Bartlett & Gluckstein; L. B. Page.*

[*Reported by W. V. BALL, Esq., Barrister-at-Law.*]

Re MELTON. MILK v. TOWERS

[COURT OF APPEAL (Swinfen Eady, Warrington and Scrutton, L.JJ.), October 19, 22, 23, 1917]

[Reported [1918] 1 Ch. 37; 87 L.J.Ch. 18; 117 L.T. 679; 34 T.L.R. 20;
[1917] H.B.R. 246]

Guarantee—Surety—Right against debtor—Bequest by surety to debtor—Bankruptcy of debtor—Proof of debt by creditor—Satisfaction of guaranteed debt out of surety's estate—Right of executor to retain out of bequest to debtor amount paid in respect of debt.

In 1901 a testator guaranteed to a bank the amount of his son's indebtedness thereto to the extent of £250. The testator died in 1907, having by his will given his estate to his wife for life, with remainder to the son and three daughters in equal shares. In 1910 the son assigned his vested interest in the estate to the bank, and in 1911 he became bankrupt. The bank proved in the bankruptcy, and received a dividend. In 1912 the executors of the testator paid the £250 due to the bank under the guarantee. In 1915 the bank, with the concurrence of the trustee in the son's bankruptcy, assigned the son's interest in the testator's estate to the son's wife. On the death of the testator's wife in 1916,

Held: the son being under an obligation to indemnify the testator against the consequence of the guarantee, he became a debtor to the testator's estate to the extent of the amount by which his liability to the bank had been discharged out of the testator's estate; so much of the son's assets as was necessary to satisfy this claim of the testator's estate never formed part of the son's property distributable among his creditors in the bankruptcy; and, therefore, although the bank had proved against the son in his bankruptcy, the executors of the testator's estate were entitled to deduct the amount paid by them under the guarantee from the son's one-fourth share of the testator's estate which had been assigned to the son's wife.

Re Binns, Lee v. Binns (1), [1896] 2 Ch. 584, overruled.

Notes. Referred to: *Re Lennard, Lennard's Trustee v. Lennard*, [1934] Ch. 235. Applied: *The Liverpool* (No. 2), [1960] 3 All E.R. 307.

As to legatees bringing debts into account, see 16 HALSBURY'S LAWS (3rd Edn.) 321, 322, and as to a surety's rights against a debtor after satisfaction by surety of guaranteed debt, see *ibid.*, vol. 18, pp. 478-482. For cases see 23 DIGEST (Repl.) 444 et seq., and 26 DIGEST (Repl.) 124 et seq.

Cases referred to:

(1) *Re Binns, Lee v. Binns*, [1896] 2 Ch. 584; 65 L.J.Ch. 830; 75 L.T. 99; 40 Sol. Jo. 654; 26 Digest (Repl.) 126, 891.

- (2) *Midland Banking Co. v. Chambers* (1869), 4 Ch. App. 398; 38 L.J.Ch. 478; 20 L.T. 846; 17 W.R. 598, L.J.J.; 26 Digest (Repl.) 123, 862.
- (3) *Re Sass, Ex parte National Provincial Bank of England*, [1896] 2 Q.B. 12; 65 L.J.Q.B. 481; 74 L.T. 383; 44 W.R. 588; 12 T.L.R. 333; 40 Sol. Jo. 686; 3 Mans. 125; 26 Digest (Repl.) 92, 635.
- (4) *Re Oriental Commercial Bank, Ex parte European Bank* (1871), 7 Ch. App. 99; 41 L.J.Ch. 217; 25 L.T. 648; 20 W.R. 82, L.J.J.; 10 Digest (Repl.) 982, 6764.
- (5) *Willess v. Greenhill* (No. 1) (1860), 29 Beav. 376; 30 L.J.Ch. 808; 9 W.R. 217; 54 E.R. 673; 26 Digest (Repl.) 140, 1008.
- (6) *Re Watson, Turner v. Watson*, [1896] 1 Ch. 925; 65 L.J.Ch. 553; 74 L.T. 453; 44 W.R. 571; 23 Digest (Repl.) 447, 5159.
- (7) *Stammers v. Elliott* (1868), 3 Ch. App. 195; 37 L.J.Ch. 353; 18 L.T. 1; 16 W.R. 489, L.C.; 40 Digest (Repl.) 431, 230.
- (8) *Cherry v. Boulton* (1839), 2 Keen, 319; 4 My. & Cr. 442; 9 L.J.Ch. 118; 3 Jur. 1116; 41 E.R. 171, L.C.; 4 Digest (Repl.) 452, 3967.
- (9) *Re Peruvian Railway Construction Co., Ltd.*, [1915] 2 Ch. 442; 85 L.J.Ch. 129; 113 L.T. 1176; 32 T.L.R. 46; 60 Sol. Jo. 25, C.A.; 10 Digest (Repl.) 1075, 7434.
- (10) *Re Whitehouse, Whitehouse v. Edwards* (1887), 37 Ch.D. 683; 57 L.J.Ch. 161; 57 L.T. 761; 36 W.R. 181; 23 Digest (Repl.) 447, 5158.
- (11) *Rhodesia Goldfields, Ltd., Partridge v. Rhodesia Goldfields, Ltd.*, [1910] 1 Ch. 239; 79 L.J.Ch. 133; 102 L.T. 126; 54 Sol. Jo. 135; 17 Mans. 23; 43 Digest 922, 3617.
- (12) *Re Akerman, Akerman v. Akerman*, [1891] 3 Ch. 212; 61 L.J.Ch. 34; 65 L.T. 194; 40 W.R. 12; 23 Digest (Repl.) 448, 5163.

Also referred to in argument:

- Re Dacre, Whitaker v. Dacre*, [1916] 1 Ch. 344; 85 L.J.Ch. 274; 114 L.T. 387; 60 Sol. Jo. 306, C.A.; 23 Digest (Repl.) 455, 5243.
- Re Wheeler, Hankinson v. Hayter*, [1904] 2 Ch. 66; 73 L.J.Ch. 576; 91 L.T. 227; 52 W.R. 586; 48 Sol. Jo. 493; 23 Digest (Repl.) 450, 5186.
- Armstrong v. Armstrong* (1871), L.R. 12 Eq. 614; 25 L.T. 199; 19 W.R. 971; 4 Digest (Repl.) 455, 3986.
- Re Overend, Gurney & Co., Grissell's Case* (1866), 1 Ch. App. 528; 35 L.J.Ch. 752; 14 L.T. 843; 30 J.P. 548; 12 Jur. N.S. 718; 14 W.R. 1015, L.C. and L.J.J.; 10 Digest (Repl.) 986, 6787.
- Priddy v. Rose* (1817), 3 Mer. 86; 36 E.R. 33; 43 Digest 921, 3612.
- Re Wallis, Ex parte Jenks*, [1902] 1 K.B. 719; 71 L.J.K.B. 465; 18 T.L.R. 414; 9 Mans. 136; 5 Digest (Repl.) 684, 6030.

Appeal from an order of ASTBURY, J., made on a summons taken out by executors and trustees to determine a question arising on the trusts of the will.

On Oct. 29, 1901, Richard Melton and James Chapman executed a deed by which they guaranteed to the London and Provincial Bank the payment of moneys then owing by or in the future to be advanced to the former's son, Arthur Melton. The guarantors covenanted:

"We hereby jointly and severally guarantee to you, your successors, representatives and assigns . . . the repayment of all moneys which shall at any time hereafter for the time being be due or payable to you from or by the said Arthur Melton . . . either separately or jointly with any other person or persons . . . and we and each and every of us hereby declare that this guarantee shall be a continuing guarantee to the extent at any one time of £500 from the amount which for the time being shall be owing as aforesaid to you . . . and in addition to the said sum of such further sum for interest and other banking charges and for costs as shall accrue after the date of demand by you upon us . . . or either of our executors or administrators for payment . . . and we and each

and every of us further declare that you may, without thereby affecting your rights hereunder, at any time or times hereafter determine or vary any credit to the said debtor, or require or accept from him any further security or consideration, or vary, exchange, or release any securities held or to be held by you from or on account of the said debtor. . . . This joint and several guarantee shall continue to be binding on us . . . without right or power on the part of us or either of us to revoke or determine the same except by or with your consent thereto in writing previously had and obtained and upon the executors and administrators, estates and effects of us and each and every of us not so released and discharged by you as aforesaid until the expiration of one calendar month after you shall have received notice in writing from the executor or administrator so bound as aforesaid determining their liability in respect of any liabilities arising after the expiry of the said month, from which date the estate and effects of the party hereto so dying shall cease to be liable thereunder except as to the liabilities existing before and at the date of the expiry of the said month."

Richard Melton made his will in 1906, appointing his wife, Maria Melton, the son, Arthur Melton, and the plaintiff, David Milk, to be his executors and trustees. After providing for payment of his debts and giving some small pecuniary legacies, he gave all the residue of his personal estate to his wife absolutely. He demised all his real estate to her for life, and directed that after her death the surviving trustees should sell the real estate and divide all the moneys arising from the sale amongst his children in equal shares. The testator died on July 6, 1907, leaving his wife, his son, and three married daughters surviving him. The value of the personal estate was small and insufficient to pay the debts and funeral expenses, but the value of the real estate was estimated at his death at about £3,000. In June, 1910, Arthur Melton, by way of security for his indebtedness, assigned all his vested interest in remainder in his father's estate to the London and Provincial Bank. In April, 1911, Arthur Melton absconded. On May 24, 1911, a receiving order was made against him, and on June 12, 1911, he was adjudicated bankrupt. At that time he owed the bank more than £1,030. The bank proved in his bankruptcy, and received a dividend of £494 4s. 6d. James Chapman having died in 1909, the bank, in 1912, called upon the executors of both guarantors to pay the £500 specified in the deed of guarantee, with charges and costs. The executors of Chapman paid at once, and the two acting executors of Richard Melton obtained an order of the court enabling them, without the concurrence of Arthur Melton, to raise by mortgage of the real estate a sum sufficient to pay their testator's share of the guarantee. The amount paid to the bank for debt, interest, and charges amounted to £313 13s. 8d. In April, 1915, the bank, in consideration of the sum of £75, assigned all the interest of Arthur Melton in the residuary estate of the testator to Arthur Melton's wife, Frances Melton. The official receiver in bankruptcy of Arthur Melton was a party to the deed. Maria Melton died on April 13, 1916, the four children of the marriage surviving her. After her death Arthur Melton's whereabouts were discovered, and by a deed executed in July, 1916, he retired from the trusts of Richard Melton's will, another trustee being appointed in his place. The then trustees, the plaintiffs in this summons, realised Richard Melton's estate, and after paying off all charges, including the mortgage raised to pay the bank the amount due under the guarantee, there remained a sum of £1,597 18s. 10d. They now asked the court to determine whether they should deduct from the one-fourth share due to Frances Melton, as assignee of Arthur Melton, the amount so paid to the bank. Frances Melton and the three daughters of the testator were cited as defendants. ASTBURY, J., held that the defendant assignee, Frances Melton, was not entitled to receive in the administration of the testator's estate more than the true amount of the bankrupt's residuary share, which must be determined after bringing into account the amount paid for him

under the guarantee, with interest thereon at four per cent. From that decision the assignee appealed.

L. F. Potts for the assignee.

Beebee for the defendants the other residuary legatees.

Sheldon, for the trustees, took no part in the argument.

SWINFEN EADY, L.J.—This is an appeal from a decision of **ASTBURY, J.**, whereby he declared that in the events that have happened the plaintiffs, as trustees of the will of Richard Melton, were entitled to retain as against the defendant, Frances Melton, or to deduct from the share of which she was an assignee, two sums—one a sum of £313 13s. 8d., and the other a sum of £47 2s. 2d. She appeals against that order. With regard to the sum of £47 2s. 2d. the point has not been argued, and, indeed, when the grounds upon which the claims are put are stated it was conceded that it was not arguable. Mrs. Melton is the assignee of a share under the will of Arthur, a son of the testator. Arthur was a trustee of the will, and absconded, and put the estate to certain costs, which were taxed at £47 2s. 2d., and it is conceded that Arthur must bear those costs. The assignee of Arthur with regard to them is in no better position than Arthur himself should have been; and so the appeal with regard to the £47 2s. 2d. has not been pressed.

The question really turns upon the point relating to the £313 13s. 8d. The contention of Frances Melton is that that sum is not to be retained out of the share of Arthur, or brought into account as against the assignee of the share. The question arises in this way. On Oct. 29, 1901, the testator, Richard Melton, gave a guarantee to a bank for his son Arthur; a Mr. Chapman joined in the guarantee. It was a joint and several guarantee on the bank's printed form, which is of an elaborate character, and its effect, which is not in dispute, is that it is a continuing guarantee for the whole of the debt owing from Arthur to the bank from time to time, with a limit of the liability of each surety to £250. On July 6, 1907, the testator died. He gave his personal estate to his wife, subject to his debts, funeral and testamentary expenses. The personal estate was small and insufficient to pay the debts, funeral and testamentary expenses. He had some realty, and he gave that, after the death of his widow, upon trust for sale and to convert and divide into four shares (he had four children), a share to each child, the son Arthur and three daughters. So that Arthur took one-fourth of the proceeds of sale of the testator's real estate. On June 4, 1910, Arthur mortgaged his share under the will to the bank to secure a debt. On June 12, 1911, Arthur was adjudicated a bankrupt. He has never obtained his discharge in the bankruptcy. In the autumn of 1912 a sufficient amount was raised out of the real estate to pay the debts of the testator remaining unpaid, including the £250 which the testator's estate was called upon to pay under the guarantee, with an amount for interest, bringing up the total sum paid to £313 13s. 8d., that is £250 principal and £63 13s. 8d. for interest, making together £313 13s. 8d. The testator's estate was liable for the payment, and that was raised under an order of the court, and recourse had to be had to the court in consequence of the absconding of the trustee—the beneficiaries could not deal with the real estate—and the costs incurred on that occasion were the £47 to which I have already referred and from which I now pass. On April 30, 1915, Arthur's wife, Frances Melton, purchased the share of Arthur under his father's will from the bank as mortgagees, the trustee in bankruptcy concurring in the assignment, and in that way became entitled to the share of Arthur. The rest of the real estate has now been sold. After paying expenses and so on there is a sum of £1,597 18s. 10d. for distribution among the testator's four children. I will call it about £1,600. Frances Melton claims that she is entitled to receive one-fourth, say about £400, of that, without any deduction in respect of the £313. Against her it is said: "Not so. The estate consists not only of the sum of £1,600 but also of the £313 which the estate has paid on behalf of Arthur, and which Arthur was originally

indebted to his father in respect of the agreement that the debtor must indemnify the surety for the obligations of the surety." The trustees say: "We have to administer this fund in our hands, treating notionally that £313 as part of the fund." So, again calling it roughly £1,600 and £313 or together £1,900, the trustees say: "You, Mrs. Arthur, are entitled to about one-fourth of about £1,900, of which you have in hand £313." That is the way it is put, and those are the respective contentions of the parties.

It is not disputed that, having regard to the form of the guarantee under an ordinary creditor's deed—and it would be the same in bankruptcy for this purpose—the creditor can prove for the whole amount of the debt. The bank in this case have carried in a proof against the bankrupt's estate for the whole amount of their debt; they can do that notwithstanding that the surety on account of his liability may have made a payment to the bank in respect of which the bank are not bound to give credit. They may prove for the whole amount just as if no payment had been made by the surety. I think, further, that it cannot now be disputed that that would be the same, although the payment made by the surety had been made not out of his own money, but out of the proceeds of a counter-security which may have been given to him by the debtor to indemnify him against his liability as surety. That is the effect of the decision in *Midland Banking Company v. Chambers* (2). There the surety had paid to the bank, who were the creditors, a sum of £300, the surety had received a mortgage from the debtor to secure his liability under the guarantee, the debtor executed a creditor's deed, the property was realised by the trustees under the creditor's deed, and thereout they paid to the surety the sum of £300, which the surety had paid to the principal creditor. Notwithstanding that, the principal creditor claimed to prove for the whole amount of the debt—£410—which was the amount which the debtor owed them, without having given credit for the £300. In that case it was urged in the same way as counsel for Frances Melton has urged here that it is paying the debt out of the debtor's property twice over, because it was out of his property that the £300 paid by the surety to the bank had been raised, and if the bank proved for the full amount of their claim it was paying the debt twice over. That line of argument did not find favour with the court in *Midland Banking Co. v. Chambers* (2), and GIFFARD, L.J., on appeal, expressed himself thus (4 Ch. App. at p. 402):

"The argument that [the £300] has been paid out of the debtor's estate is a fallacy; it was paid out of something which, having before the execution of the creditor's deed been dedicated to the purpose of indemnifying the surety, was not at the time of the execution of that deed part of the debtor's estate. Such a payment stands on the same footing as if it had been made by Thorpe [the surety] out of his own moneys, and furnishes no ground for reducing the proof."

On the construction of the guarantee, *Re Sass, Ex parte National Provincial Bank of England* (3) was referred to and is to the same effect. It has not been disputed that the form of the guarantee is such that the bank can prove for the full amount. It is quite true, that there can be no double proof against the estate, and the rule against double proof has regard to the substance of the transaction and not to the form. It may well be that technically there are two demands against the debtor in respect of the transaction—two claims, two separate legal liabilities of the debtor, arising out of the transaction. One is the debtor's liability to the bank for the money that he has owed. A separate liability arising out of the contract of guarantee is the debtor's liability to indemnify the surety in respect of the surety's liability to the principal creditor. Technically there are two separate liabilities, but in substance it is the same, and in respect of that liability there could not be double proof against the estate—that is, the creditor could not prove for the amount of the debt, and the surety bring in a proof practically for the same or part of the same amount as regards his liability for part of that amount.

I think that is clear from what MELLISH, L.J., said in *Re Oriental Commercial Bank, Ltd., Ex parte European Bank* (4). The learned lord justice there said (7 Ch. App. at p. 103):

"This rule against double proof applies in the Court of Chancery as well as in the Court of Bankruptcy, and, therefore, would apply equally where companies are being wound-up. It seems to me that the principle is a perfectly sound one."

After referring to the extent to which the principle should be carried, he proceeded (*ibid.*):

"But the principle itself—that an insolvent estate, whether wound-up in Chancery or in bankruptcy, ought not to pay two dividends in respect of the same debt—appears to me to be a perfectly sound principle. If it were not so a creditor could always manage, by getting his debtor to enter into several distinct contracts with different people for the same debt, to obtain higher dividends than the other creditors, and perhaps get his debt paid in full. I apprehend that is what the law does not allow; the true principle is that there is only to be one dividend in respect of what is in substance the same debt, although there may be two separate contracts."

That applies to a case of principal and surety. There could not be a double proof in respect of that obligation. But apart from Arthur having become bankrupt, I think that it cannot be questioned that the debt arising under an obligation to indemnify a surety can be deducted from a legacy or share of residue given to the debtor. Apart from bankruptcy, there can be no question at all.

Willes v. Greenhill (No. 1) (5) was referred to. There a residuary legatee mortgaged his share of residue. After the mortgage a debt of that legatee of which the testator had become surety was paid out of his estate. Of course, the liability of the surety was existing at the date of his death. He was the testator, and his liability to pay as surety was existing at the date of his death. Then the legatee mortgaged his share; and after the mortgage the obligation of the surety was discharged by payment out. It was held by the Master of the Rolls that the lien of the executors had priority over the mortgage; and he put it in this way (29 Beav. at p. 382):

"The share of a residuary legatee is not ascertained until all the charges on the testator's estate have been paid and all equities between each legatee of the testator's estate have been settled. That which remains after this alone constitutes the residue. It does not differ in this respect from a pecuniary legacy."

For this purpose there is no distinction between a share of residue and a pecuniary legacy. The Master of the Rolls continued thus (*ibid.* at pp. 382, 383):

"If a testator leave £1,000 to A., and A. owed the testator £100, the legacy is discharged by paying £900 to the legatee or his assigns. In like manner, if an equity exist at the death of the testator between him and one of his residuary legatees, the share of that person in the residue is only so much as remains after satisfying what is due to the testator's estate . . . All the mortgagee advanced his money upon was the share that Henry [who was entitled to a share] was entitled to receive out of the testator's estate—namely, one-sixth of the clear residue, and which residue must be increased by his paying a sum which the testator's estate has been compelled to pay for his benefit, and which must be treated as a set-off against his share. Whether it be treated as set-off or payment, or in whatever way, it has to be brought into account. This, therefore, whilst increasing the testator's estate and the shares of the other five residuary legatees, diminishes his own; it is only one-sixth of the whole after the repayment of the sum for which the testator was surety for him, and which the executors have been compelled to pay. I am of opinion that Henry's share is only the amount less the recouping that which the

testator's has paid, and accordingly the mortgages are charges on that diminished share only."

The important phrase is "if an equity exists at the death of the testator."

What was the position here? At the death of the testator Arthur took under the will a share of the proceeds of sale of the real estate. At the same moment Arthur was under an obligation to indemnify the testator against the consequences of the guarantee. The subsequent discharge out of the testator's estate of that liability would, therefore, obviously be brought in as against Arthur in respect of his share of the estate. It is money paid which he is liable to repay to the testator's estate, and he is treated as already having in his possession that sum. That is how the matter stands, apart from bankruptcy. Then take bankruptcy. I apprehend it is clear that, even if there is a bankruptcy, but the principal creditor or the creditor has not brought in a proof in bankruptcy, the right of the surety and the trustees of the surety's estate would not be affected. I think that that follows from *Re Watson, Turner v. Watson* (6). In that case it was a surety for a mortgage, the surety was the testator, and by his will he bequeathed a share of the residue of his estate to the mortgagor, for whom he was surety. The mortgagor became bankrupt, and never obtained his discharge. Neither the mortgagees—that is, the creditors—nor the testator's executors, the sureties, proved in the bankruptcy. After the bankruptcy the executors made some payments to the mortgagees in respect of the liability of the testator under the contract of suretyship. It was held that the executors were entitled, notwithstanding the bankruptcy, to retain out of the mortgagor's share of the residue the amount of the payments which they had made to the mortgagees. NORTH, J., in a reserved judgment of considerable length, dealt with the position of the assignees, referred fully to the authorities, and then pointed out ([1896] 1 Ch. at p. 931) that the assignees of the share were in no better position than the son himself would have been if he were alive and not a bankrupt. He then held that the trustees were entitled to retain out of the share of the son what had been paid out of the father's estate in respect of that liability.

Down to that point I think that there is no dispute. But then it is said that the proof by the creditor against the estate affects the right of the surety, and that if the creditor has proved against the estate of the bankrupt, the right of the representatives of the surety to make this deduction is lost. I cannot see why. I put this case to counsel for the assignee during the argument, because the way in which he was then putting his point was thus. He said that by virtue of the bankruptcy and the proof by the creditor the debt is gone, there is nothing owing in respect of which the executors have a right to retain. I put the case to him of a surety receiving a specific charge by deposit of deeds on real estate to indemnify him in respect of his suretyship, and the creditor proving in the bankruptcy. If the surety were not able to retain the security because there was no longer any debt, the principal creditor having proved, it would follow that the trustee in bankruptcy could then come to the surety and say: "Give up the deeds; there is no debt in respect of which you are entitled to them; give them up to me as trustee in bankruptcy." It would be quite impossible to argue that, and counsel conceded that. The only authority on which he relied in support of his proposition was the authority of the case before NORTH, J., of *Re Binns, Lee v. Binns* (1). That was a case in which the surety had deposited with the bank, who were the creditors, a considerable sum, £2,400, as a continuing security for any amount which might be due from the surety's two sons to the bank as principal debtors. The bank proved in the bankruptcy for the whole amount of their debt, £8,858. No dividend was paid in the bankruptcy. It was conceded that it was improbable that the estate would realise enough to pay the bank in full, and that the bank would ultimately appropriate the whole of the deposit towards the sons' debt. The question was whether the trustees of the will were entitled to retain the legacies and shares of

residue bequeathed to the sons against the liability of the father's estate as surety to the bank. NORTH, J., dealt with the case upon the footing of what the position would have been if the sons had not become bankrupt, and he said ([1896] 2 Ch. at pp. 587, 588):

"Suppose that the sons had gone to the executors immediately after the father's death and had pointed out to them that there was a large estate, and that they wished to receive their legacies, or suppose that a year had elapsed from the father's death, and the time had therefore come at which they would have a right to ask for payment of their legacies, and they had come and asked for them? The executors would then have been entitled to say: 'There is a matter still pending as between your father's estate and you; he has become surety for you as principal debtors to the bank; he is entitled to have the security which he has given as your surety released and to be indemnified by you against any claim which can be made by the bank upon the security, or upon himself as giving that security.' It seems to me that the executors would then have been in a position to say to the sons that, although they were not indebted in any particular amount to their father in respect of this transaction, they were bound to indemnify his estate against all liability by reason of his having become surety for them at their request. Under these circumstances the executors might have declined to pay over the legacies to the sons until the account had been worked out and the amount of the liability ascertained."

Now, that would undoubtedly have been the position apart from bankruptcy. The learned judge went on to consider what was the effect of the bankruptcy, and he said (*ibid.* at p. 588):

"How then does the matter stand between the testator's estate and the sons? The trustees of the estate still say to the sons: 'We will not pay over to you any part of your legacies or shares of residue till we have been indemnified by you.' But the difficulty in their way is this: that there is no debt in respect of which the trustees of the will can at present claim to retain anything as against the trustees of the sons' estate. The claim against that estate is made by the principal creditors, and the surety cannot, as against the principal creditors, set up an adverse claim of any kind."

That is the fallacy that was exposed by GIFFARD, L.J., in *Midland Banking Co. v. Chambers* (2). The claim of the surety is not an adverse claim set up against the principal creditors. The suggestion here is that it is set up against the principal creditors because the estate that would be divisible in the bankruptcy is diminished by reason of this claim. That is the point. The fallacy is that at the date of the bankruptcy it was not part of the debtor's estate. The equity arose at the death of the testator; and when the sons became bankrupt there was already an equity subject to which the trustee in bankruptcy took the debtor's interest. The trustee in bankruptcy took nothing more than the debtor had, and the debtor's interest under the will was subject to this equity. In my opinion, the judgment of NORTH, J., in this respect was erroneous, and I think that he fell into the fallacy that was exposed by GIFFARD, L.J., in *Midland Banking Co. v. Chambers* (2). For these reasons I am of opinion that that case was wrongly decided, and that there is nothing to prevent the trustees of the will in the present case maintaining their right to say that the share in which Arthur and his assigns are interested is a share increased by the £313 which Arthur owes to the estate.

The other cases that have been cited do not throw much further light on the present case. *Stammers v. Elliott* (7) was a simple case where the creditor had proved without valuing his security, and the court merely held that he could not prove for the whole debt and rely on his security, and that, having proved for the whole debt he had given up his security. Nor do I think that *Cherry v. Beulthee* (8) really affects the matter, because when you consider what the position was at the

death of the testatrix, she had only a right to prove, which she had not exercised. At the death of the testatrix there was a right to prove under a commission for the debt. She was entitled to dividends, that was all; and she had never exercised her right. I only refer to *Cherry v. Boulton* (8) because the nature of the right of the executor to retain, which is not strictly set-off, was dealt with by the Lord Chancellor who says that it is not a right of set-off. These are his words (4 My. & Cr. at p. 447):

"The term 'set-off' is very inaccurately used in cases of this kind. In its proper use it is applicable only to mutual demands, debts, and credits. The right of an executor of a creditor to retain a sufficient part of a legacy given by the creditor to the debtor to pay a debt due from him to the creditor's estate is rather a right to pay out of the fund in hand than a right of set-off."

Re Peruvian Railway Construction Co., Ltd. (9) was a similar case to that of *Cherry v. Boulton* (8), and was decided on the same ground. There the deceased, Mr. Alt, was a debtor to the company at the time of his death. He died insolvent, and the company had a right to prove against his estate and receive dividends, but that was all. It was years after the death that in the winding-up of the company there was some return upon his shares, and so the estate became entitled to some money. That is practically the same as *Cherry v. Boulton* (8), and was decided on the same ground. The only other case that I need refer to is *Re Whitehouse*, *Whitehouse v. Edwards* (10), decided by STIRLING, J. The language there is appropriate, and only appropriate, to the facts of the case to which it was there applied. That was a case of a composition, and STIRLING, J., pointed out the respective rights of the principal and of the surety. But it was not a case of bankruptcy.

For these reasons I am of opinion that the appeal wholly fails, both as regards the £313 and as regards the £47. I may add this. Care must be taken in properly expressing in the order the effect of the present decision. I mention this because I see that in the affidavit in support of the application the trustee says that he and his co-trustee "now have in our hands the sum of £1,597 18s. 10d. for distribution among the four children." Then Arthur claims one-fourth share of the proceeds; and the question is whether out of that share—that is, one-fourth of £1,600—there ought to be deducted the sum of £313. That is not quite right. The whole share must be brought into account. The fund treated as being available for division must first be increased by the amount which Arthur owes; he is entitled to one-fourth of that entire amount; and as against that he must give credit for what he has already notionally received.

WARRINGTON, L.J.—I am of the same opinion. I think it is quite clear that at the death of the testator the trustees had a right to be indemnified against any claim which they might ultimately have to satisfy as the result of the guarantee, and to retain in their hands so much of the share of Arthur as was sufficient to provide for that indemnity. But it is said that subsequent circumstances have deprived them of that right. Those subsequent circumstances are that after the death of the testator the son became bankrupt. The bank had taken a mortgage of his share for the purpose of securing their debt, and in the bankruptcy, having placed a value on that security, they proved and received dividends on the entire balance of the debt, without reference to the fact that part of it had been guaranteed. That, of course, they were entitled to do. They have also realised the security which they held, but the net result is that they have not yet received 20s. in the pound on their entire debt. Those, I think, are the whole of the really material facts.

It is said that those circumstances deprive the trustees of the right which, but for those circumstances, they would certainly have had. I ask myself "Why?" The first question as to which one has to satisfy one's mind is: What is really the nature of the right which the trustees had as against Arthur, the beneficiary

under the testator's will? That is clearly expressed by the Lord Chancellor in *Cherry v. Boulton* (8), in the particular passage 4 My. & Cr., at p. 447. It had been suggested there that the right of the trustees was in the nature of a set-off. The Lord Chancellor combats that view and says this (*ibid.*):

"It must be observed that the term 'set-off' is very inaccurately used in cases of this kind. In its proper use it is applicable only to mutual demands, debts and credits. The right of an executor of a creditor to retain a sufficient part of a legacy given by the creditor to the debtor to pay a debt due from him to the creditor's estate is rather a right to pay out of the fund in hand than a right of set-off. Such right of payment, therefore, can only arise where there is a right to receive the debt so to be paid, and the legacy or fund so to be applied in payment of the debt must be payable by the person entitled to receive the debt."

The important part of that is that the right of the executor is a right to pay out of the fund in hand. I think it follows from that that if the right of the executors at this testator's death was to pay out of the share sufficient to discharge and satisfy the claim to be indemnified, then so much of that fund as was necessary to make good the trustees' claim never formed part of the estate of Arthur, the legatee, divisible in bankruptcy among his creditors. In saying that, I am only adopting the view clearly expressed by GIFFARD, L.J., in *Midland Banking Co. v. Chambers* (2). It seems to me clearly a corollary of the statement of the Lord Chancellor of that which is the executors' right. GIFFARD, L.J., said (4 Ch. App. at p. 402):

"The argument that [the payment that had been made in that case] has been paid out of the debtor's estate is a fallacy; it was paid out of something which, having before the execution of the creditors' deed [an equivalent in that case to the bankruptcy in the present case] been dedicated for the purpose of indemnifying the surety was not, at the time of the execution of that deed, part of the debtor's estate."

In my judgment, therefore, the answer to the claim put forward by the assignee, who is in the same position, of course, as Arthur, is that so much as is necessary to repay to the testator's estate that which has been paid in satisfaction of the guarantee—that is £313—never formed part of the bankrupt's estate at all divisible among his creditors.

That completely answers the argument put before us founded on the undoubted principle that in bankruptcy there can never be double proofs for the same debt. It is not a question of double proof at all. Double proof has nothing to do with it. In my humble judgment, it is that fallacy referred to by GIFFARD, L.J., into which, with all respect, I think NORTH, J. fell in *Re Binns, Lee v. Binns* (1). The facts in that case are undoubtedly, for all substantial purposes, identical with those of the present case; and if *Re Binns, Lee v. Binns* (1) was rightly decided, it would decide the present case. But, in my opinion, that case was not rightly decided, and the fact that NORTH, J., unwittingly fell into the fallacy referred to by GIFFARD, L.J., is shown quite plainly by his judgment. He said this ([1896] 2 Ch. at p. 588):

"The difficulty in [the way of the trustees] is this: that there is no debt in respect of which the trustees of the will can at present claim to retain anything as against the trustees of the sons' estate. The claim against that estate is made by the principal creditors; and the surety cannot, as against the principal creditors, set up an adverse claim of any kind. No doubt, when the principal creditors have been paid in full, the position of matters would be different."

There are two statements there which seem to me to be unfounded, that is to say, not to be the foundation of the decision at which the learned judge arrives. The first of those statements is "that there is no debt in respect of which the trustees can at present claim to retain." That seems to me to be quite incorrect. The trustees held a certain fund. They had a right to retain in their hands part of that

fund in satisfaction of a claim which they had, and which they had had before his bankruptcy against the bankrupt. It seems to me quite immaterial whether there was a set-off for which they could sue at that moment or not. The second mistake, I think, is found in the statement of the learned judge that the surety cannot, as against the principal creditors, set up an adverse claim of any kind. The answer is that the surety is not setting up an adverse claim against the principal creditors. That which the surety is claiming never was distributable among the creditors of the bankrupt at all. I think, therefore, that in the present case, on the simple ground that the right of the trustees to retain is in respect of something which at the date of the bankruptcy did not form part of the estate distributable among the creditors of the bankrupt, the trustees are still entitled to the right which they then had.

If it were necessary for the purposes of the decision of the present case—I do not think it is as at present advised—I should be prepared to say that the trustees, in respect of their claim, are in the position of secured creditors, for their right, as expressed by the Lord Chancellor in *Cherry v. Boulton* (8), seems to me to have all the characteristics of a depository lien. They have certain moneys in their hands, and out of those moneys they are entitled to pay themselves a certain sum. But it is not necessary to decide that. It is enough to say that, for the other reasons which I have given, I think that the trustees are clearly entitled to retain the amount due from Arthur to the testator's estate in respect of the guarantee, and that the judgment of ASTBURY, J., was, therefore, right and ought to be affirmed.

SCRUTTON, L.J.—A number of authorities have been cited to us in the present case, which is one of considerable complication. I suppose it is inevitable that there should be complication when the facts raise the relation of principal and surety, the right, whatever it is—varying language has been used to describe it—of executors to pay themselves a debt due from a beneficiary under a will out of his share, and the position in bankruptcy. I have had an opportunity while the case has been proceeding of considering the authorities which have been cited, and I am very glad to be able entirely to concur in the result at which my brothers have arrived. It appears to me to be the only result consistent with common sense. But, as I am not quite sure that I get at the result in the same way as one at any rate of my brothers does, I think it right to express shortly my judgment in my own way.

[HIS LORDSHIP stated the facts, said that Frances Melton, the assignee, had relied on the judgment of NORTH, J., in *Re Binns, Lee v. Binns* (1), which decided the point in her favour, and continued:] Take one by one the questions of law which arise. First of all, if there was no bankruptcy, and if there was no question of principal and surety excepting existing debt, what would be the position of the executor? A long series of authorities has decided the position in a simple case like that. I take the statement of the law by SWINFEN EADY, J., in *Re Rhodesia Goldfields, Ltd., Partridge v. Rhodesia Goldfields, Ltd.* (11) ([1910] 1 Ch. at p. 247):

"The rule is of general application that where an estate is being administered by the court, or where a fund is being distributed, a party cannot take anything out of the fund until he has made good what he owes to the fund."

That followed a series of authorities, of which the passage most often cited is a passage by KEKEWICH, J., in *Re Akerman, Akerman v. Akerman* (12) ([1891] 3 Ch. at p. 219):

"A person who owes an estate money—that is to say, who is bound to increase the general mass of the estate by a contribution of his own, cannot claim an aliquot share given to him out of that mass without first making the contribution which completes it. Nothing is in truth retained by the representative of the estate; nothing is in strict language set-off; but the contributor is paid by

holding in his own hand a part of the mass, which, if the mass were completed, he would receive back."

Apply that to a simple case like the present case. A beneficiary is given half the residue. That beneficiary, one of the two beneficiaries who were to divide the residue, owes the estate a sum. I will take a simple figure. Suppose the executors have in hand £500, but that the first beneficiary A. owes the estate £500, what happens? The executors are entitled under that principal to say: "The real residue is £1,000, for you must pay your £500. Half £1,000 is £500. We can give the beneficiary B. £500; we need give you nothing, because you have to give us £500. There is no need to go through that performance; what you get is a release of your debt." In the same way, if instead of owing £500 beneficiary A. owed £250, and the amount in the hands of the executors was £500, the amount of the distributable fund would be £750, and each beneficiary would be entitled to £375, £375 would be paid to beneficiary B., but to beneficiary A. the executors would say: "Here is £125; the other £250 is, as far as you are concerned, discharged. You ought to have given it to us, and we would have handed it back to you. It has the same effect as taking a discharge." I do not think that it is necessary in the present case to decide exactly what that right of the executors is. I am rather disposed to agree with the view that was expressed by KEKEWICH, J. It is not retainer. I have a great difficulty, in spite of the dictum of the learned Lord Chancellor in *Cherry v. Boulton* (8), in seeing how it is a lien. It seems to me that it is simply ascertaining what the share is by finding out what the whole residue is. But I do not think that it is necessary for me, beyond stating the principle in the way which I have done, to say what the exact legal description of it is.

The next question is: How does the fact that the debt is a debt arising out of the relation of principal and surety affect it? As I understand, you work out the law of principal and surety by paying attention to three principles. The debtor must discharge the debt once, and he need not discharge it more than once. The creditor is entitled to get his 20s. in the pound from someone. He cannot get more than 20s. in the pound. The surety is not entitled to keep against the debtor more than he has paid, or is liable to pay. If the creditor is paid in full by the surety, that does not stop the creditor from suing the debtor for the whole debt, because it is true that, although the creditor has got 20s. in the pound, he has not got it from the debtor, and he enforces the full claim as trustee for the surety who has paid the 20s. Again, supposing the debtor has paid the surety the full amount, but owing to the surety's absconding the creditor has not got the money, although the debtor has paid 20s. in the pound, the creditor has not got it. If a debtor pays more than 20s. in the pound, he can get the surplus back; and if the creditor has received more than 20s. in the pound, the surety has received from the debtor more than his debt. To these two sets of legal principles you apply further the question of bankruptcy, with the rule that you must not have double proof—that is to say, not have two proofs for the same debt—and with the further explanation that in regarding what is the same debt you look, not at technicalities, but at substance, as pointed out in *Re Oriental Commercial Bank, Ex parte European Bank* (4) to which my Lord has referred.

Bankruptcy has ensued. The trustee in bankruptcy and the bank come to the executors and say: "Pay over the share of this beneficiary in the estate." What is there to stop the executors from exercising the first right, and saying: "You want your share in the estate. Very well, we must find out what the whole is of which this is a share; and the whole includes your making good the debt." As I understand, it is said first of all: "You cannot use that right, because the only person who can use such a right is a secured creditor, and you are not a secured creditor." A secured creditor is defined in the Bankruptcy Act, 1914, as a person who has a mortgage, charge or lien. Speaking simply for myself, I am

not prepared to say that this right of the executor is a mortgage, charge, or lien. It appears to me to be, as I have said, a right to say to a man who asks for a share: "You must have a share of the whole estate, and not of a part of it. You cannot say: 'Here is part of the estate; I want a share of that, and I am going to disregard that part of the estate which consists of the amount that I ought to pay under a debt to the estate.' " As at present advised, though I do not wish finally to decide it, because the question may arise in other cases, I doubt how that can be called a lien. But equally I see nothing in s. 7 (1) of the Bankruptcy Act, 1914, to make this a remedy against the property or person of the debtor which the creditor is forbidden to exercise unless he is a secured creditor otherwise than by proof. It appears to me to be simply this, that the person who claims a share of the estate is required to claim the proper share, and not to pick out such portions of the estate as he thinks will give him a benefit, and leave out those portions which will reduce the share he would otherwise have. Therefore, I see nothing in s. 7 of the Bankruptcy Act, 1914, which prevents it from being put forward in that way.

Does the rule against double proof come in? When one considers the principles that I have laid down, I hope correctly, on which the law of principal and surety can be governed, how in any way does it infringe the rule of double proof when the bankrupt comes and says: "I want my share," and the creditors say: "Certainly, but you must ascertain your share in the proper way?" If in the end it turns out that the debtor has paid more than 20s. in the pound, he will get it back from one or the other. If in the end it turns out that the creditor has got more than 20s. in the pound, the surplus will be returned to the surety or to the debtor, whichever ought to have it. I am quite unable to see how the rule of double proof applies to the present case. From what I have said it follows that I think that the decision in *Re Binns, Lee v. Binns* (1) was wrongly decided. I agree with the reasons which have been given by the other members of the court as to exactly why it was wrongly decided. For the reasons that I have expressed I have come to the conclusion that the judgment of ASTBURY, J., was right, and that it correctly works out the legal principles, though possibly he was—as we are not—technically bound by *Re Binns, Lee v. Binns* (1), which decided the question the other way.

Appeal dismissed.

Solicitors: *Harrison, Powell & Tulk*, for *E. H. Vores*, East Dereham; *Haslewood, Hare & Co.*, for *Norgate & Hood*, East Dereham.

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

CORNELIUS v. PHILLIPS

[HOUSE OF LORDS (Lord Finlay, L.C., Viscount Haldane, Lord Dunedin, Lord Atkinson and Lord Parmoor), October 30, November, 1, 29, 1917]

[Reported [1918] A.C. 199; 87 L.J.K.B. 246; 118 L.T. 228; 34 T.L.R. 116; 62 Sol. Jo. 140, H.L.]

Moneylender—Address—Business to be carried on at registered address—Solitary transaction carried out elsewhere—Commission of offence—Avoidance of transaction—Moneylenders Act, 1900 (63 & 64 Vict., c. 51), s. 2 (1) (b).

By s. 2 (1) (b) and s. 2 (2) of the Moneylenders Act, 1900 [see now Moneylenders Act, 1927, s. 1 (3) (b): 16 HALSBURY'S STATUTES (2nd Edn.) 377] it was made an offence for a moneylender to carry on the moneylending business at any address other than his registered address or addresses. Such an offence is committed where a moneylending transaction is carried out at an address which is not the moneylender's registered address even though it is an isolated transaction of that kind. It is immaterial whether a single transaction or a number of transactions are involved. The contract resulting from the transaction, being forbidden and made criminal by statute, is void and cannot be enforced by the moneylender against the borrower.

Decision of the Court of Appeal [1916] 2 K.B. 719, sub nom. *Finegold v. Cornelius; Philips, third party*, reversed.

Per LORD FINLAY, L.C.: If a transaction has been substantially effected at the moneylender's registered address, the fact that some subsidiary acts have been done elsewhere will not amount to an offence.

Notes. Considered: *H. Bowen & Co. v. Samuels* (1918), 34 T.L.R. 487; *Grosvenor Guarantee Trust, Ltd. v. Colleano* (1950), 94 Sol. Jo. 706.

As to restrictions on the carrying on of moneylending business, see 27 HALSBURY'S LAWS (3rd Edn.) 29-36, and for cases see 35 DIGEST 202 et seq.

Cases referred to:

- (1) *Kirkwood v. Gadd*, [1910] A.C. 422; 79 L.J.K.B. 815; 102 L.T. 753; 26 T.L.R. 530; 54 Sol. Jo. 599, H.L.; 35 Digest 207, 324.
- (2) *Sadler v. Whiteman* (1910), 26 T.L.R. 255; reversed [1910] 1 K.B. 868; 79 L.J.K.B. 786; 102 L.T. 472; 26 T.L.R. 372; 54 Sol. Jo. 375, C.A.; on appeal, sub nom. *Whiteman v. Sadler*, [1910] A.C. 514; 79 L.J.K.B. 1050; 103 L.T. 296; 26 T.L.R. 655; 54 Sol. Jo. 718; 17 Mans. 296, H.L.; 35 Digest 204, 294.
- (3) *Fergusson v. Norman* (1838), 5 Bing. N.C. 76; 1 Arn. 418; 6 Scott, 794; 8 L.J.C.P. 3; 2 J.P. 809; 3 Jur. 10; 132 E.R. 1034; 32 Digest 237, 215.
- (4) *Cope v. Rowlands* (1836), 2 M. & W. 149; 2 Gale 231; 6 L.J.Ex. 63; 1 Digest (Repl.) 611, 1990.

Appeal by the plaintiff from an order of the Court of Appeal (SWINFEN EADY and BANKES, L.J.J., PHILLIMORE, L.J., dissentiente) reversing a judgment of RIDLEY, J., on the trial of an action without a jury at Liverpool Assizes.

The facts are stated in their Lordships' opinions.

Greer, K.C., and *Clement Davies* for the appellant.

Leslie Scott, K.C., *Rigby Swift, K.C.*, and *W. Greaves* Lord for the respondent.

Their Lordships took time for consideration.

Nov. 29, 1917. The following opinions were read.

LORD FINLAY, L.C.—The question in this case is whether a single transaction of lending may amount to carrying on a moneylending business at an address other than the registered address of the moneylender, and, if so, whether the Moneylenders Act, 1900, renders it void.

The respondent was a moneylender registered under the Act, his registered address being at No. 33, Crown Street, Liverpool. The appellant, a young man holding a commission in the Royal Garrison Artillery, had been asked by a friend of his, of the name of Shelmerdine, to assist him in raising money. The appellant and Shelmerdine went out for a walk together, and Shelmerdine took the appellant to the Blundell Arms Hotel, Formby, where they found the respondent, who was quite unknown to the appellant. The respondent produced two promissory notes, each for £300, one in favour of the respondent and the other in favour of the appellant, which were then and there signed, the former by the appellant and the latter by Shelmerdine. The respondent then drew a cheque for £200 to the appellant's order, and this was indorsed by the appellant and handed over to Shelmerdine, who received payment. The effect of this transaction was that Shelmerdine got £200, while the appellant became indebted on his promissory note to the respondent for £300, in respect of which liability the appellant held Shelmerdine's promissory note for the same amount. The respondent transferred the appellant's promissory note to one Finegold, and he, in the capacity of *bonâ fide* holder for value without notice, sued the appellant. Finegold was entitled to recover by virtue of the Moneylenders Act, 1911, s. 1 [repealed by Moneylenders Act, 1927], but as that Act gave Cornelius a right of recourse against Phillips, the latter was made party to the action under a notice claiming indemnity. Finegold signed judgment against Cornelius for £300 with interest and costs, and Cornelius filed a statement of claim against Phillips claiming indemnity. The case was tried before RIDLEY, J., who gave judgment in favour of Cornelius as against Phillips. This judgment was reversed in the Court of Appeal by SWINFEN EADY and BANKES, L.JJ., PHILLIMORE, L.J., dissenting. All the members of the Court of Appeal agreed in finding that the transaction amounted to a carrying on of the business, but the majority took the view that the transaction was not rendered void by the Act, while PHILLIMORE, L.J., held that it was. The present appeal is brought from the decision of the Court of Appeal.

The case turns upon the construction of s. 2 of the Moneylenders Act, 1900, which, so far as is material, is as follows :

"2 (1). A moneylender as defined by this Act—(a) Shall register himself as a moneylender in accordance with regulations under this Act, at an office provided for the purpose by the Commissioners of Inland Revenue, under his own or usual trade name, and in no other name, and with the address, or all the addresses if more than one, at which he carries on his business of moneylender; and (b) shall carry on the moneylending business in his registered name, and in no other name and under no other description, and at his registered address or addresses, and at no other address; and (c) shall not enter into any agreement in the course of his business as a moneylender with respect to the advance and repayment of money, or take any security for money in the course of his business as moneylender, otherwise than in his registered name; and (d) shall on reasonable request, and on tender of a reasonable sum for expenses, furnish the borrower with a copy of any document relating to the loan or any security therefor. (2) If a moneylender fails to register himself as required by this Act, or carries on business otherwise than in his registered name, or in more than one name, or elsewhere than in his registered address, or fails to comply with any other requirement of this section, he shall be liable on conviction under the Summary Jurisdiction Acts to a fine not exceeding £100, and in the case of a second or subsequent conviction to imprisonment. . . . (3) A prosecution under sub-s. (1) (a) of this section shall not be instituted except with the consent in England of the Attorney-General or Solicitor-General, and in Ireland of the Attorney-General or Solicitor-General for Ireland."

I agree with all the judges in the court below in thinking that the transaction contravened the provisions of para. (b) of s. 2 (1). The whole of the transaction in

this case, in every one of its stages as between the moneylender Phillips and the borrower Cornelius, was carried out at the Blundell Arms Hotel, which was not the registered address of Phillips. In effecting this transaction, Phillips was carrying on the moneylending business. If the transaction had been substantially effected at the registered address of the moneylender, the fact that some subsidiary acts had been done elsewhere would not have amounted to a contravention of para. (b), but here no part of the transaction was carried out at the moneylender's address. I entirely agree with what is said on this point in the judgment of SWINFEN EADY, L.J. The matter seems to me clear on principle, and there is a great weight of authority in favour of the view which was taken on this point in the courts below.

It was argued before this House that if a single transaction might amount to a carrying on of business under para. (b), para. (c) would be surplusage, and that, therefore, para. (b) must be read as dealing only with a course of business or a series of transactions as distinguished from one transaction. I cannot agree. Having regard to the manner in which Acts of Parliament are drawn, the argument that a restricted meaning must be adopted for a certain provision in a statute on the ground that otherwise there would be repetition in a subsequent provision, is not a very safe guide. The repetition may have been *ex major cautela* only. But, further, para. (c) is not surplusage. It is not correct to say that all the transactions which would fall within para. (c) would have been covered by para. (b), inasmuch as taking particular agreements or securities might be merely incidental to the transaction, and would not fall within (b), but it may have been considered advisable to secure complete publicity for the registered name of the moneylender by providing specifically by (c) that in every one of these documents the registered name should appear. All that was decided by the House of Lords in *Kirkwood v. Gadd* (1) was that every stage and every incident of the moneylending business need not be transacted at the registered office.

The question remains whether this contravention of the statute rendered the transaction void, or merely subjected the moneylender to a penalty. While PHILLMORE, L.J., held that the transaction was void, the majority of the Court of Appeal held that it merely subjected the moneylender to a penalty, proceeding solely on the ground that they thought the point was concluded by the decision of this House in *Whiteman v. Sadler* (2). In my opinion, the point should have been decided by the Court of Appeal on its own view of the construction of the section, as it was not covered by the decision in *Whiteman v. Sadler* (2). It is admitted on all hands, and, indeed, could not be disputed, that a statutory prohibition avoids any transaction in contravention of the prohibition, as the transaction is unlawful and any contract which forms part of it is void, and can confer no rights. The Act of 1900 by s. 2 (1) provides that a moneylender shall carry on a moneylending business at his registered address and at no other address, while sub-s. (2) imposes a penalty for contravention of this provision. The words of the statute prohibit carrying on the moneylending business at any address other than the registered address, and to do so is, therefore, an unlawful act. Paragraphs (b) and (c) stand in this respect on precisely the same footing; there is a prohibition in (b) just as much as in (c).

The case with which the House of Lords had to deal in *Whiteman v. Sadler* (2) was that of a moneylender who had been in fact registered, but it was said that the registration was void and ought to be disregarded for two reasons. First, that the registration was in a trade name, and inasmuch as he had never before carried on business in that name he could not be registered under it as his "usual trade name" s. 2 (1) (a), and ought to have been registered in his own name; and, second, that the moneylender under different names carried on one business as an individual and another as a member of a firm, and that the registration was, therefore, in contravention of s. 2 (1) (b). It was, therefore, contended that the registration should not have been effected, and, being wrongful, was void. In order to understand the judgments in the House of Lords, the earlier history of the case must

be examined. Arthur and Walter Whiteman carried on business as moneylenders, and were registered under the name of Cobb & Co., at Moorgate Street, while Arthur also carried on business as a moneylender under another name at Seven Sisters Road. The plaintiff in the action applied for a loan at the office of Cobb & Co. The loan was arranged and a bill of sale was given as security, under which the moneylender seized the goods. Sadler thereupon brought an action of trespass, and contended that the bill of sale was invalid. The case was tried before BRAY, J. The first ground of invalidity alleged was that Cobb & Co. was not the usual trade name of the brothers Whiteman, as they were not known by that name as moneylenders before registration. BRAY, J., held that the words "usual trade name" were satisfied, as Cobb & Co. was the trade name under which they intended to carry on business, and that this complied with the Act. The other main objection to the validity of the bill of sale was that Arthur Whiteman, one member of the firm of Cobb & Co., was also registered and carried on business as a moneylender under another name at another address. BRAY, J., held that this was not an infringement of the Act, on the ground that the one business was that of the firm and the other that of one of the members alone. He accordingly dismissed the action with costs, holding both objections invalid. The Court of Appeal by a majority, consisting of FLETCHER, MOULTON and FARWELL, L.JJ., reversed the judgment of BRAY, J., on these points and entered judgment for the plaintiff, treating the bill of sale as void.

The case was brought on appeal to this House. LORD MACNAGHTEN, with whom LORD LOREBURN, L.C., concurred, agreed with the Court of Appeal, and held that the Act was infringed because Cobb & Co. was not the usual trade name and also because Arthur Whiteman was carrying on two businesses under different names, but he differed as to the effect of this contravention of the Act, holding that as there was a *de facto* registration the registration could not be treated as void so as to avoid the bill of sale under s. 2 (1) (c). In other words, he held that registration *de facto* cannot be ignored for the purposes of s. 2 (1). LORD MACNAGHTEN says ([1910] A.C. at p. 521):

"A moneylender registered under these regulations is to carry on the money-lending business in his registered name and in no other name. That is s. 2 (1) (b). He is not to enter into any agreement in the course of his business otherwise than in his registered name. That is s. 2 (1) (c). . . If, in violation of the plain words of the Act, a moneylender trades without being registered at all, or, being registered, trades in another name, he is very properly left to the mercy of anyone who chooses to attack him, and his contracts are rightly avoided. But if he is registered by the commissioners and registered improperly, the fault does not lie with him alone. . . In the case of an alleged infringement of sub-s. (1) (a), the sub-section with which the commissioners are mainly concerned, no prosecution can be instituted except with the consent of the law officers. No such provision is made with regard to (b) or (c). This seems to me to show that what the Act meant to strike at in (c) was the case of a person actually registered by the commissioners contracting otherwise than in his registered name, and that, so long as his name remains on the register, his contracts in that name are not to be held void, or his action in making contracts in that name punishable by fine and imprisonment."

It was under (c) that the bill of sale given by Sadler was impeached. No question arose with regard to the effect of (b) except as avoiding the registration. The whole transaction was carried out in the registered name of Cobb & Co., and, as was held (as stated by FARWELL, L.J., [1910] 1 K.B. at p. 890), substantially at the moneylender's address. The bill of sale was not void on the ground that Arthur Whiteman carried on business under another name except on the view that the registration was on this ground improper, and, therefore, should have been treated as non-existent, so as to make the case one of a moneylender with no registered

name. LORD DUNEDIN points out ([1910] A.C. at p. 525) that registration of Cobb & Co. ought to have been refused on the ground that Cobb & Co. was not their usual trade name, and that Arthur Whiteman, being already registered, could not be again registered, he says (*ibid.* at p. 527) :

"I come, therefore, to the conclusion that the contract here was only void if it was struck at by the prohibition in s. 2 (1) (c). Was it so struck at? It is said that because we hold the registration to have been an improper registration therefore it was no registration. I do not think so. I think registered name means *de facto* registered name, and that it would be contrary to all justice to penalise the appellants for what was really a mistake of the Inland Revenue. The appellants had a registered name, and I think the statute sought only to prohibit dealing in a name which was not registered at all."

This last passage really contains a statement of all that was decided in *Whiteman v. Sadler* (2) and LORD LOREBURN, L.C., expressed his concurrence with LORD DUNEDIN's judgment as well as with LORD MACNAGHTEN's. In the result, the House of Lords restored the judgment of BRAY, J., but for very different reasons.

I have read with great attention the passage in the judgment of SWINFEN EADY, L.J., in which he deals with the effect of the decision of the House of Lords in *Whiteman v. Sadler* (2). It appears to me to overlook the fact that in that case the whole question was whether the registration was vitiated and should be treated as non-existent. In the report of *Sadler's Case* (2) in the Court of Appeal ([1910] A.C. at p. 521) occur the words which I have already quoted :

"If, in violation of the plain words of the Act, a moneylender trades without being registered at all, or being registered trades in another name, he is very properly left to the mercy of anyone who chooses to attack him, and his contracts are rightly avoided."

SWINFEN EADY, L.J., understands that LORD MACNAGHTEN in this passage was referring to contracts in violation of s. 2 (1) (c). I cannot so understand LORD MACNAGHTEN. It appears to me plain that he was referring, not to s. 2 (1) (c) but to s. 2 (1) (b). No question was raised in *Whiteman v. Sadler* (2) as to the effect of an infringement of s. 2 (1) (b) except by way of rendering the registration null. The decision was that the registration was not null, although it should not have been effected. I cannot agree with the statement in LORD MERSEY's judgment (*ibid.* at p. 534) that "there is no express prohibition in either of these clauses" (a) and (b) "whereas in cl. (c) there is." Paras. (b) and (c) appear to me, for the reasons I have stated earlier in this judgment, to stand exactly on the same footing. BANKES, L.J., in his judgment says ([1916] 2 K.B. at p. 740) :

"It is not, therefore, for us on the present occasion to give any independent judgment, but only to ascertain how far, if at all, the decisions of this court on these questions have been adopted or dissented from in the House of Lords."

He goes on to say that the judgment of LORD DUNEDIN, appears to him to decide in terms that the effect of a breach by a moneylender of the provisions of s. 2 (1) (b) does not invalidate the transaction, and adds (*ibid.* at p. 741) :

"I have some difficulty in taking the same view of LORD MACNAGHTEN's language, but as LORD LOREBURN and LORD ASHBOURNE treats the opinions of LORD MACNAGHTEN and LORD DUNEDIN as being in accord, I think the decision of *Whiteman v. Sadler* (2) in the House of Lords must be treated as a decision in the appellant's favour."

I think that LORD DUNEDIN and LORD MACNAGHTEN were in accord, but in a sense opposite to that which the lord justice ascribed to them.

The majority of the Court of Appeal in this case have expressed no opinion of their own upon the point in dispute. I think it was open to them to do so, and I concur in the conclusion reached by PHILLIMORE, L.J. For these reasons,

I think that the appeal should be allowed and the judgment of RIDLEY, J. restored. The appellant should have his costs here and in the Court of Appeal.

VISCOUNT HALDANE.—I think that this appeal should succeed. The facts are not in dispute. According to the appellant's evidence, Shelmerdine, who was a friend of his, wanted him to back a bill in order that money might be advanced on it to him, Shelmerdine. He told the appellant that a friend who would lend the money was at the Blundell Arms Hotel, which is not in Liverpool, though not very far from it. The appellant and Shelmerdine found the respondent in a room at the hotel. The appellant did not know who the respondent was, or that he was a registered moneylender carrying on business at an address in Liverpool, and he was not told. He signed a promissory note for £300, which was produced by the respondent, and the latter handed him a cheque for a smaller amount, which he endorsed. The respondent then handed the cheque to Shelmerdine. The respondent did not enter the box or challenge this evidence.

Two questions arise on these facts. The first is whether the respondent, who was a registered moneylender whose registered address was in Crown Street, in Liverpool, carried out this particular transaction in his moneylending business "at his registered address or addresses" within the meaning of s. 2 (1) (b) of the Moneylenders Act, 1900. The second question is whether, if the first question be answered in the negative, the effect was to render the transaction void, or was merely to expose the moneylender to liability for criminal proceedings without rendering the transaction void. On the first question the Court of Appeal decided in appellant's favour, and I entertain no doubt that they were right in holding as they did that the sub-section applies, whether or not the place other than his registered address where the transaction has taken place is one at which the moneylender can be said to have an address of a different kind. On the facts it is clear that the transaction, as between the appellant and the respondent, the only parties who, under the circumstances of the case, have to be considered, took place and was carried out in its integrity at this hotel.

On the second question the Court of Appeal by a majority (PHILLIMORE, L.J., dissenting) decided that the point was covered by the decision of this House in *Whiteman v. Sadler* (2). There a moneylender had been registered under the statute by the Commissioners of Inland Revenue, to whom the duty of registering him had been entrusted by the legislature, under two names. It was held that this was an improper act of the commissioners, but that, as the name under which the moneylender had traded was de facto registered, even though improperly, the statute did not render illegal a transaction entered into in a name thus registered. It was said in the course of the judgments that if the transaction had fallen within s. 2 (1) (c) by reason of not being entered into in any registered name, it would have been avoided, but that the language used could not be construed as avoiding transactions which de facto complied with s. 2 (1) (a). The only point before the House was whether a registered name meant a name which was de facto registered. There was no question whether, if the case was one to which sub-s. (1) (b) applied, by reason of the transaction being carried out otherwise than at a registered address, it was rendered void. None of the judgments was directed to the consideration of such a point, and even if the dicta relied on by the majority in the Court of Appeal can be read as covering it in words, which I greatly doubt, they were not part of the decision, and I wish to add that dicta by judges, however eminent, ought not to be cited as establishing authoritatively propositions of law unless these dicta really form an integral part of the train of reasoning directed to the real question decided. They may, if they occur merely at large, be valuable for edification, but they are not binding. I do not find in any of the judgments in this House an intention to decide the question on sub-s. (1) (b) which was before the Court of Appeal in the present case and is before us now, and, as I have said, I doubt whether any of the dicta in question justify the assumption that there was an intention to consider

the point. We are certainly free on the present occasion to construe the sub-section according to the words which the legislature has used. These words do not appear to all to be ambiguous. They enact that a moneylender shall carry on his business at his registered address and at no other address. So standing, they are clear, and they prohibit, and, therefore, make void, any contract which contravenes them. That there is a subsequent sub-section which makes a contravention by the moneylender a criminal offence makes no difference. There might have been inserted in the statute a context which would have modified the application of the general rule—that there is nothing in the actual context to exclude the ordinary result which follows in law when a statutory prohibition is disregarded. I am, therefore, of opinion that the majority in the Court of Appeal were wrong in their answer to this question.

LORD DUNEDIN.—The first question in this case is, in my view, a pure question of fact: Was the respondent on Nov. 24, 1914, at the Blundell Arms, Formby, carrying on the business of a moneylender? I think he was. Each case depends on its own circumstances. *Kirkwood v. Gadd* (1) only decided that if a particular transaction is substantially arranged and started at the moneylender's registered place of business, the mere fact that certain incidental proceedings are carried through at another place does not make the moneylender carry on business at that other place. It was said that this was an isolated transaction. That fact is not conclusive one way or other, though it may in particular circumstances lead to an inference decisive of the question. Here I think the respondent only appeared at the Blundell Arms as a moneylender for the purposes of a moneylender, and in fact acted as, and so carried on the business of a moneylender.

There remains the question what is the result, and it was strongly urged that the decision of this House in *Whiteman v. Sadler* (2) settles that unless there is an infringement of s. 2 (1) (c), the contract itself is not avoided. The opinion of LORD MERSEY does go that length, and an expression used by myself, *expressio unius est exclusio alterius*, would, although directed to s. 2 (1) (a), apply in terms to s. 2 (1) (b). But the actual decision of the House only applied to s. 2 (1) (a), and I am satisfied on reconsideration that the expression I used was not accurate if applied to s. 2 (1) (b), because s. 2 (1) (c) and s. 2 (1) (b) do not cover exactly the same ground. The judgment is binding on us, but further I have no doubt it was right. Two views may be taken. Inasmuch as *Whiteman* had been *de facto* registered, although wrongly registered, it might be held that there had been no contravention of any of the sections. That is not my own view. I think there had been a contravention of s. 2 (1) (a), though I think that in view of the faulty regulations issued by the Inland Revenue, the Attorney-General might well have withheld his consent to any prosecution, or even if he had given it, a jury might have refused to convict. But the contravention had nothing directly to do with the contract. In fact it came within the category of matters collateral, as pointed out by TURNER, C.J., in *Fergusson v. Norman* (3). This was the view expressed in the present case by PHILLMORE, L.J., and I think it was the correct one. As I said in *Whiteman's Case* (2), the question always comes to be put as PARKE, B., put it in *Cope v. Rowlands* (4). Does the statute seek to prohibit the contract? Sect. 2 (1) (b) seems to me to prohibit the contract, though it is expressed in words which apply directly to the contractor rather than to the contract. Indeed, if one looks at the mischief sought to be remedied, the case seems to me a stronger one than that of *Cope v. Rowlands* (4). I am, therefore, of opinion that the appeal should be allowed.

LORD ATKINSON.—In this case Isadore Phillips, the third party in the action, was at the date of the transaction impeached a moneylender registered in accordance with the Moneylenders Act, 1900, and carrying on moneylending business at his registered address, No. 33, Crown Street, in the city of Liverpool. The appellant had the misfortune to have a friend, named Harvey Shelmerdine, who apparently testified his regard for him by borrowing considerable sums of money from him,

and on Nov. 24, 1914, stood indebted to him in the sum of about £3,000. At about 9.30 in the morning of that day Shelmerdine called upon the appellant while the latter was at breakfast, and in a room adjoining the breakfast-room, into which they went, asked him to put his name on a bill for him (Shelmerdine), so that he might obtain some money, as he was "hard up." After some time, not at first, the appellant consented to do this. Shelmerdine and he then went out to take a walk. As they came to the end of the lane leading up to the Blundell Arms Hotel, Shelmerdine said to the appellant: "Are you coming? I have got my friend in the hotel." The appellant replied: "All right," and went to the hotel. In a small room at the back of the hotel he found the moneylender. He did not know Phillips. He did not know, and was not told who or what he was. He merely thought he was a friend of Shelmerdine. Phillips appears to have been then furnished with two of the instruments of his trade, two promissory notes already drawn up. The transaction had the true moneylender's ring about it. No rate of interest is mentioned in the promissory note which Cornelius signed, but, in fact, he was to pay £100 for the loan of £200 for six months—cent. per cent. Phillip's cheque was endorsed by both the appellant and Shelmerdine, and given to the latter. That this transaction was regarded by Phillips as a transaction carried out by him in the conduct of his business of moneylending, and not as an isolated transaction unconnected with that business, is evident from this, that he entered the transaction as of Nov. 24 in the ledger account of his moneylending business. He also entered the transfer of the note on May 5, 1915, to K. Finegold, the alleged *bonâ fide* holder for value without notice of any defect due to the operation of s. 2 of the Moneylenders Act, 1900, so as to secure for it the protection afforded by s. 1 of the Moneylenders Act, 1911. He had carried out the matter in his registered name. In that name he was made the payee of the promissory note. He had nothing, therefore, to fear from s. 2 of the Act of 1900, unless the carrying out of this transaction amounted under sub-s. (1) (b) of that section to carrying on his moneylending business at an address other than his registered address. It is, of course, quite evidence that the whole transaction was arranged between Phillips and Shelmerdine before the latter called upon the appellant on the morning of Nov. 24.

No difficulty arises about the meaning of the words "address" or "addresses" in s. 2 (1) (b) of the Act of 1900. The immediately preceding provision shows, I think, that the word "address" is used to identify the houses or house, office or buildings, in which the moneylender carries on his moneylending business. If he should carry it on in any house, office or building other than that registered as his address, then he would commit a crime within the provision of sub-s. (1) (b). I do not think that it is incumbent on any person impeaching the validity of a money-lending transaction carried out at a place other than that indicated by the registered address of the moneylender to prove that the latter has carried out many other transactions of the same kind at the same unauthorised place. In my view, when a registered moneylender, whose business it is to lend money, comes to a place other than his registered address and carries out there a moneylending transaction, it must be taken, in the absence of all evidence to the contrary, that he is carrying on his moneylending business at the latter place. A man may be a moneylender within the meaning of the statute, though he never made a loan in the whole course of his existence, provided he advertises, or announces himself, or holds himself out in any way as carrying on moneylending business. Here the very mischief against which the statute of 1900 was directed was contrived. The appellant was introduced to the respondent as a person ready to lend money. He was induced to deal with him without knowing whether he was a moneylender or not, and without knowing whether he had a registered office or not. I think that, having regard to all the circumstances of the case, the respondent, by entering into this moneylending transaction on Nov. 24, 1914, at Blundell Arms Hotel, Formby, did carry on moneylending business at an address other than his registered address

within the meaning of s. 2 (1) (b) of the Moneylenders Act, 1900. In *Kirkwood v. Gadd* (1) it was contended by the persons impeaching the security that every step or stage in a loan transaction must be transacted at the registered address of the lender, and that, as the bill of sale given in that case was executed, and the money lent to the borrower, paid at his own house, the moneylending business was not carried on at the lender's registered address. This House decided against that contention. It was not necessary to decide any other point. It had, however, been contended, on behalf of the respondent, that, even if the business of making the loan should be taken to have been transacted at the borrower's residence, still it was only a single moneylending transaction, and that the carrying of it through did not amount to carrying on moneylending business within the meaning of s. 2 (1) (b). There was nothing amounting to a decision of the House that the carrying through of one moneylending transaction at a given place might not amount to the carrying on of moneylending business at that place within the statute. On the contrary, the effect of the decision was, I think, that it depended upon the facts and circumstances of each case whether it amounted to that or not. The main point decided in *Whiteman v. Sadler* (2) was, as I read the report, that a contract made with a moneylender in one of his registered names did not come within s. 2 (1) (b), because the lender, though wrongly registered in two names, did in fact take from the borrower the security impeached in his registered name—not in an unregistered name.

In the argument in the present case the object aimed at by this latter provision has, I think, been misunderstood. The clause had a special object—namely, to require that as far as possible the name of the moneylender should appear in a written agreement on the face of the document as a contracting party in order to prevent these agreements being made in the name of persons who were trustees for the moneylender or acted as agents for him as an undisclosed principal. It provided a protection additional to that mentioned in the preceding section against borrowers being induced to deal with the same moneylender under different names, and it secured that transferees or holders of bills and promissory notes and such like securities for money should know who the real lender was. But s. 2 (1) (b), and s. 2 (1) (c), are not mutually exclusive. That is the fallacy underlying the respondent's argument. If a moneylender in the conduct of his moneylending business makes a loan in a place other than that indicated by his registered address, and as security for that loan takes from the borrower a promissory note of which the moneylender's clerk is the payee, the transaction offends against the provisions of both s. 2 (1) (b), and s. 2 (1) (c). Against the first, because the moneylender has carried on moneylending business at a place other than that indicated by his registered address, and against the second because the moneylender has taken a security for money in the course of his business as a moneylender otherwise than in his registered name. The argument that, because the form of the document given as security offends against sub-s. (1) (c), therefore the moneylending transaction of which the giving of that security forms a part, cannot offend against the provisions of sub-s. (1) (b), is, I think, altogether unsound. It is not disputed that the language of sub-s. (1) (c) is prohibitive. I think it is clear that if the lender in *Whiteman v. Sadler* (2) had not registered his name at all, this House would have applied the principle laid down by PARKE, B., in *Cope v. Rowlands* (3), and by TINDAL, C.J., in *Fergusson v. Norman* (4), and, as the taking of the bill of sale could not have been held to be a collateral matter have held that security to be void. The words which are said to make the latter clause prohibitive are: "shall not enter into . . . otherwise than in his registered name," but if s. 2 (1) (b), be thrown into a negative form, the sense will remain quite the same and yet it will be equally prohibitive. It would then run: "shall not carry on the moneylending business in any name other than his registered name nor at any address other than his registered address or addresses." The sense of the clause is in no way altered, yet it is quite as prohibitive as the succeeding clause, while the doing of the thing prohibited is in each case

an offence of the same kind and punishable by the same penalties in s. 2 (2). The definite article "the" is used in sub-s. (1) (b) to refer to the business mentioned in the preceding clause as his "(the moneylender's) business of moneylending." The appellant's account of the transaction must be accepted as accurate since he is absolutely uncontradicted. I am of opinion that the promissory note dated Nov. 4, 1917, and the whole transaction of which it formed part was void, that the judgment appealed from was erroneous and should be reversed, and that the judgment of RIDLEY, J., be restored, and this appeal be allowed with costs here and below.

LORD PARMOOR.—The facts in this appeal are not in dispute. On Nov. 24, 1914, the appellant, at the invitation of a friend, Harvey Shelmerdine, entered the Blundell Arms Hotel, Formby, and met the respondent, whom he had not before seen. The respondent was a moneylender, as defined by the Moneylenders Act, 1900, properly registered, and carrying on the moneylending business at his registered address, 33, Crown Street, in the city of Liverpool. At this meeting an ordinary moneylending transaction was completed. The respondent drew a cheque for £200 payable to the appellant or order, and the appellant signed a promissory note promising to pay the respondent or order the sum of £300 for value received six months after date. There was, therefore, a moneylending transaction carried out with a registered moneylender at an address other than his registered address.

It was contended on behalf of the respondent that a single transaction of this character did not amount to a carrying on of the moneylending business so as to bring the respondent within the prohibition of s. 2 (1) (b) of the Moneylenders Act, 1900, that the moneylender should not carry on the moneylending business at other than his registered address. I think that it is impossible to accept this contention. In my opinion, the respondent, in effecting a moneylending transaction with the appellant, was, in the ordinary sense, carrying on the moneylending business, and that it is immaterial whether a single transaction or a number of transactions are involved. The business was carried through at an address other than the respondent's registered address, and, therefore, comes directly within the prohibition of s. 2 (1) (b). Reference was made to *Kirkwood v. Gadd* (1). In that case it was decided on a question of fact that the particular transaction was not impeachable, because every stage and every incident of every piece of the moneylending business was not transacted at the registered office, and it does not, in my opinion, affect the matters involved in the present appeal, or give any colour to the view that the moneylending business is not carried on at a place where all the stages of a single moneylending transaction are carried through.

The second point argued on behalf of the respondent was that, assuming the moneylending transaction to come within s. 2 (1) (b), yet on the true construction of the section as a whole it was not thereby rendered an illegal transaction so as to make the contract void. In support of this contention it was said that the case had been determined in favour of the respondent by *Whiteman v. Sadler* (2) as decided by a majority in the Court of Appeal. I propose, in the first instance, to consider the construction of the section and then to examine the decision in your Lordships' House. No question arises under sub-s. (1) (a), and the respondent had fulfilled his obligation in this respect by a proper registration. Sub-section (1) (b) not only places an obligation on a moneylender to carry on the moneylending business in his registered name and at his registered address, but expressly prohibits him from carrying on that business in any other name or at any other place. If the moneylending transaction at the Blundell Arms, Formby, was a carrying on of the moneylending business by the respondent, as I think it was, the transaction is one which the statute has expressly prohibited. It was argued, however, that sub-s. (1) (c) was inconsistent with the inference that the transaction prohibited under sub-s. (1) (b) was thereby rendered void as between the parties. Sub-section (1)

(c) enacts that the moneylender shall not enter into any agreement in the course of his business as a moneylender with respect to the advance and repayment of money, or take any security for money in the course of his business as a moneylender otherwise than in his registered name. This sub-section has no reference to the address, and, as was pointed out in *Kirkwood v. Gadd* (2), any such limitation as applied to the address might render the convenient carrying on of a particular transaction in some cases very difficult. The sub-section, in my opinion, in no way limits the obligations imposed under sub-s. (1) (b), but is cumulative in effect, and provides that every agreement made in the course of his business as a moneylender by a moneylender shall not be entered into otherwise than in his registered name, thereby providing that all agreements incident to the moneylending business with respect to the advance and repayment of money or the taking of security for money, shall not be transacted otherwise than in the registered name of the moneylender. It is putting a further restriction on the moneylender as to the use of his registered name beyond that put upon him in reference to the use of his registered address. If the sub-s. (1) (c) did nothing more than enforce in more specific language obligations which had been placed on a moneylender under sub-s. (1) (b) I should not come to the conclusion that it was intended to limit the obligations which sub-s. (1) (b) had imposed, but that it was intended to make clear its meaning and ambit. Sub-section (1) (d) is not material. Section 2 (2) renders a moneylender liable to a fine not exceeding £100, and, in the case of a second or subsequent conviction, to imprisonment if he carries on his business otherwise than at his registered address. The result is that the transaction under consideration in this appeal is prohibited by statute, and renders the moneylender liable to a fine on conviction under the Summary Jurisdiction Acts.

The principle of law applicable has been accurately expressed by FARWELL, L.J., that a contract which is expressly forbidden and made criminal by Act of Parliament can give no cause of action to a party who seeks to enforce it. In *Whiteman v. Sadler* (2), LORD DUNEDIN adds that the same result follows in the case of a contract which is not expressly but only impliedly forbidden. I have, therefore, come to the conclusion that the appellant is not liable and that his appeal should be allowed, unless the case is governed by the decision in *Whiteman v. Sadler* (2). If it is so governed, the appellant cannot succeed.

The point really decided in *Whiteman v. Sadler* (2) is that a moneylender whose name has been placed on the register by the officers of a public department in conformity with regulations purporting to be issued under the authority of Parliament does not become liable to fine and imprisonment and the absolute loss of all his contracts, not for trading without registration, but for trading in a name registered wrongly, but registered by the authorised exponents of the requirements of the Act as statutory custodians of the register. This passage is in substance taken from the opinion of LORD MACNAGHTEN. LORD MACNAGHTEN goes on to say : ([1910] A.C. at p. 521) :

"If, in violation of the plain words of the Act, a moneylender trades without being registered at all, or being registered, trades in another name, he is very properly left to the mercy of anyone who chooses to attack him, and his contracts are rightly avoided."

In the case with which LORD MACNAGHTEN was dealing the question was one of registered name, but, in my opinion, the passage is equally applicable to a question of registered address. LORD DUNEDIN states in his opinion (*ibid.* at p. 527) :

"I think registered name means *de facto* registered name, and that it would be contrary to all justice to penalise the appellants for what was really a mistake of the Inland Revenue."

LORD DUNEDIN no doubt expresses the opinion that, apart from the question of registration, the contract was only void if it was struck at by the prohibition under s. 2 (1) (c), but this was not the matter directly in debate, and the noble

Lord has expressed his opinion on this point in the present appeal after full discussion. LORD LOREBURN expresses his concurrence, and that of LORD ASHBOURNE, with the opinions of LORD MACNAGHTEN and LORD DUNEDIN. LORD JAMES OF HEREFORD withdrew his intended opinion, although entertaining on some points considerable doubt. There is no doubt that the opinion of LORD MERSEY does state specifically that there is no express prohibition in either sub-s. (1) (a) or (b), whereas there is in sub-s. (1) (c), but this opinion, although entitled to great weight, was not concurred in by any other of the noble Lords before whom the appeal was heard. I think, therefore, that the question now in appeal before your Lordships is not governed by *Whiteman v. Sadler* (2), but is open to consideration on its merits. In my opinion the appeal should be allowed with costs here and below.

Solicitors: *Pritchard, Englefield & Co.*, for *Simpson, North, Harley & Co.*, Liverpool; *Ford, Lloyd, Bartlett & Michelmores*, for *Barrett & Co.*, Liverpool.

[Reported by W. E. REID, Esq., Barrister-at-Law.]

NORMAN v. MATHEWS AND ANOTHER

[KING'S BENCH DIVISION (Lush and Sankey, JJ.), February 9, 10, 1916]

[Reported 85 L.J.K.B. 857; 114 L.T. 1043; 32 T.L.R. 303; 80 J.P. Jo. 100]

[COURT OF APPEAL (Swinfen Eady, Pickford and Bankes, L.JJ.), February 14, March 18, 1916]

[Reported 32 T.L.R. 369]

County Court—Jurisdiction—Hearing in camera—Need to secure proper administration of justice—Public interest—Dismissal or stay of proceeding because frivolous or vexatious.

A county court judge has jurisdiction to hear a case in camera if it appears that it is necessary to do so to secure the proper administration of justice, e.g., where it would not be in the public interest for the case to be heard in open court with the result that the contents of documents alleged to be likely to cause disaffection to the Crown during a time of war would be made public. The court, however, should not lightly decide to hear a case in camera. Before doing so the court should carefully consider whether there is any *prima facie* ground for departing from the ordinary method of administering justice.

A county court judge has the same jurisdiction as a judge of the High Court to dismiss or stay a proceeding on the ground that it is frivolous and vexatious.

Notes. As to the jurisdiction of the county court generally, see 9 HALSBURY'S LAWS (3rd Edn.) 141 et seq.; for cases see 13 DIGEST (Repl.) 380 et seq.; and for County Courts Act, 1934, see 5 HALSBURY'S STATUTES (2nd Edn.) 11.

Cases referred to:

- (1) *Scott v. Scott*, [1913] A.C. 417; 82 L.J.P. 74; 109 L.T. 1; 29 T.L.R. 520; 57 Sol. Jo. 498, H.L.; 16 Digest 81, 301.
- (2) *Reichel v. Magrath* (1889), 14 App. Cas. 665; 59 L.J.Q.B. 159; 54 J.P. 196, H.L.; Digest (Pleading) 84, 701.
- (3) *Metropolitan Bank v. Pooley* (1885), 10 App. Cas. 210; 54 L.J.Q.B. 449; 53 L.T. 163; 49 J.P. 756; 33 W.R. 709, H.L.; Digest (Pleading) 82, 691.

Also referred to in argument:

Coster v. Headland, [1906] A.C. 286; 75 L.J.K.B. 483; 94 L.T. 589; 70 J.P. 249; 22 T.L.R. 441; 4 L.G.R. 589, H.L.; 18 Digest (Repl.) 400, 1489.

Bynoe v. Bank of England, [1902] 1 K.B. 467; 71 L.J.K.B. 208; 86 L.T. 140; 50 W.R. 359; 18 T.L.R. 276, C.A.; 14 Digest (Repl.) 592, 5900.

Ex parte Norman (1915), 85 L.J.K.B. 203; 114 L.T. 232; 80 J.P. 156; 60 Sol. Jo. 90; 25 Cox, C.C. 263; 16 Digest 129, 268.

Appeal from Westminster County Court.

On Aug. 18, 1915, upon the instructions of the defendant, Sir Charles Mathews, Director of Public Prosecutions, an information in writing upon oath was laid before Alderman Sir John Knill, one of His Majesty's justices of the peace in and for the city of London, by a detective-inspector of the City of London Police Force, which satisfied him that certain newspapers, books, periodicals, pamphlets, and other printed publications containing reports of statements likely to cause disaffection to His Majesty or to prejudice His Majesty's relations with foreign Powers, or to prejudice the recruiting, training, discipline, or administration of His Majesty's forces were about to be issued for publication or dispersion in or upon certain premises in the city of London contrary to reg. 27 of the Defence of the Realm (Consolidation) Regulations, 1914. Sir John Knill thereupon issued a warrant, pursuant to reg. 51A of the regulations, authorising the entry on such premises and the seizure of documents. Some of the documents thus seized were alleged by the plaintiff to be his. On Aug. 27 the plaintiff commenced an action in the Westminster County Court against the defendants Sir Charles Mathews and Sir William Nott-Bower, Commissioner of Police for the City of London, claiming a declaration that he was entitled to possession of these documents and damages for their wrongful detention. On Sept. 10 the documents were brought before the alderman, who read and considered them, and satisfied himself that they contained statements likely to prejudice His Majesty's relations with foreign Powers and likely to prejudice the recruiting of His Majesty's naval and military forces. He thereupon issued a summons to the owners of the documents, including the plaintiff, Clarence Henry Norman, the owner of some of them, calling upon them to appear before the court of summary jurisdiction, sitting at the Mansion House Justice Room, to show cause why they should not be destroyed. On Sept. 13 and various subsequent dates some of the owners, including the plaintiff, appeared, but, after various hearings, which were conducted in *camerâ*, the alderman, not being satisfied by the arguments addressed to him that the articles were not of such a character as mentioned in reg. 51A, on Oct. 25 ordered them to be destroyed after the expiration of seven clear days unless notice of appeal against his order should have been given within such seven clear days by any person who felt aggrieved. On Oct. 29 an application was made *ex parte* on behalf of the plaintiff to the Divisional Court for a rule nisi directed to the magistrate to show cause why a writ of certiorari should not issue to bring up the order to be quashed. That application, which was heard in *camerâ*, the judgment, however, being delivered in open court, was dismissed. On Dec. 6 the plaintiff gave notice of an application in the county court action for discovery and interrogatories, and for a special day to be fixed for the trial of the action in open court. On Dec. 8 the defendants gave notice of an application to strike out the plaintiff's action as being frivolous and vexatious and an abuse of the process of the court. On Dec. 9 the parties appeared before the county court judge, who heard the application in private at the request of the defendants, and struck out the action as frivolous and vexatious. The plaintiff appealed.

The plaintiff appeared in person.

G. A. H. Branson for the defendants.

LUSH, J. (after stating the facts).—I will assume, as the plaintiff asks us to do, that not all the books belonging to him were destroyed under the order, but that some are still in existence and in the possession of the defendants. The question is whether this action was one which the county court judge was entitled to strike out as frivolous and vexatious and an abuse of the process of the court.

The plaintiff has raised many objections. I will deal first with the question whether the procedure adopted by the county court judge was right or wrong. The plaintiff contended that the county court judge had no jurisdiction to hear the matter in *camerâ*, and that, apart from that, he had no power to hear an application or make an order to strike out the action on the ground that it was frivolous and vexatious. The plaintiff further contends that, even if the county court judge had such power, the action was not frivolous and vexatious, and that he had a substantial and real cause of action and was entitled to have it adjudicated upon.

As to the question of the hearing in *camerâ*, a Divisional Court, of which I was a member, have already held that in this case it was a proper order to make that it should be heard in *camerâ*, for, after the order for the destruction of these documents had been made, an application was made to this court for a writ of *certiorari* to quash the order on the ground that it was invalid. This court held that, having regard to the nature of the publications in question, it was not in the public interest or for the public welfare that the case should be heard in open court, and, therefore, heard the application for a writ of *certiorari* in *camerâ*. Having regard to the view expressed by the Divisional Court on that occasion, I am of opinion that the county court judge was right in holding that this action, which dealt with the same documents, ought to be heard in *camerâ* also. I desire to add, however, that I do not think that a court should lightly decide to hear a case in *camerâ*. It does not follow that because there is an application for a case to be heard in *camerâ* that the order should be made as of course. The court should carefully consider whether there is any *primâ facie* ground for departing from the ordinary method of administering justice; but if there are materials before the court which lead them to the conclusion that it is necessary for the proper administration of justice that the matter should be heard in *camerâ*, there is no doubt that the court has power, apart from any particular regulation to that effect, to hear a case in *camerâ*. The question was fully discussed in *Scott v. Scott* (1), where LORD HALDANE, L.C., pointed out that, while the broad principle was that the courts should administer justice in public, it was subject to exceptions which were the outcome of a yet more fundamental principle—that the chief object of courts of justice must be to secure that justice was done. He said ([1913] A.C. at p. 439):

“I think that to justify an order for hearing in *camerâ* it must be shown that the paramount object of securing that justice is done would really be rendered doubtful of attainment if the order were not made.”

LORD LOREBURN, after pointing out that a court could be closed in a case of some secret process of manufacture on the ground that to communicate it to the world in open court would be in effect a denial of justice, said (*ibid.* at p. 445):

“Again, the court may be closed or cleared if such a precaution is necessary for the administration of justice. Tumult or disorder, or the just apprehension of it, would certainly justify the exclusion of all from whom such interruption is expected, and, if discrimination is impracticable, the exclusion of the public in general . . . It would be impossible to enumerate or anticipate all possible contingencies, but in all cases where the public has been excluded with admitted propriety the underlying principle, as it seems to me, is that the administration of justice would be rendered impracticable by their presence, whether because the case could not be effectively tried, or the parties entitled to justice would be reasonably deterred from seeking it at the hands of the court.”

Therefore, if it is necessary in the interests of justice that the public should be excluded, the court has jurisdiction to hear and try the matter in *camerâ*. The order of the magistrate for the destruction of these books and documents was made upon the ground that their contents were of such a nature that it would be incompatible with the public welfare that publicity should be given to them. If it was open to the owner of them to bring an action against those who had been instrumental in moving the court to make the order for their destruction and to insist

on the trial of the action being heard in open court before a jury, the very mischief might be done which the regulation was intended to obviate. It is, therefore, impossible to say, having regard to the circumstances of the case, that the county court judge had no jurisdiction to make the order, and I see no reason for disagreeing with his exercise of that jurisdiction.

The next question is: Had the county court judge jurisdiction to entertain the application to dismiss or stay the action on the ground that it was frivolous and vexatious? I am of opinion that a county court judge has the same jurisdiction as a judge of the High Court in that respect. There is the authority of LORD HALSBURY in *Reichel v. Magrath* (2) and of LORD SELBORNE in *Metropolitan Bank v. Pooley* (3) for saying that there is an inherent power in every court of justice to stay or dismiss actions or applications that are frivolous and vexatious in order to protect itself from the abuse of its procedure. It is clear that there must be such powers, otherwise a county court judge would be compelled to listen to an action when it was patent to him that it was one which no sensible man would have brought. Further, if the authority of a statute is necessary, s. 164 of the County Courts Act, 1888 [now s. 100 of County Courts Act, 1934], expressly provides that the general principles of practice in the High Court may be adopted and applied in the county court, and s. 9 [s. 72 of Act of 1934] also provides that a county court judge shall have jurisdiction to make any order or exercise on an *ex parte* application any authority or jurisdiction in any action or proceeding which might be given, made, or exercised by a judge of the High Court in chambers. It is, therefore, clear that the county court judge had both an inherent and a statutory jurisdiction to dismiss this action as frivolous.

[On the facts HIS LORDSHIP held that it was a case which the county court judge was entitled to treat as frivolous and vexatious, and concluded:] The appeal therefore fails, and must be dismissed.

SANKEY, J.—I agree. Three questions arise in this case: (i) Was the county court judge entitled to hear the case in *camerâ*? (ii) Had he a right to dismiss the action as frivolous and vexatious? (iii) If he had such a right, did he properly exercise it in dismissing or striking out this action?

As to the first question, it must be noted that the hearing of the summons before the magistrate for the order to destroy these documents was conducted in *camerâ*, and the application for a *certiorari* to quash that order was also heard in *camerâ*. I entirely agree with my brother LUSH as to the very great care and caution which ought to be exercised before an application to hear a case in *camerâ* is granted. To hear a case in *camerâ* is to take a very exceptional course, and it is a jurisdiction which ought to be exercised with the greatest care, and only upon the strongest grounds. In my view, the best exposition of the law is that laid down by LORD HALDANE, L.C., in *Scott v. Scott* (1). He says ([1913] A.C. at p. 439):

"I think that to justify an order for hearing in *camerâ* it must be shown that the paramount object of securing that justice is done would really be rendered doubtful of attainment if the order were not made."

I have already pointed out that the previous hearings before the magistrate and the Divisional Court were conducted in *camerâ* and in numerous other cases which have come before the courts recently a similar course has been adopted. It is, therefore, clear that there is jurisdiction to hear a case in *camerâ*, but that jurisdiction ought to be exercised with caution. In *Scott v. Scott* (1) LORD SHAW (*ibid.* at p. 482), lays down the three exceptions to the application of the general rule of publicity, and one of them is where secrecy is of the essence of the cause. In my opinion, secrecy was of the essence of the cause here, and that the county court judge was, therefore, justified in hearing the application in *camerâ*. With regard to the second point, I think that the county court judge clearly had the right to strike out the action as frivolous and vexatious and an abuse of the process of the court. The latter part of s. 164 of the County Courts Act, 1888, confers that

jurisdiction, and I think it is within the inherent jurisdiction of the court. The authority for that is contained in the judgment of LORD SELBORNE, L.C., in *Metropolitan Bank v. Pooley* (3), where he says (10 A.C. at p. 214):

"Before the rules were made under the Judicature Act, the practice had been established to stay a manifestly vexatious suit which was plainly an abuse of the authority of the court, although as far as I know there was not at that time either any statute or rule expressly authorising the court to do it. The power seemed to be inherent in the jurisdiction of every court of justice to protect itself from the abuse of its own procedure."

I am therefore, of opinion that the answer to the second question is in the affirmative [His LORDSHIP added that on the facts the action was frivolous and vexatious] and the county court judge was perfectly justified in striking it out.

Appeal dismissed.

Feb. 14, 1916. The plaintiff appealed to the Court of Appeal. The Court reserved judgment. On Mar. 18 **SWINFEN EADY, L.J.**, said that he had had an opportunity of considering the shorthand notes of the proceedings in the courts below and in that court and also of the application for a certiorari, and having considered them he saw no ground for giving the applicant leave to appeal. **PICKFORD, L.J.**, and **BANKES, L.J.**, concurred, and the appeal was dismissed.

Solicitor: *Treasury Solicitor.*

[Reported by L. H. BARNES & E. J. M. CHAPLIN, Esqs., Barristers-at-Law.]

ABINGDON RURAL DISTRICT COUNCIL v. CITY OF OXFORD ELECTRIC TRAMWAYS, LTD.

[COURT OF APPEAL (Swinfen Eady and Scrutton, L.JJ., and Bray, J.), April 20, 24, 1917]

[Reported [1917] 2 K.B. 318; 86 L.J.K.B. 1247; 117 L.T. 133;
81 J.P. 189; 33 T.L.R. 319; 15 L.G.R. 446]

Highway—Damage—Extraordinary traffic—Question of fact—Full omnibus service started on country road—Traffic not increasing with slow, normal development of district—Cessation of traffic being extraordinary—Highways & Locomotives Amendment Act, 1878, (41 & 42 Vict., c. 77), s. 23.

"Whether traffic over a road is "extraordinary traffic" within s. 23 of the Highways and Locomotives Amendment Act, 1878 [now s. 62 (1) of the Highways Act, 1959 (see 39 HALSBURY'S STATUTES (2nd Edn.) 480)] is a question of fact in each particular case and in deciding it all the circumstances of the case must be taken into consideration. Increased traffic which is due to the slow and normal increase of the development of the district is not "extraordinary traffic." In considering whether traffic is "extraordinary" there is no distinction in principle between the conveyance of goods and the conveyance of persons, e.g., by motor omnibus, and the purpose and occasion of the traffic is immaterial. Accordingly, where an hourly omnibus service was started over roads which no heavy traffic had previously used, it was held to constitute "extraordinary traffic" although it was instituted to satisfy the needs of the neighbourhood.

Per **SWINFEN EADY, L.J.**: Traffic held to be extraordinary need not always remain extraordinary traffic. In each case the court is only dealing with the

position in the period in respect of which the extraordinary expenses are claimed. Extraordinary traffic may in course of time become merely a portion of the ordinary traffic of the district.

Notes. Referred to: *Weston-super-Mare U.D.C. v. H. Butt & Co., Ltd.* [1919] 2 Ch. 1.

As to extraordinary traffic, see 19 HALSBURY'S LAWS (3rd Edn.) 156-161, and for cases see 26 DIGEST (Repl.) 437 et seq.

Cases referred to:

- (1) *Hill v. Thomas*, [1893] 2 Q.B. 333; 62 L.J.M.C. 161; 69 L.T. 553; 57 J.P. 628; 42 W.R. 85; 9 T.L.R. 647; 4 R. 565 C.A.; 26 Digest (Repl.) 489, 1370.
- (2) *Barnsley British Co-operative Society, Ltd. v. Worsborough U.D.C.*, [1916] 1 A.C. 291; 85 L.J.K.B. 103; 113 L.T. 1121; 80 J.P. 114; 32 T.L.R. 41; 60 Sol. Jo. 25; 14 L.G.R. 122 H.L.; 26 Digest (Repl.) 449, 1449.

Also referred to in argument:

- Etherley Grange Coal Co. v. Auckland District Highway Board*, [1894] 1 Q.B. 37; 69 L.T. 702; 58 J.P. 102; 42 W.R. 198; 10 T.L.R. 62; 38 Sol. Jo. 38; 9 R. 88, C.A.; 26 Digest (Repl.) 440, 1382.
- Hemsworth R.D.C. v. Micklethwait* (1904), 68 J.P. 345; 2 L.G.R. 1084, D.C.; 26 Digest (Repl.) 441, 1390.
- Billericay R.D.C. v. Poplar Union and Keeling*, [1911] 2 K.B. 801; 80 L.J.K.B. 1241; 105 L.T. 476; 75 J.P. 497; 55 Sol. Jo. 647; 9 L.G.R. 796, C.A.; 26 Digest (Repl.) 452, 1478.

Appeal by the defendants, omnibus proprietors, from an order made by SANKEY, J., giving judgment for the plaintiffs, the local authority, in an action in which the plaintiffs claimed the expenses alleged to have been incurred by them in repairing certain roads between the city of Oxford and Abingdon, by reason of the damage caused by the excessive weight and extraordinary traffic of the defendants' omnibuses.

The facts are stated in the judgment of SWINFEN EADY, L.J.

Disturnal, K.C., and *Eustace Hills* for the defendants.

Clavell Salter, K.C., and *C. Willoughby Williams* for the plaintiffs were not called on to argue.

SWINFEN EADY, L.J.—This is an appeal by the defendants, City of Oxford Electric Tramways, Ltd., from a decision of SANKEY, J., who tried the case without a jury. The plaintiffs are the Abingdon Rural District Council, and the claim in the action was made in respect of extraordinary traffic under s. 23 of the Highways and Locomotives (Amendment) Act, 1878. The learned judge gave judgment for the plaintiffs for a sum of £350. SANKEY, J., gave a very full and elaborate judgment dealing in great detail with the nature of the traffic in respect of which the claim was made, and full particulars of the roads over which the traffic proceeded. The claim is in respect of the institution of a line of motor-omnibuses running between Oxford and Abingdon. These omnibuses run over a road divided into sections and dealt with by SANKEY, J., as section A, section B, and section C. The claim allowed at the trial is in respect of the road section B, and some eighty yards of section C.

It appears that the road, starting from Oxford, leads to the residential district of Boar's Hill, and then proceeds to Abingdon. The traffic in question consists of traffic from Oxford to Abingdon, and from Abingdon to Oxford, thus enabling the through journey to be made, and also enabling persons living at or near the Boar's Hill to proceed either to Oxford or to Abingdon. The traffic in respect of which the claim is allowed is for one year from July 20, 1914, to July 20, 1915. It is beyond dispute that the traffic has occasioned very much extra expense in the repair of the road used by the omnibuses—in fact, according to the evidence, the charge for maintaining the roads previous to this traffic was about £117 per mile, and the additional charge, caused solely by this traffic, is almost double that figure, that is

to say, it has increased it from £117 per mile to £221 per mile. Section 23 of the Act of 1878 provides :

"Where by a certificate of their surveyor it appears to the authority which is liable or has undertaken to repair any highway, whether a main road or not, that, having regard to the average expenses of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon, such authority may recover in a summary manner from any person by whose order such weight or traffic has been conducted the amount of such expenses . . ."

That extraordinary expenses have been incurred by the plaintiff authority to the extent of £104 per mile by reason of this traffic is not in dispute, but the defendants contest that they are under any liability for it, on the ground that the traffic which has occasioned this additional charge is not extraordinary traffic within the meaning of s. 23 of the Act. The road over which the traffic extends is thus described by the judge. He says :

"I, therefore, find, with regard to these roads, that they were as described by Mr. Weaving—that is to say, that road B was a lane more or less; that there was hardly any traffic on it before the buses came; that a person walking along the road seldom met anybody or anything; that it was very narrow at parts and very steep; that it was tortuous and with nasty bends, and it was merely a country lane for country light traffic, agricultural carts occasionally, and occasionally possibly a tradesman's cart, still more occasionally a motor-car, but that it was a mere cross-country lane."

That is a description of the road which forms the middle section from Oxford to Abingdon, section B, and is the road in respect of which the claim is mostly made. There are another eighty yards or so on road C, but as to that the Judge says :

"Road C, which is the other road I have to deal with, was, I think, of a different character. That was a road which was much better than road B, but at the same time nothing approaching what is known as a main road, and, although the traffic along it was traffic of a more frequent and a heavier character than the traffic along road C, it still remained, for all intents and purposes, a country road."

It was with reference to the roads so described that the present traffic became additional traffic. What happened was that the defendants were minded to supply a series of motor-omnibuses. Previously, according to the evidence, there had been a one-horse omnibus that for a time sufficed to take the people from Boar's Hill into Oxford and vice-versâ, but in 1914 the defendants established a series of motor-omnibuses that were of three types. They were double deck, large single deck, and small single-deck omnibuses. The weights were between 3 tons and a little under 3½ tons empty, but when loaded with passengers they weighed from 4 tons 7cwt. to 5½ tons. The service, from one terminus to the other was a daily service. the omnibuses running hourly from each terminus from about nine in the morning until nine at night, and, accordingly, about twenty-four of them passing over and along the highways in every period of twenty-four hours. So that there would be something like 168 buses in the week going over the roads in question, weighing from 3 to 5½ tons, where previously to the commencement of this traffic there were no motor-omnibuses at all. That is the nature of the traffic. It was urged that it is necessary to consider the nature of the neighbourhood, the nature of the traffic, and the roads in the district. The judge did that. He pointed out, and I will not dwell further upon it, the nature of the roads and the nature of the traffic brought on to these roads where previously there was no traffic of this description. It is an entirely new traffic so far as regards motor-omnibuses.

Is that extraordinary traffic within the meaning of s. 23 of the Act. In *Hill v. Thomas* (1) BOWEN, L.J., in delivering the judgment of the Court of Appeal, dealt with extraordinary traffic in this way ([1893] 2 K.B. at p. 340):

"Extraordinary is really a carriage of articles over the road at either one or more times, which is so exceptional in the quality or quantity of articles carried, or in the mode or time of user of the road, as substantially to alter and increase the burden imposed by ordinary traffic on the road, and to cause damage and expense thereby beyond what is common."

That will apply to the carriage of persons as well as to that of articles. Here the burden has been very much increased, the cost has been almost doubled, and this additional traffic is traffic of an entirely novel kind, not forming hitherto any portion of the ordinary traffic. It is not traffic that has grown up by slow degrees, but it has been put on, it may be, to serve the needs of the neighbourhood, on quiet country roads on which previously the ordinary traffic of the road did not comprise any omnibus traffic at all. Counsel for the defendants argued that the court is bound, in considering the question of extraordinary traffic, to take into account the purpose and occasion of the traffic. He formulated a proposition which is dealt with by SANKEY, J., when he says:

"I come to another point, and that is the point raised by the learned counsel for the defendants. Briefly it may be put as follows: He says the question that has to be answered in this case is: Is an omnibus service run to serve the needs of a district an extraordinary service—that is to say, is an omnibus service so run extraordinary traffic—and he refers to the colony at Boar's Hill as being the district over which, including Abingdon itself, this motor service is run."

In substance this was the argument that was put in arguing *Barnsley British Co-operative Society, Ltd. v. Worsborough U.D.C.* (2). It was part of the argument that was advanced unsuccessfully in that case. There it was argued: "At the present day the essential characteristic of the law with regard to the user of roads is that every member of the public is entitled to use them properly as much as he needs, and traffic will not now be treated as extraordinary, although it be heavy and although it be by traction engine, if it is the ordinary carrying traffic of persons engaged in business in the neighbourhood." So here it is now argued that, if all these motor-omnibuses do is to satisfy the needs of the immediate neighbourhood and to carry the ordinary local traffic between Abingdon and Oxford, that cannot amount to extraordinary traffic. In my opinion, such an argument as that is not well founded. The observations LORD BUCKMASTER in the *Barnsley Case* (2) ([1916] 1 A.C. at p. 299) are important. He says:

"It is therefore quite plain that before the road was used under the circumstances that I have stated traffic of the description which was put upon it by the appellants would not have been the ordinary traffic of the road; but this is essentially a question of fact, and a question of fact which I think must be determined at the time, and under all the circumstances existing, when the complaint was made. I do not think it is necessary in this case to consider how long the road may be the subject of extraordinary traffic before such extraordinary traffic becomes ordinary. What the learned judge who tried this case himself said with regard to that matter appears to me to be perfectly sound—namely, that extraordinary traffic is not the traffic which is due to the slow and normal increase of the development of traffic owing to the development of the district."

That is applicable to the present case. This service of motor-buses was not the slow and normal increase of the development of traffic owing to the development of the district, but it was a service of buses put on at almost one time, and it so rapidly increased from the time of its first institution as to be dealt with as being substantially put on at one time and wholly different in character from anything that preceded it. Counsel for the defendants in substance argued, that if the

traffic is now extraordinary traffic, it must always remain extraordinary traffic. I do not accept that at all. All that we are dealing with is the particular year in question, and traffic which when it first takes to the road is new and out of the ordinary may in course of time become merely a portion of the ordinary traffic of the district. But we are not now concerned to inquire within what time the traffic that is now extraordinary may become ordinary. All we have to determine is whether the plaintiffs in this case have made out that during the year in question in which they were put to the additional expense of £350 by reason of traffic the like of which had not been seen on the road before, that traffic, at that time and for that year, was extraordinary traffic within the meaning of s. 23 of the Act.

In my opinion, the judge did not misdirect himself in any way, and in his long and careful judgment he arrived at the proper conclusion. I must say here what was said by LORD BUCKMASTER in the *Barnsley Case* (2) ([1916] 1 A.C., at p. 300):

"I am unable to find that the learned judge who considered this case and gave a long and careful judgment has in any respect whatever misdirected himself in forming the opinion which he expressed as to this user complained of having been extraordinary and excessive."

Whether user is extraordinary, whether the traffic is extraordinary, is a question of fact in each particular case, and in deciding it all the circumstances of the case must be taken into consideration. I am of opinion that the learned judge arrived at the right conclusion of fact. I am quite unable to accept the distinction which junior counsel for the defendants attempted to draw between this case and the *Barnsley Case* (2) by saying that in the *Barnsley Case* (2) it was a demand for goods or commodities which caused the increased traffic, whereas here the traffic results from a demand by passengers for conveyance. The circumstances under which this new traffic takes place differs in different cases. In one case it may be in respect of goods, in another case it may be in respect of the conveyance of persons. In my judgment, there is no distinction in principle between the conveyance of persons and the conveyance of goods in determining whether traffic is or is not extraordinary traffic. For these reasons I am of opinion that the judgment of the court below was quite right, and that the appeal fails.

SCRUTTON, L.J.—I agree.

BRAY, J.—I agree. It is quite clear that this traffic falls within the definition which has been read from the judgment of BOWEN, L.J., in *Hill v. Thomas* (1), and equally within the passage from LORD BUCKMASTER's speech in the *Barnsley Case* (2) ([1916] 1 A.C., at p. 300):

"The learned judge must determine, having regard to all the circumstances, what was the ordinary traffic of the road, and he must then settle whether or no the traffic complained of was not that ordinary traffic, but was extraordinary traffic which the road was not accustomed to bear."

It is said that there must be an exception to that, and that the traffic ceases to be extraordinary if it is due to the development of traffic owing to the development of the district. In the present case SANKEY, J., dealt with that. He found as a fact that the additional traffic was not due to the development of the district at all. Certainly it was not slow and gradual. He said:

"I am considering road B and a part of road C, and I do not think that, even if the point taken by counsel for the defendants was right with regard to the demand preventing the traffic from being extraordinary, it applies to the road in question. I cannot forget that his own and chief witness said—I mean his first official witness—that the defendant company did not cater for wayside traffic. We had considerable evidence given with regard to the number of people who went through from Oxford to Abingdon and vice versa. There was considerable evidence given with regard to the number of people who went to

Boar's Hill, but I watched carefully and I think it was only two or three gentlemen who were put down at Pound's Corner, and who wanted to wander off even to Wooton on the one side or Pewit House on the other side. As I have already said, I do not think, either in law or in fact, that the contention of counsel for the defendants applies here."

In my opinion, that is quite right, and this was clearly extraordinary traffic.

Appeal dismissed.

Solicitors: *Church, Adams & Co.*, for *Challenor & Son*, Abingdon; *Sydney Morse*.

[*Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.*]

PRITCHETT AND GOLD AND ELECTRICAL POWER STORAGE CO. v. CURRIE AND ANOTHER

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Pickford and Warrington, L.JJ.),
July 7, 8, 1916]

[*Reported* [1916] 2 Ch. 515; 85 L.J.Ch. 753; 115 L.T. 325]

Lien—Sale of goods—Goods supplied under sub-contract—Right of sellers against party to main contract.

The defendant C. entered into a contract with the second defendant, a company for the installation of an electrical apparatus. Among the materials that were required to be supplied was a storage battery. The defendant company entered into a sub-contract with the plaintiff company for the supply of a battery and the erection thereof. The battery was delivered, and a short time afterwards the defendant company went into liquidation. Thereupon the plaintiff company commenced an action against the defendant C. for the price of the battery.

Held: the plaintiffs had no lien on or right to follow any part of the money which was payable under the main contract by the defendant C. to the defendant company, and, therefore, their claim must fail.

Bellamy v. Davey (1), [1891] 3 Ch. 540, where the subject-matter of the main contract and the sub-contract was co-extensive, distinguished.

Notes. Referred to: *Pole-Carew v. Western Counties and General Manure Co., Ltd.*, [1920] 2 Ch. 97.

As to legal and equitable liens, see 24 HALSBURY'S LAWS (3rd Edn.) 148-164, and for cases see 32 DIGEST 275 et seq.

Case referred to:

(1) *Bellamy v. Davey*, [1891] 3 Ch. 540; 60 L.J.Ch. 778; 65 L.T. 308; 40 W.R. 118; 7 T.L.R. 725; 32 Digest 284, 613.

Appeal by the defendant company, Hamble River, Luke & Co., Ltd., from an order of SARGANT, J.

The facts are stated in their Lordships' judgments.

Romer, K.C., and *H. E. Wright* for the defendant company.

Grant, K.C., and *S. P. J. Merlin* for the plaintiffs.

LORD COZENS-HARDY, M.R.—This appeal from a decision of SARGANT, J., raises some curious points. The first is a question not involving any general principle of law, but involving the construction of a somewhat obscure contract. On the one side it is said that the property in the subject-matter of the contract remained in the plaintiffs and did not pass to the defendant company. That is

denied by the other side. The main bulk of the argument which we have heard depends upon that issue. The other question is, whether the property passed or not, can the plaintiffs be entitled, as against the defendant company, to claim the money paid into court in the circumstances which I must shortly mention? In my view, the second point is the easier one to deal with, and I propose to deal with that first.

The defendant Mrs. Hilda Beatrice Currie entered into a contract with the defendant company for the supply of an electrical installation. It was a contract for a large sum, and among the things which were required was a storage battery. The defendant company were minded to do that which they had a perfect right to do—namely, to obtain this storage battery from other traders. Accordingly, they entered into a contract with the plaintiffs for—I am using a neutral word—the supply of the storage battery and its erection. That was, of course, for a much smaller sum than was due as between Mrs. Currie and the defendant company. That was one of the many things which had to be dealt with in order to complete the contract between Mrs. Currie and the defendant company. The defendant company got into financial difficulties. The plaintiffs commenced this action originally against Mrs. Currie. It is very hard to see what right they had against her, but I do not say whether they had or had not any such right. Mrs. Currie then took a step which has probably been the cause of a great many of the difficulties. She instituted something in the nature of interpleader proceedings (it plainly was not a case for interpleader), and also asked that the defendant company might be made defendants to the action. The master did not adjourn the case to the judge as usually would have been done. He made an order adding the defendant company, and also providing that a sum of £269, less costs, part of the contract price as between Mrs. Currie and the defendant company, should be paid into court without prejudice to any question between the parties, and proceedings were stayed against Mrs. Currie. The plaintiffs say that they ought to have the money which is in court handed over to them. The learned judge in the court below has adopted that view. With great respect, I am quite unable to follow that. What is this money? On the face of it, it is part of the purchase money to which the defendant company are entitled from Mrs. Currie. When counsel is asked to justify that order, he says that the only authority in point to support that contention is the decision of ROMER, J., in *Bellamy v. Davey* (1).

Without saying whether *Bellamy v. Davey* (1) is an authority upon which the court can rely—which I very much doubt—it certainly is no authority for a case like the present. In *Bellamy v. Davey* (1) there was a contract for erecting two tanks and there was a sub-contract for the erection of the same two tanks. The tanks were unfinished and in an incomplete state when the original contractor became insolvent, and an order was made by the court that the tanks should be completed by the plaintiff, the sub-contractor. Let them be completed by him, said the court, and let him be paid the amount. In that case ROMER, J., seems to have held that it was something in the nature of stoppage in transitu—though it is very difficult to see how that could be so. He held that the sub-contractor was entitled to be paid out of the money due from the building owner to the principal contractor. That may be right or it may be wrong. But it is impossible to apply that doctrine to a case like the present, where the principal contract is one for a large number of items involving more than £1,300, and the sub-contract is merely for one of the elements to be furnished under the contract and is for a very small sum of money. I know of no authority which can justify such a contention as that which has been urged. I am bound to say that I doubt it unless it is put on the footing of arrangement between the parties, and even if *Bellamy v. Davey* (1) is right, it seems to me to be no authority for the order which has been made here. Counsel for the defendant company say that this is part of the purchase money, and must be handed out of court to the defendant company. I can see no answer to that claim. That being so, in the view which

I take, it is not strictly necessary to consider the language of the contract between the sub-contractors and the defendant company on the question whether the property did or did not pass. It is a point of difficulty. Upon the whole, for reasons which I think PICKFORD, L.J., will more fully elaborate, I think that the property did pass under the terms of this contract. For these reasons I think that this appeal must be allowed.

PICKFORD, L.J.—I am of the same opinion. The plaintiffs sued the defendant, Mrs. Currie, for the value of materials which they had supplied to the defendant company for the purpose of their being erected by the defendant company on Mrs. Currie's premises as an electric battery as part of a much larger contract for the whole electrical installation, amounting to nearly £1,350. The master made an order that without prejudice to any questions between the plaintiffs and the defendant company Mrs. Currie should lodge in court a certain sum of money, a portion of the balance of the contract price alleged to be payable by her to the defendant company, and it was ordered that on such lodgment all proceedings should be stayed against Mrs. Currie and that the plaintiffs should within fourteen days deliver a statement of their claim to the defendant company who were within fourteen days thereafter to deliver their defence and be at liberty therein to set up any counter-claim. The defendant company had been added on the application of Mrs. Currie as defendants. The result of that was that a certain sum of money payable by Mrs. Currie in respect of the main contract was paid into court, and the plaintiffs were to deliver a claim by which they were to establish their right to that sum of money as against the defendant company. I think that one of the learned counsel used the expression that it was a "sort of interpleader issue." But it was not an interpleader issue at all.

To establish that right, counsel for the plaintiffs, concedes, quite rightly, that he must establish that he has a lien upon or a right to follow that particular sum. He also concedes that, unless such a right is given to him by the authority of *Bellamy v. Davey* (1), he cannot make out such a right because it is the assertion by a sub-contractor of a lien on the whole of the money payable by the principal debtor to the head contractor under the contract. He admits that, unless that is given to him by the authority of that case, it is contrary to the general rules of law. I do not think that it is in the least necessary for me to consider whether *Bellamy v. Davey* (1) is right or is wrong. I think that it is enough to say that, assuming that the decision in that case was absolutely right, it is no authority for the proposal for which the plaintiffs contend in the present case. That was a case in which the contractor and the sub-contractor were concerned only with the article that was supplied by the sub-contractor. No doubt the contractor had charged a larger price to the building owner than the sub-contractor charged to him. But that and that only was the subject of the contract. It may be—I do not say whether it is or is not so—that in that case the sub-contractor may have a lien upon the amount payable to the contractor for the amount due to him, and that only the surplus went to the contractor, but it seems to me that that does not in any way establish that where there is a sum of money payable to a contractor, not in respect of one article only, but in respect of the whole contract which includes many things other than the subject-matter of the sub-contract, the sub-contractor has a lien upon a large sum which is not connected with him except indirectly for the payment of his debt. It seems to me that *Bellamy v. Davey* (1) is no authority for such a proposition as that. The plaintiffs have to establish their right as against the defendant company. The defendant company are entitled to have this money paid to them by Mrs. Currie unless the plaintiffs have established that they have a lien upon it. The plaintiffs have not established any such lien. Therefore, it seems to me that they have not established that they are entitled to the money as against the defendant company or anybody else. I think that the action fails on that ground. [His LORDSHIP dealt in detail with the documents

which had been put in evidence and said, in his opinion, the property in the battery did pass to the defendant company.]

WARRINGTON, L.J.—In this case SARGANT, J., made an order that the £255 odd paid into court by Mrs. Currie should be paid out to the defendants. Can that order be supported? It is admitted by counsel for the plaintiffs that the only authority which could support the order is *Bellamy v. Davey* (1). It is quite unnecessary to say whether *Bellamy v. Davey* (1) on the facts of that particular case, was properly decided. All that it is necessary for us to say is that it does not apply to a case like the present, where the head contract was for the performance of a number of applications, only one of which was covered by the sub-contract. In *Bellamy v. Davey* (1) the head contract and the sub-contract were co-extensive so far as their subject-matter was concerned. On the first point I say nothing more than that—that *Bellamy v. Davey* (1), whether rightly or wrongly decided, does not apply to the present case. On the second point, whether the learned judge in the court below was right in saying that the plaintiffs were entitled to the electric battery and fittings, I have closely followed the reasons given by PICKFORD, L.J., and I think that it would be sheer waste of time to express the same reasons in my own language. I agree, therefore, that the appeal ought to be allowed.

Appeal allowed.

Solicitors: *Bircham & Co.; Claremont, Haynes & Co.*

[Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]

AMMONIA SODA CO., LTD. v. CHAMBERLAIN AND ANOTHER

[COURT OF APPEAL (Swinfen Eady, Warrington and Scrutton, L.JJ.), October 29, 30, 31, November 1, 2, 5, 7, 1917]

[Reported [1918] 1 Ch. 266; 87 L.J.Ch. 193; 118 L.T. 48;
34 T.L.R. 60; 62 Sol. Jo. 85]

Company—Dividend—Distribution—Payment out of profit—Need to make good loss of fixed capital in previous trading period—"Fixed capital"—"Circulating capital".

There is no legal obligation on a limited company not to distribute as dividend the net profit earned by it during a trading period unless its fixed capital is then intact, any loss suffered by that capital in previous trading periods having been made good out of profit.

For this purpose a distinction must be drawn between "fixed capital" and "circulating capital." "Fixed capital" is that which a company retains in the shape of assets on which the subscribed capital has been expended, which assets either themselves produce income independently of any action by the company—as, e.g., a trust company formed to acquire and hold securities and from time to time to divide the income arising therefrom—or, being retained by the company, are used to gain profits—e.g., a manufacturing company erecting works and installing machinery or plant. "Circulating capital" is subscribed capital temporarily parted with and circulated in business, as in the purchase of goods to be sold at a profit or a loan by a banker to be repaid with interest. The amount of such circulating capital must be charged against receipts in ascertaining profit. Otherwise gross profit would be dealt with as

net profit, and its distribution as dividend would involve a distribution of capital which would be illegal.

Notes. Applied: *Lawrence v. West Somerset Mineral Rail. Co.*, [1918] 2 Ch. 250. Considered: *Atherton v. British Insulated and Melsby Cables*, [1925] 1 K.B. 421. Referred to: *Stapley & Co., Ltd. v. Read Bros., Ltd.*, [1924] All E.R.Rep. 421; *Long Acre Press v. Odhams Press*, [1930] All E.R.Rep. 237; *Abbott v. Albion Greyhounds (Salford), Ltd.*, [1945] 1 All E.R. 308.

As to the source and distribution of dividends, see 6 HALSBURY'S LAWS (3rd Edn.) 396 et seq.; and for cases see 9 DIGEST (Repl.) 179-182, 627 et seq. The present Companies Act is that of 1948, for which see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Cases referred to:

- (1) *Lee v. Neuchatel Asphalte Co.* (1889), 41 Ch.D. 1; 58 L.J.Ch. 408; 61 L.T. 11; 37 W.R. 321; 5 T.L.R. 260; 1 Meg. 140, C.A.; 9 Digest (Repl.) 180, 1161.
- (2) *Verner v. General and Commercial Investment Trust*, [1894] 2 Ch. 239; 63 L.J.Ch. 456; 70 L.T. 516; 10 T.L.R. 393; 38 Sol. Jo. 384; 1 Mans. 136; 7 R. 170, C.A.; 9 Digest (Repl.) 181, 1170.
- (3) *Re National Bank of Wales, Ltd., Cory's Case*, [1899] 2 Ch. 629; 68 L.J.Ch. 634; 81 L.T. 363; 48 W.R. 99; 15 T.L.R. 517; 43 Sol. Jo. 705, C.A.; affirmed sub nom. *Dovey v. Cory*, [1901] A.C. 477, H.L.; 3 Digest (Repl.) 152, 170.
- (4) *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392; 68 L.J.Ch. 699; 81 L.T. 334; 48 W.R. 74; 15 T.L.R. 436; 43 Sol. Jo. 622; 7 Mans. 165, C.A.; 9 Digest (Repl.) 36, 44.
- (5) *Re County Marine Insurance Co., Rance's Case* (1870), 6 Ch. App. 104; 40 L.J.Ch. 277; 23 L.T. 828; 19 W.R. 291, L.J.J.; 9 Digest (Repl.) 527, 3474.
- (6) *Bond v. Barrow Hematite Iron Co., Ltd.*, [1902] 1 Ch. 353; 71 L.J.Ch. 246; 86 L.T. 10; 50 W.R. 295; 18 T.L.R. 249; 46 Sol. Jo. 280; 9 Mans. 69; 9 Digest (Repl.) 181, 1168.

Also referred to in argument:

- Re Sharpe, Re Bennett, Masonic and General Life Assurance Co. v. Sharpe*, [1892] 1 Ch. 154; 61 L.J.Ch. 193; 65 L.T. 806; 40 W.R. 241; 8 T.L.R. 194; 36 Sol. Jo. 151, C.A.; 9 Digest (Repl.) 631, 4209.
- Irvine v. Union Bank of Australia* (1877), 2 App. Cas. 366; L.R. 4 Ind. App. 86; 46 L.J.P.C. 87; 37 L.T. 176; 25 W.R. 682, P.C.; 9 Digest (Repl.) 665, 4407.
- Boschoek Proprietary Co., Ltd. v. Fuke*, [1906] 1 Ch. 148; 75 L.J.Ch. 261; 94 L.T. 398; 54 W.R. 359; 22 T.L.R. 196; 50 Sol. Jo. 170; 13 Mans. 100; 9 Digest (Repl.) 465, 3042.
- Re Crabtree, Thomas v. Crabtree* (1911), 106 L.T. 49, C.A.; 40 Digest (Repl.) 744, 2319.
- Dent v. London Tramways Co.* (1880), 16 Ch.D. 344; 50 L.J.Ch. 190; 44 L.T. 91; 9 Digest (Repl.) 181, 1175.
- Davison v. Gillies* (1879), 16 Ch.D. 347, n.; 50 L.J.Ch. 192, n.; 44 L.T. 92, n.; 9 Digest (Repl.) 637, 4243.
- Lubbock v. British Bank of South America*, [1892] 2 Ch. 198; 61 L.J.Ch. 498; 67 L.T. 74; 41 W.R. 103; 8 T.L.R. 472; 9 Digest (Repl.) 178, 1155.
- Foster v. New Trinidad Lake Asphalt Co., Ltd.*, [1901] 1 Ch. 208; 70 L.J.Ch. 123; 49 W.R. 119; 17 T.L.R. 89; 45 Sol. Jo. 100; 8 Mans. 47; 9 Digest (Repl.) 629, 4201.
- Bishop v. Smyrna and Cassaba Rail. Co. (No. 2)*, [1895] 2 Ch. 596; 64 L.J.Ch. 806; 73 L.T. 337; 2 Mans. 575; 13 R. 803; 9 Digest (Repl.) 178, 1150.
- Macdougall v. Jersey Imperial Hotel Co., Ltd.* (1864), 2 Hem. & M. 528; 4 New Rep. 497; 34 L.J.Ch. 28; 10 L.T. 843; 28 J.P. 708; 10 Jur.N.S. 1043; 12 W.R. 1142; 71 E.R. 568; 9 Digest (Repl.) 630, 4207.

- Re Exchange Banking Co., Flitcroft's Case* (1882), 21 Ch.D. 519; 52 L.J.Ch. 217; 48 L.T. 86; 31 W.R. 174, C.A.; 9 Digest (Repl.) 631, 4210.
- Re National Funds Assurance Co.* (1878), 10 Ch.D. 118; 48 L.J.Ch. 163; 39 L.T. 420; 27 W.R. 302; 9 Digest (Repl.) 630, 4208.
- Re Mercantile Trading Co., Stringer's Case* (1869), 4 Ch. App. 475; 20 L.T. 591; 17 W.R. 694; sub nom. *Re Mercantile Trading Co., Ex parte Official Liquidator*, 38 L.J.Ch. 698, L.J.J.; 9 Digest (Repl.) 524, 3454.
- City of Glasgow Bank (Liquidators) v. Mackinnon* (1882), 9 R. (Ct. of Sess.) 535; 9 Digest (Repl.) 528, *1416.
- Wilmer v. McNamara & Co., Ltd.*, [1895] 2 Ch. 245; 64 L.J.Ch. 516; 72 L.T. 552; 43 W.R. 519; 11 T.L.R. 371; 39 Sol. Jo. 450; 13 R. 513; 9 Digest (Repl.) 182, 1176.
- Re Crichton's Oil Co.*, [1901] 2 Ch. 184; 70 L.J.Ch. 639; 84 L.T.Rep. 864; 8 Mans. 319; affirmed [1902] 2 Ch. 86; 71 L.J.Ch. 531; 86 L.T. 787; 18 T.L.R. 556; 9 Mans. 402, C.A.; 10 Digest (Repl.) 1086, 7406.
- Leeds Estate, Building and Investment Co. v. Shepherd* (1887), 36 Ch.D. 787; 57 L.J.Ch. 46; 57 L.T. 684; 3 T.L.R. 841; 36 W.R. 322; 9 Digest (Repl.) 632, 4216.
- Hinds v. Buenos Ayres Grand National Tramways Co., Ltd.*, [1906] 2 Ch. 654; 76 L.J.Ch. 17; 95 L.T. 780; 23 T.L.R. 6; 51 Sol. Jo. 13; 13 Mans. 411; 9 Digest (Repl.) 178, 1153.
- Bosanquet v. St. John D'El Rey Mining Co., Ltd.* (1897), 77 L.T. 206; 13 T.L.R. 525; 9 Digest (Repl.) 182, 1179.

Appeal by the plaintiff company from an order made by PETERSON, J., dismissing an action in which the company claimed that the defendants, directors of the company, should make good sums paid as dividends which, the company alleged, were not paid out of available profits, but out of capital.

The facts are as stated by SWINFEN EADY, L.J.

Gore-Browne, K.C., and *J. H. Stamp* for the plaintiff company.

Clauson, K.C., and *D. D. Robertson*, for the defendants, were not called on to argue.

SWINFEN EADY, L.J.—This is an appeal by the plaintiff company from the judgment of PETERSON, J., dismissing the action. In the autumn of 1915 the plaintiff company was the owner of lands in Cheshire of about 160 acres with extensive beds of rock salt and two proved brine flows. They also had buildings and machinery which had been erected at a cost, including the cost of exploration of the lands, of upwards of £150,000. The plaintiff company's predecessors purchased the land in 1907. It had taken several years to erect the works and establish the business, and by 1911 it had become a paying concern. For the thirteen months ending Jan. 31, 1912, the net profit was £13,030, and for the twelve months ending Jan. 31, 1913, the net profit was £15,669. In each year the profit was made after charging depreciation, mortgage and debenture interest, directors' fees, and other outgoings. The business carried on by the plaintiff company apparently competed with the business of Brunner, Mond & Co., and in the autumn of 1915 Brunner, Mond & Co. approached the directors and negotiated for and ultimately purchased substantially all the shares of the company. They thus obtained entire control of the plaintiff company, including all effective voting power. The old directors retired, and a new board nominated by Brunner, Mond & Co. took its place. The first report of the new board is dated Apr. 26, 1916, for submission to the shareholders in general meeting on May 16, 1916. The present action was commenced on May 18, two days after. The object of the action was to obtain a declaration that the dividends declared between September, 1912, and March, 1915, were paid out of capital, and to have the amount refunded by the defendants to the plaintiff company. The dividends alleged to have been paid out of capital are the following amounts. £916 10s. 7d. on Sept. 30, 1912;

£2,429 2s. 7d. on Mar. 31, 1913; a similar amount on Sept. 30, 1913; a similar amount on Apr. 4, 1914; and a further sum of £4,264 12s.—part of £4,912 10s. 1d.—on Mar. 31, 1915. Thus the total amount claimed in this action as dividends alleged to have been paid out of capital is £12,468 10s. 4d. If the claim were well founded it would be immaterial that Brunner, Mond & Co. had acquired their shares at what the parties agreed to be the value after all these dividends had been paid, and that the repayment of the amount to the plaintiff company would now in effect operate to enable Brunner, Mond & Co. to acquire a substantial additional benefit. The real question is: Were these dividends paid out of capital? PETERSON, J., held that they were not, and the plaintiff company contends that that judgment was erroneous. There is no dispute between the parties that these dividends were not paid out of the subscribed capital in the ordinary sense; on the contrary, it is admitted that they were paid out of net profits earned during the period in respect of which the dividends were paid. This is clearly the case, and is admitted on the face of the report of Apr. 26, 1916.

The plaintiff company contends, however, that although net profits were earned during the period, they were not available for dividend, and cannot really be considered "profits," as in the earlier period of the plaintiff company's history a loss had been incurred, and it is contended that until that loss has first been made good there cannot be any profits in the true sense of the word. In my judgment, this argument is unsound and has been exposed again and again. The Companies (Consolidation) Act, 1908, does not press any obligation upon a limited company, nor does the law require it, that it shall not distribute as dividend the clear net profit of its trading unless its paid up capital is intact or until it has made good all losses incurred in previous years. Upon this point it is only necessary to refer to three decisions of the Court of Appeal and one in the House of Lords.

In *Lee v. Neuchatel Asphalte Co.* (1) COTTON, L.J., said (41 Ch.D. at pp. 15, 16, and 18):

"The plaintiff's second point is that the property of the company is not now sufficient to make good the share capital; that assets to provide for that share capital must be made up before any dividend can be declared; and that, if dividends are declared without that being done, that is to be treated as a return and a division of capital amongst the shareholders, and therefore illegal. In my opinion that is entirely wrong. It is a misapplication of the term 'Return of capital.' . . . But if the court sees that the directors and the company have acted fairly and reasonably in ascertaining whether this is a division of profit and not of capital, then in what is really a matter of internal arrangement (if it is done honestly, and does not violate any of the provisions of the articles) the court is very unwilling to interfere and, in my opinion, ought not to interfere, with the discretion exercised by the directors, who have the management of the company, or with the powers exercised by the company, within the articles."

LINDLEY, L.J., said (*ibid.* at pp. 22 and 23):

"I may safely say that the Companies Acts do not require the capital to be made up if lost. They contain no provision of the kind. There is not even any provision that if the capital is lost the company shall be wound-up, and I think this omission is quite reasonable. The capital may be lost and yet the company may be a very thriving concern. As I pointed out in the course of the argument, and I repeat now, suppose a company is formed to start a daily newspaper; supposing it sinks £250,000 before the receipts from sales and advertisements equal the current expenses, and supposing it then goes on, is it to be said that the company must come to a stop, or that it cannot divide profits until it has replaced its £250,000, which has been sunk in building up a property which if put up for sale would perhaps not yield £10,000? That is a business matter left to business men. . . . Having shown from the Acts (negatively, of course, because this is a negative proposition, and can only be

proved by looking through the Acts) that the Acts do not require the capital to be made up if lost, I cannot find anything in them which precludes payment of dividends so long as the assets are of less value than the original capital."

LOPES, L.J., was of the same opinion.

The next case was *Verner v. General and Commercial Investment Trust* (2) LINDLEY, L.J., in delivering the judgment of himself and A. L. SMITH, L.J., said ([1894] 2 Ch. at pp. 266 and 267):

"The law is much more accurately expressed by saying that dividends cannot be paid out of capital than by saying that they can only be paid out of profits. The last impression leads to the inference that the capital must always be kept up and be represented by assets which, if sold, would produce it; and this is more than is required by law. Perhaps the shortest way of expressing the distinction which I am endeavouring to explain is to say that fixed capital may be sunk and lost, and yet that the excess of current receipts over current payments may be divided, but that floating or circulating capital must be kept up, as otherwise it will enter into and form part of such excess, in which case to divide such excess without deducting the capital which forms part of it will be contrary to law. . . . There is nothing in the Companies Acts, 1867 and 1887, any more than in the Act of 1862, which prevents a company which has lost part of its capital from continuing to carry on business and declaring and paying dividends."

KAY, L.J., said (*ibid.* at p. 270) that he did not know of any law to prevent income received from being divided, whether part of the capital is lost or not, and he added that it might be difficult to frame such a law without unduly interfering with the liberty of commercial proceedings.

In *Re National Bank of Wales, Ltd., Cory's Case* (3) LORD LINDLEY, M.R., in delivering the judgment of the court, said ([1899] 2 Ch. at p. 669):

"It is not possible for the court to say that the law prohibits a limited company, even a limited banking company, from paying dividends unless its paid-up capital is intact."

After referring to *Lee v. Neuchatel Asphalte Co., Ltd.* (1) and to *Verner v. General and Commercial Investment Trust, Ltd.* (2), he said (*ibid.* at pp. 670 and 671):

"What was lost there was fixed capital, and it is obvious that circulating capital, or any other money employed in earning returns, must be deducted from them in order to ascertain how much of them can be regarded as profit. If the returns do not exceed the money spent in procuring them (whether such money be called circulating capital or by any other name) there can be no profits; and no ingenious process of bookkeeping can alter the fact. It is not denied that in this case the annual receipts did exceed the annual outgoings, and, the dividends having been paid out of the excess, the allegation that they were paid out of capital is not accurate. . . . It was stated in the judgment of this court in *Lagunas Nitrate Co. v. Lagunas Syndicate* (4) that, if directors act within their powers—if they act with such care as is reasonably to be expected from them, having regard to their knowledge and experience—and if they act honestly for the benefit of the company they represent, they discharge their equitable as well as their legal duty to the company. We believe this statement of the law to be correct, and we adopt it as our guide."

In the same case in the House of Lords, under the name of *Dovey v. Corey* (3), some observations of LORD MACNAGHTEN may appropriately be cited, with reference to the large number of points of detail upon which counsel for the plaintiff company invited us to express an opinion. He said ([1901] A.C. at p. 488):

"I do not think it desirable for any tribunal to do that which Parliament has abstained from doing—that is, to formulate precise rules for the guidance or embarrassment of business men in the conduct of business affairs. There

never has been, and I think there never will be, much difficulty in dealing with any particular case on its own facts and circumstances; and, speaking for myself, I rather doubt the wisdom of attempting to do more."

LORD DAVEY approved of the principle laid down by LORD ROMILLY in *Rance's Case* (5) with a slight qualification. He also cited with approval (6 Ch. App. at p. 493) LINDLEY, L.J.'s judgment in *Verner v. General and Commercial Investment Trust, Ltd.* (2) ([1894] 2 Ch. at p. 266), where he said:

"Perhaps the shortest way of expressing the distinction which I am endeavouring to explain is to say that fixed capital may be sunk and lost, and yet that the excess of current receipts over current payments may be divided, but that floating or circulating capital must be kept up, as otherwise it will enter into and form part of such excess, in which case to divide such excess without deducting the capital which forms part of it will be contrary to law."

The distinction between "fixed" capital and "circulating" capital is not to be discovered in any of the Companies Acts. It appears to have first found its way into notice in *Lee v. Neuchatel Asphalte Co., Ltd.* (1), where LINDLEY, L.J., in his judgment adopted the expression which had been used by Sir Horace Davey in argument derived from writers in political economy. It is necessary to consider the sense in which the expressions "fixed capital" and "circulating capital" were used in that case and in *Verner v. General and Commercial Investment Trust, Ltd.* (2). What is fixed capital? That which a company retains in the shape of assets upon which the subscribed capital has been expended, which assets either themselves produce income independently of any further action by the company, or, being retained by the company are made use of to reproduce income or gain profits. A trust company, founded to acquire and hold stocks, shares, and securities, and from time to time to divide the dividends and income arising therefrom, is an instance of the former. A manufacturing company, acquiring or erecting works with machinery or plant, is an instance of the latter. In these cases the capital is fixed in the sense of being invested in assets intended to be retained by the company more or less permanently and used in producing an income. What is circulating capital? It is a portion of the subscribed capital of the company intended to be used by being temporarily parted with and circulated in business in the form of money, goods, or other assets, and which or the proceeds of which are intended to return to the company with an increment and are intended to be used again and again and to always return with some accretion. Thus the capital with which a trader buys goods circulates; he parts with it and with the goods bought by it, intending to receive it back again with profit arising from the resale of the goods. A banker lending money to a customer parts with his money and thus circulates it, hoping and intending to receive it back with interest. He retains, more or less permanently, bank premises in which the money invested becomes fixed capital.

It must not be, however, assumed that the division into which capital thus falls is permanent. The language is merely used to describe the purpose to which it is for the time being appropriated. This purpose may be changed as often as considered desirable, and as the constitution of the bank may allow. Thus bank premises may be sold and the money used as circulating capital may be expended in acquiring bank premises. The terms "fixed" and "circulating" are merely terms convenient for describing the purpose to which the capital is for the time being devoted, when considering its position in respect to the profits available for dividend. Thus, when circulating capital is expended in buying goods which are sold at a profit, or in buying raw materials from which goods are manufactured and sold at a profit, the amount so expended must be charged against, or deducted from, receipts before the amount of any profits can be arrived at. This is quite a truism, but it is necessary to bear it in mind when you are considering what part of current receipts are available for division as profit.

To return to the facts of the present case. The plaintiff company was registered in 1908 as a private company, and took over the property and assets of a partnership which carried on business as the Ammonia Soda Co. No profit was made on the sale of the concern by the partnership to the company. The plaintiff company took over all the assets and property at the price which they had cost the firm, and paid for them in shares. The substance of the transfer was that the private partnership was converted into a private company. It was carried on as a private company for three years until 1911, when, further capital being needed to the extent of about £150,000, it was decided to convert the private company into a public company. At this time its capital was £150,000 in ordinary shares, and it was decided to increase it to £300,000, the additional capital created being £150,000 in 6 per cent. preference shares which were to be issued to the public. The private partnership having been formed in 1907, it had taken four years to carry out the exploratory works, erect plant and machinery, and bring the concern to a profit-earning stage. Before the conveyance of Sept. 2, 1907, to the partnership of the 160 acres of land the existence of a brine run on the premises, furnishing a supply of brine which was practically inexhaustible, had been established. After purchase a shaft was sunk to work this brine. Another boring was made which proved the existence of a second brine run, the hydrostatic value of which differed by some 20 ft. from that of the first boring, but probably having some connection with the first. After a tool had been broken in the bore hole this was abandoned. Another boring was also made to the depth of 2,509 ft., which was not successful in achieving the purpose for which it was sunk, but nevertheless produced a wholly unexpected, startling, and unique result. The purpose of the sinking was to reach water into which could be turned the effluent from the company's works, and so dispose of it. This purpose failed, but a new bed of rock salt of a thickness of 666 ft. or thereabouts was proved, the existence of which was previously entirely unknown and unsuspected. The directors and their advisers considered that the results obtained by this expenditure increased the value of the company's property considerably in excess of what had been expended upon it. There was, however, in 1911, when the company was contemplating the issue of preference shares, an amount standing to the debit of profit and loss of £19,028 5s. 4d. This amount arose by debiting to that account at a time when the company's gross trading profit was insufficient to provide for the purpose the following sums for depreciation of buildings, plant, and machinery—namely, for the twelve and a half months ending Jan. 12, 1910, £5,383 6s. 6d.; for the year ending Dec. 31, 1910, £5,218 10s. 1d.; and for the seven months ending July 31, 1911, £3,119 3s. 6d., making together £13,721 0s. 1d. These sums represent a bookkeeping entry of $2\frac{1}{2}$ per cent. on buildings and $7\frac{1}{2}$ per cent. on plant and machinery. But there is no evidence of any actual depreciation of these items during this period. There were also debited during the same period large sums for directors' fees and mortgage and debenture interest. By reason of these debits there stood to the debit of profit and loss in May, 1911, when the issue of preference shares was contemplated, the said sum of £19,028. The directors proceeded to write off this debit balance in a manner which I will explain directly, and which is the foundation of this action. But if they had not done so, was there anything to prevent the payment of dividends out of subsequent net profits? In my opinion, there was not, for the reasons already stated. The directors were not under any obligation to recoup this lost capital before dividing net profit subsequently earned. And if money of a company be lost before any profits have been earned, which is alleged to have been the case here, it can only be capital which has been lost.

Counsel for the company invited the court to lay down that wherever there was a debit to the profit and loss account, irrespective of the way in which it arose, of the stage in the company's operations, and of the nature and business of the company, it was illegal to divide profits subsequently earned without first writing off out of those profits the amount of the debit. To do so would be to fall into the error which LORD MACNAGHTEN pointed out should be avoided, and would only

serve to harass and embarrass business men, and impose upon companies a burden which Parliament has abstained from casting upon them. The directors in this case were of opinion that no capital had been really lost, and they were of opinion that the value of the land and works as a going concern had been increased, as a result of their boring and exploratory work, to a considerably greater amount than £19,028. A committee of directors was appointed to look into the matter and value the land. Mr. Cocking, who made a valuation, was a mining engineer and scientific chemist, and had planned the works which had been erected. With his assistance the committee arrived at the conclusion that the sum at which the premises stood in their books was far below its real value, and on the revaluation the amount was increased by £20,542 2s. 8d. The learned judge in the court below has found that the directors were acting perfectly honestly and in good faith in so doing. The balance-sheet fully disclosed what had been done. The auditors drew attention to it in their certificate written at the foot of the balance-sheet, and it was explained to, and concurred in by, the shareholders in general meeting, and the report and accounts were received and adopted. In my opinion, in thus acting the directors were merely stating in their balance-sheet what, upon reasonable grounds, they believed to be the real value of their assets. At the trial three expert valuers were called by the defendants, and each of them was of opinion that the land was of the value at which it was entered, and the judge in substance accepted their evidence. Indeed he held that the estimate of value of Major Jackson, who was called for the plaintiffs, did not even approach the real value. The mode in which Mr. Cocking had arrived at his value was not attempted to be justified, but the amount arrived at was the fair value of the land. The result of increasing the value at which the land stood was to give a credit which would have enabled the debit of £19,028 to be written off. Part of it was, however, actually written off out of subsequent net profits. The debit consisted in part of a nominal depreciation in the fixed assets of the company, buildings, plant, and machinery, and as regards the balance it consisted of sums paid out of the subscribed capital of the company for mortgage and debenture interest and directors' fees, there not being sufficient trading profits to provide these amounts. The transaction was carried out with the full approval of the shareholders in general meeting, and in all honesty and good faith. The dividends complained of, paid out of net earnings in the subsequent years, were not paid out of capital, but out of profits, and the defendants are, in my opinion, under no liability whatever to repay the same or any part. The appeal fails, and should be dismissed.

WARRINGTON, L.J.—I am of the same opinion. The plaintiffs, the Ammonia Soda Co., Ltd., claim to recover from two ex-directors the amount of certain dividends paid to preference shareholders, on the alleged ground that they were paid either (a) out of capital or (b) at all events otherwise than out of profits, the articles of association providing that no dividend should be paid except out of profits of the company. It is unnecessary for me to re-state the facts in detail; it is enough shortly to mention those which raise the question.

At the end of 1910 there stood to the debit of the profit and loss account the sum of £19,028 5s. 4d., being the net loss on the trading of the company up to that time. By July 31, 1911, this loss had been reduced by subsequent profits to £12,970 18s. 3d. During the period ending on the same date the total amount allowed for depreciation of buildings and machinery had been the sum of £13,702 15s. 7d. The company's land, if entered on the same footing as that previously adopted, viz., at cost with certain additions, the nature of which it is unnecessary to specify, would have stood at £63,246 and some odd shillings. The directors, however, determined to enter it in the balance sheet for the period ending July 31, 1911, at £83,788, viz., £20,542 more than the £63,246, and to carry the £20,542 to a reserve account. This they did, and to this reserve account they charged, amongst other sums, the £12,970 18s. 3d., standing to the debit of profit and loss. The result was to wipe off this debit. Subsequently, considerable profits

in trading were made, and out of these the dividends in question were paid. In arriving at the amount of the profit for purposes of dividend there were deducted from the gross returns all money employed in earning them, including wages, cost of material, depreciation of buildings and machinery, and so forth. It is not suggested that any expense of this nature which ought to have been deducted was not deducted. That such proper deductions must be made is, I believe, all that LORD LINDLEY meant in the passages relating to circulating capital contained in his two judgments in *Verner v. General and Commercial Investment Trust, Ltd.* (2) and in *Re National Bank of Wales, Ltd., Cory's Case* (3). As to the value of the land, the directors honestly believed that it was worth at least the extra £20,000, and I am quite satisfied that they had reasonable grounds for that belief. I am myself prepared to go further, and to say that the plaintiffs have failed to prove that the land was not of at least the value adopted by the directors.

Under these circumstances can the directors be held liable for the payments they made? LORD MACNAGHTEN gave utterance in *Dovey v. Cory* (3) to a warning which should be borne in mind in all such cases as these. He said ([1901] A.C. at p. 488):

"I do not think it desirable for any tribunal to do that which Parliament has abstained from doing—that is, to formulate precise rules for the guidance or embarrassment of business men in the conduct of business affairs. There never has been, and I think there never will be, much difficulty in dealing with any particular case on its own facts and circumstances; and, speaking for myself, I rather doubt the wisdom of attempting to do more. I understand from my noble and learned friend, LORD SHAND, that he also takes this view."

There is, however, one restriction on the powers of companies incorporated under the Companies (Consolidation) Act, 1908, viz., that they must not under the guise of dividends or in any other way return to their shareholders money subscribed for their shares unless it be with the sanction of the court under the appropriate statutory provisions. It has been asserted in this case, not for the first time, that there is a further restriction—suggested to be a corollary of the rule I have just mentioned—which would make it illegal for a company to pay dividends out of the profits of a current year unless it first makes good deficiencies in paid-up capital occasioned by losses in previous years, or, to put the contention in a broader form, no dividends can properly be paid out of profits so long as there are losses previously incurred and not made good.

In my opinion, this alleged restriction has no foundation in law. It is not contended that there is anything in the statutes imposing it, and its suggested existence as a doctrine of the court has been negatived by the Court of Appeal in *Lee v. Neuchatel Asphalte Co., Ltd.* (1), *Verner v. General and Commercial Investment Trust, Ltd.* (2), and *Re National Bank of Wales, Ltd., Cory's Case* (3). I am, of course, far from saying that in all such cases dividends can properly be paid without making good the previous loss. The nature of the business and the amount of the loss may be such that no honest and reasonable man of business would think of paying dividends without providing for it. In such a case I apprehend the court would take the view that a payment which no honest and reasonable man of business would think it right to make could not properly be made by directors. We have no such case here. Even without taking credit for the appreciation of the land, I think the dividends paid were properly paid. They were not paid out of capital unless they were paid out of money which the directors were bound to treat as capital. For the reasons I have given the directors were not, in my opinion, bound to treat as capital the profits out of which the dividends were paid. They were not paid otherwise than out of profits, for they were clearly paid out of profits of trading clearly ascertained after making the necessary deductions. But if I am wrong in this view, the case is made quite clear by accepting the view of the directors and treating the land as of the value at which they entered it in the

balance-sheet. If I am right, that they honestly and reasonably believed it to be of this nature, they were clearly entitled to so treat it in the balance-sheet; and the effect of so doing was to establish that there was no deficiency of paid-up capital, and no ground, therefore, for applying the restriction I have alluded to. The fund out of which the dividends were paid would then clearly be profits even if such restriction existed, as, in my opinion, it did not. I am of opinion that the judgment of PETERSON, J., was right and that the appeal should be dismissed.

SCRUTTON, L.J.—If there had not been three previous decisions of the Court of Appeal discussing the subject-matter of the law which has been argued in this case, I should certainly have desired very carefully to have considered the language in which I expressed my judgment. The course, however, which the case has taken, and the opinion that I have formed, enables me very shortly to express the view that I have taken, though having regard to what may be described, according to the point of view, as either the hope or the threat that this matter will be tested by a superior tribunal who can deal with the whole matter, I have thought it right shortly to express in my own words the opinion that I have formed.

I do not propose to repeat the facts which have been stated by SWINFEN EADY, L.J. The facts which shortly raise the point appear to me to be these. An attempt is made to make the directors liable for dividends which their company has paid under their sanction. That those dividends amount to between £1,200 and £1,300 paid in the years 1912, 1913, 1914, and 1915; in amount they are less than the net profits which were made in those years; and in calculating those net profits allowance has been made for some £28,000 for depreciation or wear and tear of fixed assets, and for some £32,000 for repairs of those fixed assets. What is said is this: "Although in the years in which you paid these dividends there were profits out of which you could pay them, in three of those years—1909, 1910, and 1911—there was a loss of £19,000, and the profits of subsequent years must be applied in the first instance to replace the loss." It is true that such a loss was shown in those years by deducting or writing off a depreciation of some £13,000 on fixed assets and repairs. The answer to the attack made on the directors is put, as I understand it, in four ways at least. [HIS LORDSHIP dealt with two questions of fact which, he said, it was unnecessary to decide, and continued:] I come now to the third and fourth answers which are made to the attack. It is said thirdly: "We might be liable if we paid dividends out of capital. But we did not pay dividends out of capital; we paid them out of profits." Fourthly it is said: "If there was a loss of capital (which we dispute) there is no obligation to replace a loss of capital out of subsequent profits before dividends are paid." Without laying down a hard-and-fast rule to settle all business cases, which LORD MACNAGHTEN deprecates, I come to the clear conclusion that in a case where the facts are such as they are in this case, the three decisions of the Court of Appeal, in *Lee v. Neuchatel Asphalte Co., Ltd.* (1), in *Verner v. General and Commercial Investment Trust, Ltd.* (2), and in *Re National Bank of Wales, Ltd.* (3), bind me to say that those two contentions of the defendants are accurate, and if they are to be reviewed or qualified, or if any further rules are to be laid down, that must be done by a higher tribunal than the Court of Appeal.

In the first place, as to whether the dividends were paid out of capital—assuming all the facts in the plaintiffs' favour—£19,000 was lost in the years 1909–1911. What was lost? It was not profits, because there were no profits to lose. It could be nothing else than capital that was lost, and when you have lost a thing you cannot use it for anything else. You cannot pay dividends out of a thing which you have lost, because it is not there to pay dividends out of. Therefore, I come to the conclusion which has been come to in the three cases to which I have referred—that it is inaccurate to say that if in subsequent years you pay dividends, having lost capital in previous years, you are paying the dividends out of the capital that you lost in the previous year. It is only possible to support the suggestion that you do so by treating the profit, when made in a subsequent

year, as in some way automatically turned into capital, as replacing the capital which has been lost, and then saying that what was made as profit has in some way automatically become capital, and, therefore, must be treated as capital. I can find no foundation for that in the statutes nor the decisions; the three judgments of the Court of Appeal to which I have referred seem to bind me to hold the opposite.

Dealing with the fourth proposition, it appears to me that the decisions of the Court of Appeal and the reasoning throughout the judgments in the Court of Appeal in the three cases to which I have referred show that there is no obligation, except of the most limited character, to make good a loss of capital out of subsequent profits. I am not sure that the language in which KAY, L.J., expressed it in *Verner's Case* (2) does not sufficiently express my position. He said ([1894] 2 Ch. at p. 270):

"These provisions seem to me to mean that any income received may be divided, whether part of the capital is lost or not. At present I do not know of any law to prevent this, and it might be difficult to frame such a law without unduly interfering with the liberty of commercial proceedings."

LINDLEY, L.J., in the same case began his judgment by saying (*ibid.* at p. 264):

"The broad question raised by this appeal is, whether a limited company which has lost part of its capital can lawfully declare or pay a dividend without first making good the capital which has been lost. I have no doubt it can—that is to say, there is no law which prevents it in all cases and under all circumstances."

When one looks to see what qualification the learned judge had in mind when he said "in all cases and under all circumstances," one finds that he introduced a distinction, which seems to me in subsequent cases and in arguments to have been much misunderstood, between fixed and circulating capital. He introduced it in this way (*ibid.* at p. 266):

"If the income of any year arises from a consumption in that year of what may be called circulating capital, the division of such income as dividend without replacing the capital consumed in producing it will be a payment of a dividend out of capital within the meaning of the prohibition which I have endeavoured to explain."

That I understand simply to mean this, which, when stated, appears to me to be a truism. When you are taking receipts in an ordinary period, and to earn those receipts you have parted absolutely with some of your capital, as when you have bought goods and then sold them for a price, you must not treat the price as the net profits without deducting the money representing the cost of the goods which you have parted with in order to obtain the price. In other words, you cannot treat as net profits what are actually gross profits. When a few lines later LINDLEY, L.J., stated the principle, he stated it with a view to the sentence which he had used just above, explaining what he means by "circulating":

"Perhaps the shortest way of expressing the distinction which I am endeavouring to explain is to say that fixed capital may be sunk and lost, and yet that the excess of current receipts over current payments may be divided, but that floating or circulating capital must be kept up, as otherwise it will enter into and form part of such excess, in which case to divide such excess without deducting the capital which forms part of it will be contrary to law."

That appears to me simply to point to the extremely true and obvious proposition which he has used a little further up, that you cannot take the gross receipts of the year without taking into account in finding the profits the part of the capital which you have parted with—circulated, sold—in order to obtain this profit. I dwell upon this because I am startled to find that in the decision of FARWELL, J., in *Bond v. Barrow Hematite Iron Co., Ltd.* (6) he has extended LINDLEY, L.J.'s

proposition to wear and tear of fixed capital, which is not parted with at all, and has treated the wear and tear of buildings as circulating capital which must be made good. Such a meaning of the term "circulating capital" is certainly not the sense in which it was used by the economists from whom the definition was taken. MR. MILL's definition of circulating capital was: Capital which fulfils the whole of its office in the production in which it is engaged by a single use. Certainly MR. MILL would have been astonished to hear that a building which deteriorates by wear and tear was circulating capital within his definition. In my view the proposition laid down by LINDLEY, L.J., and approved by LORD DAVEY in the House of Lords in *Dovey v. Cory* (3) has to be very carefully limited to the facts with regard to which LINDLEY, L.J., used it. That being the view I take of the decisions of the Court of Appeal, it seems to me impossible to say that there was any obligation imposed either by statute or by the decided cases to replace the losses of 1909, 1910, and 1911 before dealing with and dividing the profits made in 1912, 1913, 1914, and 1915.

It was suggested, as I understand, by counsel for the company that while, if he had only to deal with decisions of the Court of Appeal, he might be in some difficulty, those decisions had been so shaken as to be rendered no longer binding on this court by the judgment of the House of Lords in *Davey v. Cory* (3). I desire to say very respectfully to the House of Lords that, if Court of Appeal decisions are to be overruled, it must be done in a clearer way than has been done by the noble Lords in *Dovey v. Cory* (3). In that case LORD HALSBURY says ([1901] A.C. at pp. 482 and 486):

"I am very anxious not to deal with some reasons given for their judgment by the Court of Appeal which in view of the facts that I have do not arise here. . . . I am very reluctant to enter into a question which for the reasons I have given does not arise here, and into which the Court of Appeal has entered at some length. The only reason why I refer to it at all is lest by silence I should be supposed to adopt a course of reasoning as to which I am not satisfied that it is correct."

That, with great respect to the noble Lord, leaves the decision of the Court of Appeal where it was. It is a warning that on some future occasion the noble Lord may have to consider whether or not he is satisfied by the arguments he then hears for the reasons given by the Court of Appeal. But it certainly leaves the decisions of the Court of Appeal binding on this court. I respectfully sympathise and agree with the protest which LORD HALSBURY made in *Dovey v. Cory* (3) (*ibid.* at p. 487) as to bringing in the distinction between fixed and floating capital, which is appropriate enough to an abstract proposition like that which occurs in ADAM SMITH'S *WEALTH OF NATIONS*, but is quite inappropriate in concrete cases. LORD MACNAGHTEN, in whose judgment LORD SHAND concurs, says (*ibid.*):

"I desire to guard myself from being understood to assent to all the propositions supposed to have been laid down in the Court of Appeal in this case."

He did not say which of the propositions he dissented from. He said they were supposed to have been laid down; and again I respectfully suggest that one requires a much clearer expression from the House of Lords than that before one can treat a decision of the Court of Appeal as overruled. LORD DAVEY, who went into rather more detail, adopted the view of the principle as stated by LORD LINDLEY in *Verner's Case* (2), reserving the question for future consideration as to the effect of an actual and ascertained loss. I find nothing in that decision which renders the views of the Court of Appeal within their legitimate compass no longer binding upon them. Finding those decisions spread over a period of some twenty years, I adopt them, and I come to the conclusion that on the third and fourth points raised in answer to the attack made on the defendants in this case the decisions of the Court of Appeal bind me to say, first of all, that these dividends were not paid out of capital, for the capital, if lost at all, had been lost in preceding

years, and could not be used to pay dividends; secondly, that there was in this case no obligation, before dividends were paid out of profits accrued in an ordinary period of the working of the company, to make good losses of capital which had been suffered in a previous ordinary working period of the company. For these reasons I agree with the judgments of my brothers.

Appeal dismissed.

Solicitors: *Blyth, Dutton, Hartley & Blyth*, for *J. H. Gold*, Northwich; *Morris & Bristow*, for *William Morris*, Birmingham.

[Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]

TITMUS v. LITTLEWOOD

[KING'S BENCH DIVISION (Lord Reading, C.J., Sankey and Low, JJ.), January 28, 1916]

[Reported [1916] 1 K.B. 732; 85 L.J.K.B. 738; 114 L.T. 614;
80 J.P. 239; 23 T.L.R. 278; 25 Cox, C.C. 337]

Licensing—Offence—Sale of intoxicating liquor at place other than licensed premises—Executory agreement to sell at place not authorised by licence liquor kept at licensed premises—Licensing (Consolidation) Act, 1910 (10 Edw. 7 and 1 Geo. 5, c. 24), s. 65 (1).

By s. 65 (1) of the Licensing (Consolidation) Act, 1910: "a person shall not sell or expose for sale by retail any intoxicating liquor . . . at any place except that for which the justices' licence authorises him to hold an excise licence for the sale of that liquor," and sub-s. (2) makes a contravention of s. 65 an offence.

Held: an executory agreement for sale was not a "sale" within s. 65 (1), and, therefore, a licensee who, at a place other than his licensed premises, entered into an executory agreement for the sale of intoxicating liquor kept at the licensed premises had not acted in contravention of s. 65 (1).

Notes. The Licensing (Consolidation) Act, 1910, has been repealed by the Licensing Act, 1953. For s. 65 of the Act of 1910, see now s. 120 of the Act of 1953.

As to selling intoxicating liquor without a licence, see 22 HALSBURY'S LAWS (3rd Edn.) 663 et seq.; and for cases see 30 DIGEST (Repl.) 84 et seq. For the Licensing Act, 1953, s. 120, see 33 HALSBURY'S STATUTES (3rd Edn.) 250.

Cases referred to:

- (1) *Pletts v. Beattie*, [1896] 1 Q.B. 519; 65 L.J.M.C. 86; 74 L.T. 148; 60 J.P. 185; 12 T.L.R. 227; 40 Sol. Jo. 297; 18 Cox, C.C. 264, D.C.; 30 Digest (Repl.) 87, 665.
- (2) *Stephenson v. W. J. Rogers, Ltd.* (1899), 80 L.T. 193; 63 J.P. 230; 15 T.L.R. 148, D.C.; 30 Digest (Repl.) 93, 698.
- (3) *Strickland v. Whittaker* (1904), 90 L.T. 445; 68 J.P. 235; 52 W.R. 538; 20 T.L.R. 224; 48 Sol. Jo. 246; 20 Cox, C.C. 610, D.C.; 30 Digest (Repl.) 88, 669.

Also referred to in argument:

Pletts v. Campbell, [1895] 2 Q.B. 229; 64 L.J.M.C. 225; 73 L.T. 344; 59 J.P. 502; 43 W.R. 634; 11 T.L.R. 454; 39 Sol. Jo. 585; 18 Cox, C.C. 178; 15 R. 493, D.C.; 30 Digest (Repl.) 87, 664.

Walker v. Walker (1903), 90 L.T. 88; 67 J.P. 452; 47 Sol. Jo. 655; 20 Cox, C.C. 594, D.C.; 30 Digest (Repl.) 88, 667.

Case Stated by justices for the county of Southampton.

At a court of summary jurisdiction sitting at Southampton on Sept. 13, 1915, the respondent preferred an information against the appellant charging that he, being duly licensed to sell by retail intoxicating liquor in his house and premises known as Victoria House, Johns Road, Woolston, in the parish of Itchen, on Sept. 8, 1915, unlawfully sold by retail certain intoxicating liquor, to wit, stout, at a certain other house known as 2, Eperney Villas, Station Road, Netley, in the parish of Hound, where he was not authorised by his licence to sell the same. The following facts were admitted or proved. The appellant was the holder of a licence authorising him to sell all intoxicating liquors to be consumed off his premises, Victoria House. Before Sept. 3, 1915, and the coming into operation of the Order of the Central Control Board (Liquor Traffic) made for the area of Southampton on July 22, 1915, Annie L. Wigginton, of 2, Eperney Villas, was and had been a customer of the appellant. On Sept. 3, 1915, Jack Harrison, who was in the employ of the appellant, called about 11.30 a.m. on Annie L. Wigginton at 2, Eperney Villas, as he had been accustomed to do, and on behalf of the appellant he received from her an order for four quarts of oatmeal stout and entered the same in a book kept by him for the purpose. On receipt of the order, Harrison (in accordance with general instructions received from the appellant in consequence of the order of the Board and particularly s. 8 thereof) asked for and received from her the sum of 2s. The appellant received the order and the 2s. of Annie L. Wigginton from Harrison at Victoria House the same day, and he appropriated the stout and labelled the bottles in execution of the order, and duly despatched the stout to 2, Eperney Villas. An information was preferred on the above facts against Harrison for unlawfully selling by retail intoxicating liquor which he was not licensed to sell by retail, and by consent the informations against him and against the appellant were heard together, and the justices dismissed the information against Harrison.

It was contended on behalf of the appellant that there had been no sale by retail of intoxicating liquors by the appellant at 2, Eperney Villas, but that, on the contrary, the sale had taken place at Victoria House. It was contended by the respondent that there had been a sale by retail of intoxicating liquor by the appellant at 2, Eperney Villas. The justices convicted the appellant, and he now appealed.

Hewart, K.C. (*S. H. Emanuel* with him), for the appellant.
St. Gerrans for the respondent.

LORD READING, C.J.—The question in this case is whether an executory agreement for the sale of intoxicating liquor is to be regarded as a sale of intoxicating liquor within s. 65 of the Licensing (Consolidation) Act, 1910. The contention for the respondent is that the traveller who receives an order from a customer and payment for the goods in advance and who books the order is selling the goods within the meaning of the statute, and that, as in this case, these acts took place at the customer's house and not at the licensed premises, an offence was committed. The justices came to the conclusion on a prosecution of the appellant for having sold this intoxicating liquor at the customer's house that it was sold there and not at the licensed premises, and on these facts they convicted the appellant. It is not quite clear from the Case Stated whether they intended to hold in fact that the traveller, the appellant's agent, had completed an agreement for sale—i.e., that he had authority to make an agreement for sale—and that when he received the money and the order and booked the goods this amounted to an agreement for sale, or whether they intended to hold that he simply received an offer to be transmitted to his employer. I do not propose to deal with the case on the footing that there is that nice distinction to be drawn between the Case as Stated by the justices and the case as argued for the respondent—namely, that, as there is no finding that the traveller had no authority, it must be assumed that he had authority, and, therefore, there was an agreement for sale at the time when the traveller did these various acts, and I think that counsel for the respondent was right in saying that we ought to deal with the case as if the appellant himself had

gone to the customer's house and had done what his employee did. There is no doubt that that would make an executory contract for sale. Equally there is no doubt that it was not a sale. A

The whole question, therefore, is, as I have said, whether an executory agreement for sale can be a sale within s. 65. In cases like *Pletts v. Beattie* (1), there has been much discussion whether, in the particular case before the court, there was appropriation so as to constitute a sale at or off the licensed premises, and the court has always considered it important to determine where appropriation took place. B If the respondent's contention is right, that was unnecessary, because in that event all the court would have to consider was whether there was an agreement for sale made off the licensed premises, and, if so, it was an offence. *Primâ facie*, I find it difficult to believe that the judges and counsel in those cases did not have that point in mind. There are cases like *Stephenson v. W. J. Rogers, Ltd.* (2) and *Strickland v. Whittaker* (3) in which the court apparently expressed doubt whether an executory agreement for sale was sufficient. In *Stephenson v. W. J. Rogers, Ltd.* (2), CHANNELL, J., expressed the view (63 J.P. at p. 231) that the word "sale" might be satisfied by the making of an executory contract for a future sale. C That dictum came up for review in *Strickland v. Whittaker* (3), where LORD ALVERSTONE, C.J., and WILLS, J., both referred to the point, and certainly did not decide that such an executory agreement could not be a sale, but equally they did not decide that it could. They left the point open. LORD ALVERSTONE, C.J., inclined to the view that it might be a sale, but it certainly cannot be said that it has ever been decided. D

Although these dicta are worthy of attention, I am more impressed by the absence of any authority supporting such a conviction as this ever since the passing of the Licensing Act, 1872. That is not in itself sufficient to decide this case. It is an element for consideration, but we must decide according to the words used in the section. For some time I was much impressed by the argument that s. 85 of the Licensing (Consolidation) Act, 1910, says that, in proving a sale of intoxicating liquor, it shall not be necessary to show that any money actually passed or any intoxicating liquor was actually consumed, if the court is satisfied that a transaction in the nature of a sale actually took place. The words "in the nature of a sale" seem to indicate something less than a completed sale, which might very well be an agreement for sale. The difficulty which I felt was that I did not quite see what meaning was to be attributed to these words, but, on closer examination, I find that they were used in s. 62 of the Licensing Act, 1872, and in s. 18 of the Alehouse Act, 1828, and a reference to those statutes helps to clear up the mystery which surrounded the discussion of the words in question. Section 62 of the Licensing Act, 1872, said: E

"In proving the sale or consumption of intoxicating liquor for the purpose of any proceeding relative to any offence under this Act, it shall not be necessary to show that any money actually passed or any intoxicating liquor was actually consumed if the court hearing the case be satisfied that a transaction in the nature of a sale actually took place. . . ." F

That statute repealed s. 18 of the Alehouse Act, 1828, in which the language was as follows: G

"every person who shall sell, barter, exchange, or for valuable consideration otherwise dispose of, any excisable liquor by retail" H

shall be liable to a penalty. That leads to the conclusion that the words "in the nature of a sale" refer to a case of barter or to some equivalent other than money being given for the liquor. That gives a meaning to the words on which so much reliance has been placed by the respondent. As soon as we see the real meaning of those words, the point made for the respondent disappears. We ought not to construe the words making a sale an offence as covering an agreement for sale. Section 65 of the Act of 1910 does not use the words "agreement for sale," and the I

word "sale" in that section must mean what lawyers understand by sale. By the language used in some cases as to the legal niceties of sale not being required to be proved, I think the court can hardly have intended to say that an agreement for sale was sufficient, but were rather referring to the way in which the facts ought to be dealt with.

Bearing in mind the numerous cases in which the question whether there was any evidence of an offence has been assumed to depend on where appropriation took place, I have come to the conclusion that an executory agreement for sale is not a sale within s. 65 of the Act of 1910. The conviction was, therefore, wrong.

SANKEY, J.—I agree. The difference between a sale and an executory agreement for sale is well known. The words of s. 65 of the Licensing (Consolidation) Act, 1910, are "shall not sell or expose for sale by retail." There is no definition of sale which would bring an executory agreement for sale within it. On the plain words of the section, I think it does not cover an executory agreement for sale. As we are construing a penal section, we ought not to give its words, which in themselves are plain, a meaning which they have not got.

LOW, J.—We are asked, in construing s. 65 of the Licensing (Consolidation) Act, 1910—a highly penal section—to hold that the word "sale" means something more than it says, and this contention is supported by certain dicta which have been referred to. Is there a distinction between an agreement for sale and the act of selling? If there is, and I think that no one can doubt that there is, then, in order to convict under this section in respect of an agreement for sale, it is necessary to read words into the section. It is no part of our duty to do that, and, therefore, I entirely agree with the other members of the court in holding, on the construction of this section, that a mere agreement for sale does not come within it. It is to be observed that, in the Sale of Goods Act, 1893, it was thought right to define "sale" in s. 62 and to make it expressly include "a bargain and sale as well as a sale and delivery." If the respondent's contention is sound, there was no occasion to do anything of the sort. In the Licensing (Consolidation) Act, 1910, there is no definition of "sale," and it appears to me that we must give the word its ordinary meaning and not go out of our way to extend it.

Appeal allowed.

Solicitors: *Godden, Holme & Ward*, for *Lamport, Bassitt & Hiscock*, Southampton; *Robins, Westlake & Dominy*, Southampton.

[*Reported by W. W. ORR, Esq., Barrister-at-Law.*]

STOTT AND ANOTHER v. GAMBLE AND OTHERS

[KING's BENCH DIVISION (Horridge, J.), May 12, June 5, 1916]

[Reported [1916] 2 K.B. 504; 85 L.J.K.B. 1750; 115 L.T. 309;
80 J.P. 443; 32 T.L.R. 579; 14 L.G.R. 769]

Cinematograph—Licence—Condition—Exhibition of film—Reasonableness of condition—Prohibition of film objectionable, indecent, or likely to produce breach of peace—Interference with contract between exhibitors and person possessing exhibiting rights over film—Liability of licensing authority.

A licence to use a theatre for an exhibition of cinematograph films had been granted to the proprietors of the theatre by the licensing authority, subject to the following condition: "No film shall be shown that is objectionable or indecent, or anything likely or tending to educate the young in the wrong direction, or likely to produce riot, tumult, or breach of the peace. . . . Provided also that no film shall be exhibited if notice that the justices object to such film has been given to the licensee." The plaintiffs, who had acquired the sole right of exhibiting a certain film, entered into an agreement with the proprietors of the theatre to exhibit their film there. The licensing authority, after inspecting the film, gave notice to the proprietors of the theatre that under the condition they objected to the film being shown. In an action by the plaintiffs against the licensing authority,

Held: (i) the true meaning of the condition was that the licensing authority might give notice of objection to a film where they had bona fide and in the exercise of their discretion come to the conclusion that it was objectionable on one of the grounds mentioned therein; the condition was desirable and reasonable; and, therefore, the notice was valid.

Dictum of AVORY, J., in *Ex parte Stott* (1), [1916] 1 K.B. at p. 9, applied.

(ii) even if the condition was unreasonable and the notice invalid, the plaintiffs had no cause of action since there was no evidence that the licensing authority knowingly or for their own ends induced the theatre proprietors to commit an actionable wrong.

Dictum of LORD WATSON in *Allen v. Flood* (2), [1898] A.C. at p. 96, applied.

Notes. As to the licensing of premises for cinematograph entertainment, see 32 HALSBURY'S LAWS (2nd Edn.) 72 et seq.; and for cases see 42 DIGEST 919 et seq.

Cases referred to:

- (1) *Ex parte Stott*, [1916] 1 K.B. 7; 85 L.J.K.B. 502; 114 L.T. 234; 80 J.P. 169; 32 T.L.R. 84; 60 Sol. Jo. 418, D.C.; 42 Digest 921, 167.
- (2) *Allen v. Flood*, [1898] A.C. 1; 67 L.J.Q.B. 119; 77 L.T. 717; 62 J.P. 595; 46 W.R. 258; 14 T.L.R. 125; 42 Sol. Jo. 149, H.L.; 42 Digest 972, 35.
- (3) *Huish v. Liverpool Justices*, [1914] 1 K.B. 109; 83 L.J.K.B. 133; 110 L.T. 38; 78 J.P. 45; 30 T.L.R. 25; 58 Sol. Jo. 83; 12 L.G.R. 15, D.C.; 42 Digest 920, 156.
- (4) *L.C.C. v. Bermondsey Bioscope Co., Ltd.*, [1911] 1 K.B. 445; 80 L.J.K.B. 141; 103 L.T. 760; 75 J.P. 53; 27 T.L.R. 141; 9 L.G.R. 79, D.C.; 42 Digest 921, 164.
- (5) *Theatre de Luxe (Halifax), Ltd. v. Gledhill*, [1915] 2 K.B. 49; 112 L.T. 519; 79 J.P. 238; 31 T.L.R. 138; 13 L.G.R. 541; 24 Cox, C.C. 614; sub nom. *Halifax Theatre de Luxe, Ltd. v. Gledhill*, 84 L.J.K.B. 649, D.C.; 42 Digest 920, 160.
- (6) *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A.C. 239; 74 L.J.K.B. 525; 92 L.T. 710; 53 W.R. 593; 21 T.L.R. 441, H.L.; 42 Digest 989, 180.
- (7) *National Phonograph Co., Ltd. v. Edison Bell Consolidated Phonograph Co., Ltd.*, [1908] 1 Ch. 335; 77 L.J.Ch. 218; 98 L.T. 291; 24 T.L.R. 201, C.A.; 42 Digest 988, 177.

A (8) *Lumley v. Gye* (1853), 2 E. & B. 216; 22 L.J.Q.B. 463; 17 Jur. 827; 1 W.R. 432; 118 E.R. 749; 42 Digest 987, 169.

Action tried before HORRIDGE, J., without a jury at Liverpool Assizes.

The county borough of St. Helens having delegated to the justices of the borough sitting in petty sessions the powers conferred on them by s. 2 of the Cinematograph Act, 1909, of granting licences for cinematograph exhibitions, the justices granted

B a licence for one year from April 5, 1915, to Robert Wilkinson Fox to use the Hippodrome (St. Helens), Ltd., for the purpose of such exhibitions. The conditions attached to the licence, so far as material, were these:

C “(5) No film shall be shown that is objectionable or indecent, or anything likely or tending to educate the young in the wrong direction, or likely to produce riot, tumult, or breach of the peace, and no offensive representations of living persons shall be shown. Provided also that no film shall be exhibited if notice that the justices object to such film has been given to the licensee”; and

D “(46) For every breach of any of these rules or of any of the regulations of the Secretary of State by the owner of the cinematograph, or by the occupier of the premises who allows his premises to be used in contravention thereof, there shall be forfeited and paid a sum of not exceeding £20, and a further sum of not exceeding £5 for each day during which the offence continues, and this licence may also be revoked.”

E By an agreement dated May 28, 1915, the plaintiffs were granted the sole exclusive licence until Dec. 31, 1924, subject to certain agreements therein specified, to rent the film entitled “Five Nights” for exhibition in Lancashire and other places, and by an agreement made in August, 1915, the Hippodrome (St. Helens), Ltd., undertook to hire this film for six days for £40 as from Oct. 4, 1915. On that day, the defendants, who were members of the cinematograph committee of the justices of the peace of the borough, inspected the film, and on the same day gave notice to the Hippodrome company that they objected to it under condition 5 of the licence.

F Notice of that objection was communicated to the plaintiffs, and they instituted the present action, claiming against the defendants an injunction restraining them from wrongfully procuring or inciting the Hippodrome company or any person who had entered into contracts with the plaintiffs to hire and exhibit the film to commit a breach or breaches of their contracts. They also claimed damages. They contended that condition 5 was unreasonable, and that, by that condition, the defendants made themselves the sole judges without hearing the parties on the question

G whether the film was objectionable or not; and they alleged that the defendants caused and procured the Hippodrome company, in breach of their contract with the plaintiffs, to abandon the exhibition of the film.

H *Cyril Atkinson, K.C.*, and *T. G. R. Dehn* for the plaintiffs.

Gibbons, K.C., and *Acton* for the defendants.

Cur. adv. vult.

June 5, 1916. HORRIDGE, J., read the following judgment in London, in which he stated the facts, and continued: It was contended before me that the condition No. 5 attached to the licence was unreasonable inasmuch as the jurisdiction of the

I magistrates in granting the licence was administrative and not judicial, and that, by the condition, they made themselves the sole judges without hearing the parties as to whether or not the film was objectionable, and in the event of the licensee not complying with a notice not to exhibit, he became liable under condition 46 to penalties.

It was decided in *Huish v. Liverpool Justices* (3) that justices at petty sessions exercising delegated powers were not sitting as a court of summary jurisdiction so as to enable an order to be made on them to state a Case. In *L.C.C. v. Bermondsey Bioscope Co., Ltd.* (4), PICKFORD, J., says ([1911] 1 K.B. at p. 453):

"The county council might impose such conditions, so long as they were not unreasonable, as they thought right";

and LORD ALVERSTONE, C.J., uses similar language. In *Theatre de Luxe (Halifax), Ltd. v. Gledhill* (5) the majority of the court held that certain conditions attached to a licence were unreasonable. In giving judgment, LUSH, J., says ([1915] 2 K.B. at p. 55):

"Mr. Montgomery also conceded that the condition must be reasonable having regard to the conduct of the licensed premises, or in other words that it must be a reasonable condition having regard to the subject-matter of the licence, and if this condition were reasonable having regard to the subject-matter of the licence, namely, the use by the licensee of these premises for cinematograph exhibitions, it would be very difficult for us to say that it was in excess of the powers of the licensing authority."

The question I have to consider is whether condition 5 is reasonable having regard to the subject-matter of the licence. In *Ex parte Stott* (1), an application was made to a Divisional Court for a rule nisi for a writ of certiorari to bring up the justices' notice in that case. The court held that persons in the plaintiffs' position were not parties aggrieved, and the contention in that case was urged that this particular condition was unreasonable. AVORY, J., says ([1916] 1 K.B. at p. 9):

"I may say that I think the last clause of the condition means that the justices may give notice of objection to a film where they have bona fide and in the judicial exercise of their discretion come to the conclusion that it is objectionable on one of the grounds mentioned in the previous part of the condition. If that is the true meaning of the condition the objection to it disappears."

I think this is the true meaning of the condition. I think it is most desirable and reasonable that the justices should, when granting a licence, put in a condition retaining to themselves power to stop the exhibition of any film which they think is objectionable on the grounds mentioned in the condition. I, therefore, think the justices' notice in this case was given rightly and legally and no one has any cause of complaint in respect of it.

If, however, I am wrong in this view, I still think the plaintiffs are unable to recover. The way in which their case was put is this. It is said the giving of the notice was a wrongful act and such an act as might, as a natural and probable consequence of it, produce injury to another and which did produce injury to the plaintiffs. In the first place, I do not think it at all follows that it would cause injury to the plaintiffs. If the notice was a bad notice, the licensee might have ignored it, and he must be presumed in law to know it was an illegal notice if in fact it was. Further, even if the natural effect of the notice was to prevent the licensee from giving the performance and to cause him not to pay £40, I do not think this gives any right of action to the plaintiffs. The line of cases relied on was the one of which *South Wales Miners' Federation v. Glamorgan Co.* (6) is an example. In the judgment of BUCKLEY, L.J., in *National Phonograph Co., Ltd. v. Edison Bell Consolidated Phonograph Co., Ltd.* (7), he says ([1908] 1 Ch. at p. 359):

"I take the law which I have to apply from two passages which I will read. In *Allen v. Flood* (2) LORD WATSON says ([1898] A.C. at p. 96):

"There are, in my opinion, two grounds only upon which a person who procures the act of another can be made legally responsible for its consequences. In the first place, he will incur liability if he knowingly and for his own ends induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, it may yet be to the detriment of a third party; and in that case, according to the law laid down by the majority in *Lumley v. Gye* (8), the inducer may be held liable if he

A can be shown to have procured his object by the use of illegal means directed against that third party.' "

In my view, this case clearly does not fall within the second class, where the object has been procured by illegal means directed against a third party, and therefore, must, if there is here any cause of action, fall within the first proposition—namely,

B "he will incur liability if he knowingly and for his own ends induces that other person to commit an actionable wrong."

I see no evidence that the defendants knowingly or for their own ends induced a person to commit an actionable wrong. It is quite different from such cases as *South Wales Miners' Federation v. Glamorgan Coal Co.* (6), where, although possibly for a personal object and not to injure, the defendants had directly induced the miners to break their contracts. In my view, this action fails, and judgment must be entered for the defendants with costs as between solicitor and client.

Judgment for defendants.

Solicitors: *Field & Cunningham*, Manchester; *Cobbett, Wheeler & Cobbett*, for *Bertram Brewis*, Manchester.

D [Reported by EDWARD J. M. CHAPLIN, Esq., *Barrister-at-Law.*]

E

MATTISON v. JOHNSON

[KING'S BENCH DIVISION (Lord Reading, C.J., Sankey and Low, JJ.), January 28, 1916]

F [Reported 85 L.J.K.B. 741; 114 L.T. 951; 80 J.P. 243; 25 Cox, C.C. 373; 14 L.G.R. 457]

Criminal Law—Brothel—Lessee permitting premises to be used for prostitution Use only by lessee—Criminal Law Amendment Act, 1885 (48 & 49 Vict., c. 69), s. 13 (2).

G The respondent, a prostitute, was the tenant of premises of which she alone made use for the purpose of her own habitual prostitution. She was charged with knowingly permitting the premises to be used for the purposes of habitual prostitution under the Criminal Law Amendment Act, 1885, s. 13 (2).

H **Held:** "permitting the premises to be used" in s. 13 (2) of the Act of 1885 meant permitting them to be used by another person, and, as the respondent alone used the premises, she could not be convicted under s. 13 (2).

Notes. The Criminal Law Amendment Act, 1885, has been repealed by the Sexual Offences Act, 1956. For s. 13 (2) of the Act of 1885, see now s. 35 of the Act of 1956.

I As to disorderly houses, see 10 HALSBURY'S LAWS (3rd Edn.) 671 et seq.; and for cases see 15 DIGEST (Repl.) 904 et seq. For the Sexual Offences Act, 1956, s. 35, see 36 HALSBURY'S STATUTES (2nd Edn.) 234.

Case referred to:

(1) *Warden v. Tye* (1877), 2 C.P.D. 74; 46 L.J.M.C. 111; 35 L.T. 852; 41 J.P. 120, D.C.; 30 Digest (Repl.) 94, 706.

Also referred to in argument:

Singleton v. Ellison, [1895] 1 Q.B. 607; 64 L.J.M.C. 123; 72 L.T. 236; 59 J.P. 119; 43 W.R. 426; 18 Cox, C.C. 79; 15 R. 201, D.C.; 15 Digest (Repl.) 904, 8715.

Durose v. Wilson (1907), 96 L.T. 645; 71 J.P. 263; 21 Cox, C.C. 421, D.C.; 15 Digest (Repl.) 904, 8719.

Caldwell v. Leech (1913), 109 L.T. 188; 77 J.P. 254; 29 T.L.R. 457; 23 Cox, C.C. 510, D.C.; 15 Digest (Repl.) 904, 8718.

Case Stated by the stipendiary magistrate for the city of Manchester.

At a court of summary jurisdiction sitting at Manchester, the appellant, James Mattison, a police officer, preferred an information against the respondent, Marie Johnson, charging that she on Sept. 10, 1915, being the occupier of certain premises in New York Street, Manchester, did knowingly permit the premises to be used for the purposes of habitual prostitution. The following facts were proved or admitted. The respondent was the sole tenant or occupier of the premises in question, a dwelling-house, No. 39, New York Street, Manchester. On four successive days in September, 1915—namely, the 7th, 8th, 9th, and 10th of that month—the respondent took home different men and used the dwelling-house for the purpose of her own habitual prostitution. The premises were used solely by the respondent for the purpose of habitual prostitution; no other women either lived on or visited the premises for that purpose.

It was contended on behalf of the appellant that, on the above facts, a case was established against the respondent under s. 13 (2) of the Criminal Law Amendment Act, 1885, of having knowingly permitted the premises in question to be used for the purpose of habitual prostitution.

The learned stipendiary magistrate was of opinion that the mere use by the respondent for the purposes of habitual prostitution on her own account of premises of which she was herself the tenant or occupier did not constitute permitting such premises to be used for the purposes of habitual prostitution, and dismissed the charge.

By the Criminal Law Amendment Act, 1885, s. 13, it is provided:

“Any person who—(1) keeps or manages or acts or assists in the management of a brothel, or (2) being the tenant, lessee, or occupier or person in charge of any premises, knowingly permits such premises or any part thereof to be used as a brothel, or for the purposes of habitual prostitution, or (3) being the lessor or landlord of any premises, or the agent of such lessor or landlord, lets the same or any part thereof with the knowledge that such premises or some part thereof are or is to be used as a brothel, or is wilfully a party to the continued use of such premises or any part thereof as a brothel, shall on summary conviction in manner provided by the Summary Jurisdiction Acts be liable [to the penalties prescribed by the section].”

McCardie for the appellant.

The respondent did not appear and was not represented.

LORD READING, C.J.—There is a point of considerable importance raised in the present case. [His LORDSHIP stated the facts, and continued:] In my opinion, the learned magistrate was quite right. There was no offence disclosed under the Criminal Law Amendment Act, 1885, and I think that the view which was taken of the section under which the proceedings were taken was the correct one. If we were to accede to the contention put forward on behalf of the appellant it would be a criminal offence for a woman to use premises occupied by herself, and by herself alone, for the purposes of habitual prostitution. If a woman is the occupier of certain premises, and men resort thither for the purpose of committing with her the act which would constitute her a prostitute, can it be said that she is knowingly permitting the premises to be used for the purpose of habitual prostitution? This is not the case of another person letting the premises to her with the knowledge that she intends to use the premises for habitual prostitution. This is the case of the woman who herself does the act which, it is said, must not be knowingly permitted. I entertain no doubt whatever about this case, and it appears to me

A that it is sufficient to say that we have only to construe the language of the statute and to ascertain from that language what was the intention of the legislature. If Parliament had meant to make it a criminal offence for a woman to carry on prostitution on the premises which she rents and uses as her home it could have said so in the plainest language. It is not within our province to say whether we think that it would be a good or a bad thing for a statute to be passed making prostitution a criminal offence. We are merely concerned with interpreting the language of the statute which is now in question. If we were to accept the argument of counsel for the appellant, the result would be that though it would not be a criminal offence to be a prostitute and to carry on that occupation so long as it was not carried on on premises occupied by the prostitute, yet, if the prostitute could not have a house of her own and could not rent premises, she would be driven into the house of a person permitting it who would be liable under s. 13 (2) of the Act of 1885, if it was habitual, or she would be driven into the street to commit the act in a public place where it would be a criminal offence.

Before I could arrive at such a conclusion as that, I should have to be faced with very plain language indeed. I do not think, however, that there is any necessity to look outside the statute, the whole intention of which appears to me to be quite plain. The title of the Act is "An Act to make further provision for the Protection of Women and Girls, the suppression of brothels and other purposes." Part II is headed "Suppression of Brothels." The whole of s. 13 deals with the proceedings which may be taken against persons keeping brothels or permitting premises to be used for habitual prostitution. What Parliament was aiming at was the prevention of premises being let for the purposes of habitual prostitution. It was not sufficient to say "used as a brothel," because there might be a difficulty in proving that the premises were a brothel, and, nevertheless they might still be used for the purposes of habitual prostitution. There can be no doubt that Parliament intended that both cases should be included, and that appears to me to be the reason why the section makes the tenant, lessee, or occupier who knowingly permits the premises which he holds as tenant, lessee, or occupier to be used for the purposes of habitual prostitution guilty of a criminal offence. When the actual language is examined, it seems to me that the section is not aimed at the person who does the act. The words are "knowingly permits such premises or any part thereof to be used." The word "permits" is not used with reference to one's own acts, but to the acts of another. The present case is analogous in many respects to that of *Warden v. Tye* (1). That was a case under s. 13 of the Licensing Act, 1872, corresponding to s. 75 of the Licensing (Consolidation) Act, 1910, in which the language used is very similar to that of the section of the Criminal Law Amendment Act, 1885, which we are now considering. The section to which I have referred imposed a penalty on any licensed person who permitted drunkenness to take place on his premises. In *Warden v. Tye* (1) a licensee of certain premises was summoned for permitting drunkenness on his premises, he, the licensee, being the person who was drunk. It was held that the licensee could not be convicted. As I have said, I think that case is very analogous to the present, and, just as a licensee cannot be convicted of permitting drunkenness on his own premises when he is the person who is drunk, so a prostitute who alone uses premises of which she is the tenant or occupier for the purposes of her trade cannot be convicted of permitting her premises to be used for the purposes of habitual prostitution. I think that the learned magistrate was quite correct in arriving at his decision, and this appeal must be dismissed.

I
SANKEY, J.—I am of the same opinion. The information against the respondent was preferred under the provisions of s. 13 (2) of the Criminal Law Amendment Act, 1885, which makes it an offence for a person who is the tenant, lessee, or occupier of any premises knowingly to permit such premises or any part thereof to be used for the purposes of habitual prostitution. In my view, it is a matter

of importance to see in which part of the Act this section occurs. It occurs in Part II, and the heading of this Part is "Suppression of Brothels." This heading makes it quite clear that this portion of the Act is aimed not at the suppression of prostitution, but at the suppression of brothels. It is not denied in the present case that the respondent's premises are not a brothel. It would be strange, then, if premises which are not a brothel were brought under legislation which is for the suppression of brothels. I think that when s. 13 (2) speaks of permitting premises to be used, it must refer to permitting them to be used by another person and not by the person permitting. Both by reason of the general words of the Act and by reason of the particular words of the section, I think that the magistrate was right and that the appeal fails.

LOW, J.—I agree. This is a case of considerable importance, and I think that it is somewhat remarkable that, although this particular statute was passed in 1885, it does not appear that any attempt has been made to put on this section the construction here contended for by the appellant, although that course might have received encouragement from some statements in certain quarters. The notion of permitting implies some person to be permitted. If the appellant's contention is correct the offence aimed at is prostitution. On the facts before us, the only person who could be said to be implicated in that are the respondent and the man engaged with her in using the premises. It is said that the respondent permitted prostitution—that is, sexual intercourse for gain or reward. It could not be said that the man permitted prostitution. It would be a gross abuse of language to attempt to describe his act in that way. That being so, the only person left is the respondent herself. I think also that it is likewise an abuse of language to say that a woman who does an act is permitting the act to be done. If there had been any desire on the part of the legislature to make the mere act of prostitution an offence, there would have been no difficulty in doing so by using clear and definite language to that effect. Here there is nothing of the sort, and I thoroughly agree with my Lord in the judgment which he has given and in the reasons on which he has based it. The appeal must be dismissed.

Appeal dismissed.

Solicitors: *Austin & Austin*, for *P. M. Heath*, Manchester.

[*Reported by J. A. SLATER, ESQ., Barrister-at-Law.*]

A

LESTER v. HICKLING

[KING'S BENCH DIVISION (Scrutton, J.), May 2, 1916]

[Reported [1916] 2 K.B. 302; 114 L.T. 798; 85 L.J.K.B. 1060]

B

Bill of Sale—Defeasance—Agreement subsequent to and not part of bill of sale—Bills of Sale Act, 1878 (41 & 42 Vict., c. 81), s. 10 (3).

A bill of sale was given by the grantor, and, on the next day and as a separate transaction, an agreement was entered into between the grantor and the grantee which amounted to a defeasance of the bill of sale. The bill of sale was registered under the Bills of Sale Act, 1878, s. 10, without the terms of the subsequent agreement being included in it.

C

Held: since the agreement was made subsequent to the bill of sale, it was not a defeasance within s. 10 (3) of the Act of 1878, and, therefore, the bill of sale was valid.

D

Notes. As to defeasances, see 3 HALSBURY'S LAWS (3rd Edn.) 296-298; and for cases see 7 DIGEST (Repl.) 81 et seq. For the Bills of Sale Act, 1878, s. 10, see 2 HALSBURY'S STATUTES (2nd Edn.) 566.

Cases referred to:

(1) *Re Southam, Ex parte Southam* (1874), L.R. 17 Eq. 578; 43 L.J.Bey. 39; 30 L.T. 132; 22 W.R. 456; 7 Digest (Repl.) 83, 473.

E

(2) *Linfoot v. Pockett*, [1895] 2 Ch. 835; 64 L.J.Ch. 752; 73 L.T. 197; 44 W.R. 66; 11 T.L.R. 590; 39 Sol. Jo. 721; 2 Mans. 482; 12 R. 504, C.A.; 7 Digest (Repl.) 82, 471.

(3) *Pettit v. Lodge and Harper*, [1908] 1 K.B. 744; 77 L.J.K.B. 413; 98 L.T. 771; 24 T.L.R. 329; 15 Mans. 136, C.A.; 7 Digest (Repl.) 82, 466.

Action tried by SCRUTTON, J., without a jury.

The facts are set out in the judgment.

F

Bickmore for the plaintiff.

Doughty for the defendant.

G

SCRUTTON, J.—This case raises a short point of some difficulty, but after hearing counsel, I do not think I shall gain any advantage by taking time to consider my judgment. Thomas Lester brings an action against George Hickling, and he asks for a declaration that a bill of sale dated Apr. 25, 1912, is void. The reason why he asks for a declaration that it is void is this: He says there was an agreement which amounted to a defeasance of the bill of sale which is not expressed in the bill of sale, and, consequently, under s. 10 (3) of the Bills of Sale Act, 1878, the registration is void, and, being unregistered, the bill would be void.

H

The first thing is to ascertain what the facts are, because the plaintiff, in setting up his case, has alleged that the agreement in question which is said to amount to a defeasance was made in consideration of the plaintiff executing the bill of sale. I find the facts to be these: the plaintiff was a coal hawker and got his coal frequently from the defendant, and at the time the bill of sale was given, or shortly before the bill of sale was given, in April, 1912, the plaintiff was in debt to the extent of nearly £200 to the defendant for coal supplied. The defendant got judgment against him. That judgment stands, and, as far as I can see, the plaintiff will not gain any great advantage by having the bill of sale set aside, because execution could be put in under the judgment immediately for the unsatisfied balance on any property which he has. Judgment having been obtained, terms were attempted to be made for postponing the payment of the judgment. The plaintiff was asked to sign a bill of sale. He would not. Thereupon the defendant took the only course open to him of putting in execution under the judgment, which involved, apparently, seizing the horse and cart by which the plaintiff

I

carried on his business of a coal hawker. This seems to have been a very effectual measure as against the plaintiff and brought him round at once, because without his horse and cart he could not go on coal hawking. At an interview at the defendant's office, it was agreed that the execution should be withdrawn if the bill of sale was executed. The bill of sale was then executed providing for payment of the sum in two half-yearly payments of £102 and interest. I find that was a complete transaction and that nothing at that time was said about any payment by smaller sums. The next day, and as I find as a separate transaction from what had happened the day before, the plaintiff, having got back his horse and cart and wanting coal to go on with his business of coal hawking, went to the defendant to get coal. The question of the transaction that had taken place the day before having been raised, the defendant said, what I dare say was quite true, that he would not be able to pay the £102 in six months, to which the defendant appears to have said if he would pay by instalments he would not be hard on him; the plaintiff then said he would pay 10s. a week, and thereupon paid the first 10s. I think the effect of that was that there was an agreement that the bill of sale would not be enforced so long as the plaintiff went on paying 10s. a week and getting his coal from the defendant.

Now comes the question whether that agreement which I have found is a defeasance of the bill of sale which renders the registration, and, therefore, the bill of sale, void under s. 10 (3) of the Bills of Sale Act, 1878. I look first to the language of the section, which is the first thing I have to go by:

"If the bill of sale is made or given subject to any defeasance or condition or declaration of trust not contained in the body thereof, such defeasance, condition, or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under this Act therewith and as part thereof, otherwise the registration shall be void."

In my view, if I had no authority at all, that clearly relates to a defeasance or condition existing at the time when the bill of sale is made or given, i.e., either an antecedent agreement or a contemporaneous agreement, part of the same transaction. I do not see how, by any ordinary use of language, you can say that a bill of sale is made or given subject to a defeasance if the defeasance takes place some time after the bill of sale is made or given. That is what I should have said if there was no authority at all. It is curious that there is so little authority on the subject. As far as I can find there are only three cases which may have any bearing on the matter at all, and there is one passage in a text-book. I see that in *Re Southam* (1), in 1874, there being an agreement for payment by instalments, SIR JAMES BACON, C.J., said (L.R. 17 Eq. at p. 580):

"Mr. Robertson Griffiths [the counsel in that case] said that he did not care whether that agreement was entered into before or after the execution of the bill of sale. In my opinion it makes all the difference whether it was before or after."

I think SIR JAMES BACON clearly thought, as I think, that you did not make or give a bill of sale subject to defeasance if the defeasance came into existence after you had made or given the bill of sale. Then there is a decision of the Court of Appeal in *Linfoot v. Pockett* (2), where, a bill of sale having been drawn up, the moneylender in whose favour the bill of sale was granted sent a set of rules and regulations after the bill of sale had been drawn up which the moneylender alleged were an agreement which he tried to enforce. All three members of the court said there was not an agreement, but simply a receipt, without objection, of the regulations which were tried to be enforced. To that extent, therefore, the case does not directly decide the point which I have to decide. All three members of the court use language which appears to me to show that they took the view that an agreement, if there was one, after the bill of sale was executed was not a

A defeasance which came within s. 10 (3). LINDLEY, L.J., says ([1895] 2 Ch. at p. 844):

B “Now, was there any condition or defeasance which ought to have been embodied in this bill of sale? It appears to me that when the facts are understood there obviously was not. The bill of sale was executed; and up to that time no condition, no defeasance was mentioned. When it was executed the bargain was complete, and there was no condition or defeasance forming part of the bargain.”

C That language seems to me clearly to point to the conclusion that LINDLEY, L.J., thought that an agreement after the bargain, and forming no part of it at the time it was made, was not a defeasance within the section. LOPES, L.J., says (*ibid.* at p. 848):

D “Then another point was taken—that the bill of sale was void on the ground that it was subject to a condition or defeasance such as is contemplated by the Act of 1878, s. 1 (3). I think that means a condition or defeasance which is part of the bargain, and here, as far as I can discover, it is impossible to say that there was any condition or defeasance which was part of the bargain.”

RIGBY, L.J., says (*ibid.* at p. 850):

E “A stipulation which was not made known to the other side cannot be a condition within the meaning of the Act, and the putting forward of these rules and regulations after the bill of sale had been executed and the money advanced would not make them part of the contract.”

F All three of those judges took the view that an agreement, if there was one, after the execution of the bill of sale, and not forming part of the bargain which led to the execution, would not be a defeasance within s. 10 (3) of the Act of 1878. There remains *Pettit v. Lodge and Harper* (3), which I must frankly say has given me considerable difficulty, because, if the point has been decided by the Court of Appeal, I am bound by it. I can find no trace in the statement of the facts or the judgments to show that the judges thought or had present in their minds the question of the difference between an agreement before or contemporaneous with the bill of sale and a separate agreement afterwards. The reporter has not stated the facts so as to tell me clearly when the agreement was made, and I think he has not stated it for the reason that no consideration was laid on it one way or the other in the course of the argument. While I think counsel for the plaintiff is right in saying that the judgment of the Master of the Rolls (COZENS-HARDY, M.R.) indicates language which is more consistent with it being after, it is still extremely vague. The previous decision of the Court of Appeal in *Linfoot v. Pockett* (2) was not cited to the court. I cannot find in the argument that any question was raised about the agreement being entered into before or after the bill of sale, and I have come to the conclusion that I cannot treat *Pettit v. Lodge and Harper* (3) as a decision binding on me, that an agreement after the execution of the bill of sale can be treated as a defeasance defeating it within the meaning of s. 10 (3). It is not an authority, and I only mention it because it was referred to in the course of the case. It is gratifying to a judge coming to the conclusion I have come to to find that a living authority does agree with him. I find that in LORD HALSBURY'S LAWS OF ENGLAND, vol. 3 (1st Edn.), p. 45 [see now 3rd Edn., vol. 3, p. 297] in an article on bills of sale written by MR. HERBERT REED, it is stated in plain language that terms made subsequent to the bill are not within the provisions of the section to which I have referred.

I Finding, as a fact, therefore, as I do, that the agreement in this case was not part of the bargain for the bill of sale, but was separate and subsequent, I hold as a matter of law that such a defeasance is not one in which the bill of sale is made or given subject to the defeasance, and that, consequently, it does not come

within the prohibition of s. 10 (3) of the Bill of Sale Act, 1878, and that, therefore, the plaintiff's claim fails.

The defendant counter-claims for the sum due under the bill which has become due under the subsequent agreement also because the instalments have not been kept up, and it is agreed that the amount now due under the bill is £72 15s. There must be judgment for the defendant on the claim and on the counter-claim for the sum of £72 15s. with costs.

Solicitors: *W. A. H. Johnston; Jennens & Jennens.*

[Reported by WILFRID PRICE, Esq., Barrister-at-Law.]

NOLISEMENT (OWNERS) v. BUNGE AND BORN

[COURT OF APPEAL (Swinfen Eady and Bankes, L.JJ., and A. T. Lawrence, J.), November 1, 2, 1916]

[Reported [1917] 1 K.B. 160; 86 L.J.K.B. 145; 115 L.T. 732; 13 Asp.M.L.C. 524; 22 Com. Cas. 135]

Shipping—Detention of ship by charterers—Loading completed before expiration of lay days—Rights to detain until termination of lay days.

By a charterparty dated Feb. 1, 1915, a steamer was to be loaded at an Argentine port and to proceed therefrom to a European port at the master's option for orders "unless these be given to him by the charterers on signing bills of lading to discharge" at a certain port. By cl. 13 the steamer was to load at a certain rate, otherwise demurrage was to be paid, and by cl. 16 dispatch money was to be paid to the charterers for time saved in loading. It was agreed that the charterers had the right to keep the steamer for twenty-four hours after completion of loading, for the purpose of settling accounts. The steamer was loaded nineteen days before the expiration of the lay days, and in respect of these nineteen days the charterers received dispatch money, but, owing to delay by the charterers in deciding as to the port of call, the steamer was kept waiting for the bills of lading and orders for three days. On a claim by the shipowners for damages in respect of two days' delay,

Held: the effect of cl. 13 and 16 was not to permit the charterers to detain the steamer after she had been loaded for the remaining number of lay days; directly the ship was loaded it became their duty to present bills of lading for signature, and, if they did not do so and in consequence the ship was detained for an unreasonable time, they were guilty of a breach of duty for which the shipowners were entitled to damages; there was no provision in the charter as to the measure of damages for such detention; and, therefore, the damages were at large.

Decision of ATKIN, J., [1916] 1 K.B. 805, reversed.

Notes. As to damages for detention of a chartered vessel, see 30 HALSBURY'S LAWS (3rd Edn.) 344-352; and for cases see 41 DIGEST 577 et seq.

Cases referred to:

- (1) *Moel Tryvan Ship Co. v. Kruger & Co.*, [1907] 1 K.B. 809; 76 L.J.K.B. 550; 96 L.T. 429; 23 T.L.R. 271; 10 Asp.M.L.C. 416; 12 Com. Cas. 38, C.A.; affirmed sub nom. *Kruger & Co., Ltd. v. Moel Tryvan Ship Co., Ltd.*, [1907] A.C. 272; 76 L.J.K.B. 985; 97 L.T. 143; 23 T.L.R. 677; 10 Asp.M.L.C. 465; 13 Com. Cas. 1; sub nom. *Moel Tryvan Ship Co., Ltd. v. Kruger & Co., Ltd.*, 51 Sol. Jo. 623, H.L.; 41 Digest 403, 2503.

- A (2) *Oriental Steamship Co. v. Tylor*, [1893] 2 Q.B. 518; 63 L.J.Q.B. 128; 69 L.T. 577; 9 T.L.R. 591; 42 W.R. 89; 7 Asp.M.L.C. 377; 4 R. 554, C.A.; 41 Digest 665, 4963.

Also referred to in argument :

Oakville Steamship Co. v. Holmes (1899), 48 W.R. 152; 16 T.L.R. 54; 44 Sol. Jo. 75; 5 Com. Cas. 48; 41 Digest 576, 3997.

- B **Appeal** by shipowners from a decision of ATKIN, J., on an award in the form of a Special Case stated by an arbitrator.

C By a charterparty dated Feb. 1, 1915, made between the owners of the steamship *Nolisement* and the charterers, Ernest A. Bunge and J. Born, it was agreed (by cl. 2) that the steamer should with all convenient speed after arrival at Montevideo proceed as ordered by the charterers to various ports or places to receive a full and complete cargo of wheat or other grain. By cl. 4 the steamer, when loaded, was to proceed to one or other of various European ports at the master's option for orders,

"unless these be given to him by the charterers on signing bills of lading to discharge at a safe port on the Continent. . . ."

- D By cl. 13 the steamer was to load at a certain rate, otherwise demurrage to be paid at the rate of 8d. sterling per ton per running day. By cl. 16 dispatch money, which was to be paid to the charterers before the steamer sailed, was payable for all time saved in loading at the rate of £15 sterling per day. The loading of the vessel proceeded so rapidly that it was completed nineteen days before the lay days were completed, and the charterers received in account dispatch money in respect of those nineteen days. A dispute then arose between the parties as to what damages (if any) the owners were entitled to receive in consequence of the steamer being unable to sail from her port of loading for three days after the loading was completed owing to the failure of the charterers to make out the bills of lading, they not having made up their minds as to the port of discharge. The matter having gone to arbitration, the umpire found that the shipowners were right, and were entitled to £300 for the detention of the vessel and costs. He also found that, assuming the damages should have been assessed upon the basis of the demurrage rate, they came to £94 14s. The umpire having stated his award in the form of a Special Case, ATKIN, J., held that, the loading time granted to the charterers not having been exceeded, the shipowners were not entitled to claim for demurrage or detention, but only to a return of the dispatch money as money paid for a consideration which had failed. The shipowners appealed.

Sir Maurice Hill, K.C. (W. N. Raeburn with him), for the shipowners.
Leck, K.C. (R. A. Wright with him), for the charterers.

- H Nov. 2, 1916. **SWINFEN EADY, L.J.**—This is an appeal by the owners of the steamship *Nolisement* from the judgment of ATKIN, J., upon a Special Case stated by an umpire. The question arises in respect of a charterparty dated Feb. 1, 1915, whereby the ship *Nolisement* was to proceed to the River Plate and there load a full and complete grain cargo. The charterparty provides for the rate at which the steamer is to be loaded, and it provides for dispatch money. It appears from the facts stated in the Case that the ship was loaded in eight days and earned dispatch money for about nineteen and a quarter days, and was duly paid on that basis, but her sailing was delayed for three days after the loading was completed. The umpire found that there was an agreement between the parties that the detainer for one day was proper. He says :

"It was agreed between the parties and I find that the charterers had the right to keep the steamer for twenty-four hours for the purpose of settling the accounts, and that the dispute arises in relation to the two remaining days that the steamer was kept waiting."

In other words, after the steamer was fully loaded; at the expiration of the eight days that it took to load her, she was detained a further three, one of which was justified; and so the claim was in respect of the remaining two days that she was detained. The reason for the detention for the two days was that the charterers were unable to make up their minds as to the port of discharge, and it is in respect of the claim for that two days' detention that the owners' claim went to arbitration. [His LORDSHIP stated the findings of the arbitrator.] The umpire having made his award in an alternative form, the matter came before the learned judge, who decided that there was no liability upon the charterers in respect of the detention of the ship, and that they were entitled as of right to detain the ship for all the lay days—that is to say, for the period of time that was necessary for the loading of the ship, if she had been loaded only according to the rate of loading prescribed by the charterparty. But he says on that footing that, although the charterers had the right to detain the ship for the whole of the lay days, nevertheless they could not claim dispatch money when the ship was detained in respect of those two days, and the shipowners had gained nothing by the accelerated rate of loading. Therefore, he held that the dispatch money in respect of the two days was money paid without consideration, and the charterers must return to the owners that amount. From that judgment the owners appeal. They contend that they are entitled to damages for the detention of the vessel, that there is no contract rate of damage, that the damage is at large, that the umpire, a business man in the shipping world, has arrived at a sum which is a fair and reasonable sum, and which there is no ground to disturb, and that in other respects the award is right.

The charterparty provides, by cl. 4, that, the steamer being loaded, "shall with all reasonable speed therewith proceed to St. Vincent (Cape Verdes), or Las Palmas, or Teneriffe (Canary Islands), or Madeira or Dakar, at the master's option, for orders (unless these be given to him by charterers on signing bills of lading)." So the charterparty gives to the charterers the option, on signing bills of lading, to name the port of discharge, and it is on that option that the umpire finds that the charterers had decided, not that the ship was to sail and call for orders, but that the port of discharge was to be named by them on signing bills of lading before the ship sailed. They had not, however, made up their minds as to the particular port. The provision for lay days is in this way. Clause 12 provides that the lay days shall not commence before Mar. 1, 1915, unless charterers begin loading sooner, and, should the steamer not be ready to load by 6 p.m. on Mar. 31, the charterers should have the option of cancelling. Clause 13 provides for the rate of loading:

"The steamer shall be loaded at the rate of 225 tons per running day up to the first 3,000 tons, and at the rate of 400 tons per running day for any quantity above 3,000 tons, Sundays and holidays excepted, otherwise demurrage shall be paid . . ."

The parties have worked out, and there is no dispute between them as to this, the number of days which that rate of loading would give the vessel to load, and, having regard to the eight days that were occupied in the actual loading, there were nineteen or nineteen and a quarter in respect of which dispatch money was payable. It will be observed that demurrage is only payable under cl. 13 if the steamer is not loaded at the agreed rate. It says the steamer shall be loaded at a particular rate, otherwise demurrage is to be paid. The steamer was loaded at an accelerated rate, and, in my opinion, that clause does not provide any rate for the detention of the steamer after she is fully loaded. It is merely that, unless she is loaded at a particular rate, demurrage shall be paid. In this case, the steamer having been loaded at an accelerated rate, no claim can arise under that clause. Clause 16 provides for dispatch money which the vessel earned and received; cl. 20 provides for advance freight; and cl. 21 provides for the signature of the bills of lading:

"The master to sign bills of lading in the form indorsed hereon, at any rate of freight that the charterers or their agents may require, but any difference in

A amount between the bills of lading freight, and the total gross chartered freight, as above, shall be settled at port of loading before the steamer sails; if in the steamer's favour, to be paid in cash on or before signing bills of lading; if in charterers' favour, by usual master's bill payable five days after arrival at port of discharge, or upon collection of freight (whichever occurs first), and such bill is hereby made by owners a charge upon bill of lading freight, and the said freight is hereby hypothecated as security for said bill."

B So the master was under an obligation to sign bills of lading at any rate of freight that the charterers or their agents might require. That, no doubt, was a provision for the benefit of the charterers, who could have required the master to sign bills of lading, of course, before sailing.

C In those circumstances one must consider, in the first place, that it is the duty of the charterers to prepare and present the bills of lading. In *Moel Tryvan Ship Co. v. Kruger & Co.* (1) SIR GORELL BARNES, P., said he was proposing to apply to the terms of the contract one or two well-known propositions, and the second proposition he puts is this ([1907] 1 K.B. at p. 819):

D "That, as a matter of business—and it necessarily must be so—the charterer has to prepare the bills of lading; he has to select how many parcels of goods he wishes the shipment to be divided into, and whether he will send the bills of lading to certain specific persons named or have them made out to order and indorse them. It is obvious that it must be for the charterer, if he wishes to have bills of lading signed, to make out the bills of lading and tender them for signature."

E Here, of course, it is essential that they should be made out by the charterers, because the rate of freight to be mentioned in the bill of lading is to be the rate of freight directed by the charterers. If that is their duty, then within what time and when ought the charterers to make out the bills of lading and present them to the master? In *Oriental Steamship Co. v. Tylor* (2) LORD ESHER said ([1893] F 2 Q.B. at p. 523):

G "Now, with regard to what time is the signing of the bill of lading to be determined? What is the time at which, or from which, you are to calculate the necessity or the obligation to sign the bill of lading? It is not from the sailing of the ship; it is from the loading of the cargo. No captain has authority to sign a bill of lading unless there is cargo on board, and he has only authority to sign for the cargo which is on board. But when there is a cargo on board, what is the time within which the bills of lading are to be signed? The bills of lading are almost invariably signed before the ship sails. Take an ordinary charter, where there are not the words 'or agent' in it, where the bills of lading are to be signed by the captain only: is it not elementary to say that those bills of lading are to be signed before the ship sails? It is obvious, in almost every case, that the bill of lading is signed before the ship sails, and the time from which you are to determine the obligation as to the time of signing the bill of lading is from the time of loading the cargo. Therefore, the time for the signing of these bills of lading is to be calculated from the time of the loading on board."

I A little later on, he points out that the charterers ought to have presented the bills of lading almost immediately—that is to say, there was an obligation on the charterers to present the bills of lading within a reasonable time after the ship was loaded.

The charterers in the present case not having done that, were they in breach of any duty by detaining the ship as they did? The learned judge has held that it was not. In his judgment, he says that the true view is that the charterer had a stipulated period of lay days during which he may delay the ship at the port of

loading without incurring liability for demurrage or for damages. In other words, he commits no breach for detaining the ship for that particular period. It may well be that if all the lay days are consumed in loading, there is no breach for which the charterer is liable; but in a charterparty in this form, where the ship is fully loaded at an accelerated rate, the charterer has no right to detain the ship after she is loaded. The charterer has no right to say: "I might have taken another nineteen days to load the ship, so, after the ship is fully loaded, I can detain her for the rest of the period I might have occupied in loading without being liable in damages for forfeiting or not retaining any right to the dispatch money." In my opinion, in a charterparty in this form the charterer has no such right, and, after the expiration of the one day allowed by the parties, it was a breach by the charterers to detain the ship by not presenting the bills of lading and enabling the ship to sail. The learned judge has held that acceptance of the dispatch money did not prevent the charterers saying that they were under no obligation to let the ship sail before the lay days expired, and that the charterers could not retain the two days' dispatch money. I am of opinion that the charterers had earned and were entitled to retain the dispatch money. In cl. 16 dispatch money which is to be paid to the charterers before the steamer sails shall be payable for all time saved in loading at a certain rate. The time was saved in loading her. True it is the ship was afterwards delayed, but, according to the terms of the contract, the dispatch money is payable for time saved in loading; and when once it is ascertained that nineteen or nineteen and a quarter days were saved in loading the ship, then the dispatch money became payable for that time, and the charterers were entitled to receive and retain it, although they might also be liable in damages afterwards for detaining the ship.

The next question is: Is there any contract rate for damages? I can find none. I have already pointed out that the demurrage payable if the steamer does not load within the contract time is inapplicable; and I can find no contract for the payment of damages where the ship is detained. Where the umpire finds that she is unreasonably detained for two days at the port of loading, the damages are such sum as may reasonably be taken to be within the contemplation of the parties for the breach of it. This matter has been referred to a commercial umpire, and he has awarded the sum of £300 as damages. It is urged by counsel for the defendants that the damages were practically nil, because they were damages for detaining the ship two days at the port of loading, and, by reason of that detention, a detention later on in the voyage at the port of call was obviated, for otherwise, as she would have had to call for orders, she would have been detained under the contract for twenty-four hours at the port of call. In short it was only a question of a detention of two days at the port of loading, instead of a detention of a similar number of days at the port of call. In my opinion, as a matter of law that cannot be sustained. The ship may not have been detained for that time at the port of call. A commercial arbitrator takes those matters into consideration. I think it was rather put before the umpire, having regard to the contention of the owners, that "in calculating the damages regard must be had to the terms of cl. 22 and the consequent saving to the shipowners by reason of waiting for orders at the loading port of time which would otherwise have been lost in calling for orders and waiting for twenty-four hours or more for orders under cl. 22." Of course, a commercial arbitrator might well say that, having regard to the state of business, the ship would not have been detained for that time, or anything like it; but that is a matter for the umpire to take into consideration with all the rest of the facts of the case in ascertaining the amount of damages. I am of opinion that there is no contract rate, that neither the dispatch money rate nor the demurrage rate apply, and that, therefore, the damages were open to be assessed by the arbitration tribunal. The amount having been assessed at £300, I see no ground for disturbing that assessment. In my opinion, the judgment below ought to be reversed; and the judgment should be in accordance with para. 1 of the umpire's award.

A **BANKES, L.J.**—I agree. As presented to the arbitrators and umpire, it does not appear to me, from the statement of the Case, that the charterers dispute their liability to pay something to the shipowners, but they contend that it ought to be limited to the amount of the dispatch money, which they alleged had been paid under a mistake of fact. When the matter came before ATKIN, J., the argument which was developed and the case which was presented to the learned judge was

B that the charterers were under no obligation to present any bills of lading to the master at all, but, in any event, having regard to the provision in the charterparty with regard to the lay days and the fact that the time which the shipowners contended had been wrongly occupied fell within the named lay days, the charterers were under no obligation to pay any damages at all. With regard to the payment of dispatch money, they argued that the right ground upon which to

C put that question was that there had been a total failure of consideration, so that the money was properly repayable to the shipowners.

To take the second point first. The provision in the charterparty dealing with dispatch money is contained in cl. 16 which provides that dispatch money shall be payable for all time saved in loading. That is a short and convenient way of expressing what the parties meant. But time saved in loading must mean any

D portion of the full time allowed by the charterparty for loading which remains after the vessel has been fully loaded, and for that time the language of the clause is plain that dispatch money has to be paid. Therefore, dispatch money under this clause in the contract had to be paid for the full period which remained between the completion of the loading and the last day allowed under cl. 13 for the operation of loading. If the construction adopted by ATKIN, J., with regard to the other

E question in dispute is accepted, this, as it seems to me, extraordinary and absurd result follows—that dispatch money is payable under the terms of the charter in respect of a period of time during which the ship is not free to sail owing to the action of the charterers. That difficulty was, no doubt, felt by the charterers when they were at the arbitration, and they tried to get out of it by saying that the dispatch money had been paid under a mistake of fact. That obviously fails. Then

F another attempt was made, and this attempt was accepted by ATKIN, J. It was said: "The money ought not to be retained by the charterers because of the total failure of consideration." I am quite unable to accept that view of the position. It seems to me that the consideration for the payment of dispatch money was diligence in loading, and, so far from there being a total failure of consideration, the facts show that the consideration was fully executed. In those circumstances, I can see

G no ground for coming to the conclusion that the dispatch money in respect of those two days was not properly payable.

That brings me now to consider the first question, and that depends upon the proper construction of this charterparty. ATKIN, J., has treated cl. 13 as though it gave some right to the charterers in respect of the ship that was not limited to the time actually occupied in loading, but extended to the full period which might

H have been occupied, but which was not in fact occupied. In my opinion, that is not the correct view of cl. 13. It does not specify any number of lay days at all; so far from giving the charterers any right, in my opinion, the correct view of this clause is that it places them under an obligation to load at a certain minimum rate, with a further provision that, if they do not so load, they must pay demurrage at a certain rate. That is the effect of the clause, as it seems to me—a clause

I indirectly, you may say, conferring a right, because of the obligation it places upon them; but the primary effect of the clause is to place the charterers under an obligation to load at a certain minimum rate and an obligation that, if they fail to do so, they are to pay demurrage at a certain rate. If they fail in performing the obligation, the penalty is to pay demurrage. If they fulfil the obligation and do not occupy the full time which they were entitled to occupy, they receive dispatch money. If they occupy the exact time, they neither pay demurrage nor receive dispatch money. If that is the correct view of the clause, the right upon which

the learned judge founded his decision does not appear to me to exist, and the charterers have no right to say: "Although we did not occupy the time which the charterparty allowed us to occupy, we are still in a position to claim the right to detain the ship in the sense of refusing to take action which will allow her to depart just as long as we please, so long as our full loading time is not exceeded."

The next point is this—assuming the view of the contract to be right that when the ship is once fully loaded any right (if you call it a right) of the charterers in respect of the ship ceases, what is the position of the parties with reference to the bills of lading? I suppose in practice in almost every case the charterers desire that there shall be a bill of lading, and the owner of the ship, or his representative, the master, also desired that there shall be a bill of lading, and a certain amount of time is necessarily occupied in preparing the necessary document or documents and submitting them to the master. In this particular case the parties are agreed that a reasonable time would be twenty-four hours. Is there any obligation upon the charterers under those circumstances to present a bill of lading? I should certainly have thought there was; but this case, it seems to me, goes beyond that, because it does not rest upon ordinary commercial practice. It appears to me that upon the correct reading of cl. 21 there is an obligation upon the charterers to present bills of lading, and on the master to sign them. The obligation is not inserted there in the interest of the charterers only. It seems to me that the provisions of the clause are for the mutual benefit of the master and the charterers. In this contract it is obviously within the contemplation of the parties that the bill of lading is to be presented by the charterers to the ship-owner or master. Within what time? As I have said, the parties have agreed that twenty-four hours would be a reasonable time. If it is within the contemplation of the parties that the act shall be done, there will be an implied condition that it shall be done within what the parties have agreed is a reasonable time. Under those circumstances it seems to me that there was in this case, upon the facts as found, a breach by the charterers of the implied condition that they should present a bill of lading to the captain for signature within a reasonable time, and, as they failed to comply with that condition, they are liable in damages. The damages do not come within any provision of the charterparty fixing the amount of damages for this particular breach. Under those circumstances, the damages were at large, and I see no reason why we should interfere with the view of the umpire, who had all the matters before him, as to the amount of damages that ought to be awarded in this particular case.

A. T. LAWRENCE, J.—I am of the same opinion. The question depends upon whether the charterers' contention that the lay days provided by cl. 12 and 13 are to be taken as a gross period for which the charterers are absolutely entitled to have the ship at their disposal is right, or whether they are only a means of controlling the rate of loading, so that, if the rate of loading does not rise to that level, demurrage is to be paid. I think that they are not gross days at all, but that they are days given for the operation of loading. That is made clear by cl. 16, which provides for dispatch money in the event of the loading being at a more rapid rate than the calculation under cl. 12 and 13 would work out at. In this case the loading was completed in a lesser time, and dispatch money was earned and paid, but it does not seem to me possible to say that those days were still to the credit of the charterers. Directly the ship was finally loaded it became the charterers' duty, within a reasonable time, to present their bills of lading for signature. If they did not do so, but for an unreasonable time delayed the ship before they presented the bills of lading, that was a breach of duty, and for it damages are recoverable. It is agreed that the reasonable time within which to have done that was twenty-four hours, and after that period the ship was delayed for two days. Counsel for the charterers argues that the ship might have gone away without waiting for the bills of lading. I do not think that is a correct view of the charterparty. Clause 21 seems to me clearly to mean that the master has

A to sign bills of lading at the port of loading before the steamer sails. He could not have complied with this charterparty by leaving a bill of lading and going away. He would have had to declare his option as to what port of call he was going to in writing before signing the final bill of lading. It seems to me it is not possible to read this charterparty as one intended to give the charterers twenty-seven and a quarter days as a time in gross in which the ship was to be at their disposal, and to mean that during that time they could retain her for any purpose they liked. I think they could not. They could only detain her in the operation of loading for that time, and if they detained her otherwise they were committing a breach of duty. The measure of damages was, perhaps, a point of some difficulty, but, on the whole, I think that there is no agreed rate of demurrage here for detention. The demurrage provided for in cl. 13 is for a detention caused by delay in loading, and there are a number of other assessments of damage in the charterparty, none of which applies to this particular detention. Consequently, I think the damages for the detention in question were at large, and the umpire was entitled to find the sum which he did. I think the judgment which was given by my Lord is correct.

Appeal allowed.

D Solicitors: *Thomas Cooper & Sons; Church, Rackham & Co., for Donald Maclean & Handcock, Cardiff.*

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

VANNECK *v.* BENHAM AND OTHERS

[CHANCERY DIVISION (Younger, J.), July 14, 17, 19, 1916]

[*Reported* [1917] 1 Ch. 60; 86 L.J.Ch. 7; 115 L.T. 588]

Intestacy—Distribution—Interest of next-of-kin—Right to claim specific property.

F An interest in an intestate's estate is not sufficiently specific, apart from agreement with the other next-of-kin where there are more than one, to enable any one of the next-of-kin to say to the administrator: "This or that thing is mine. Hand it over to me."

G *Settlement—Marriage settlement—Covenant to settle after-acquired property—Exclusion of specified kinds of chattel—Covenantor becoming entitled to share of intestate's estate including chattels of excepted kinds—Sale of intestate's property—Effect of covenant on proceeds.*

H In a post-nuptial settlement the husband covenanted to bring into settlement any property coming to him thereafter under an intestacy, except chattels of specified kinds. He subsequently became entitled as one of the next-of-kin of an intestate to a share in the intestate's personal estate, which included chattels of the kinds excepted from the covenant. In the course of administration of the estate these chattels were sold.

I **Held:** the husband's interest in the intestate's estate, so far as the estate consisted of such chattels, was not an interest in each of the specific chattels, but was an interest in the fund created by the proceeds of their sale, and, therefore, his interest in such chattels or in the proceeds of sale thereof did not fall within the exception of the covenant in the settlement, but, together with his interest in the rest of the estate, was subject to the covenant.

Lord Sudeley v. A.-G. (3), [1897] A.C. 11, applied.

Cooper v. Cooper (1) (1874), 7 H.L. 53, and *Blake v. Bayne* (2), [1908] A.C. 371, distinguished.

Notes. Referred to: *Re Donkin, Public Trustee v. Cairns*, [1948] Ch. 74; *Re Cunliffe-Owen, Mountain v. I.R.Comrs.*, [1953] 2 All E.R. 196.

As to the distribution of an intestate's estate and the settlement of after-acquired property, see 16 HALSBURY'S LAWS (3rd Edn.) 392 et seq., and *ibid.*, vol. 34, pp. 450 et seq. For cases see 24 DIGEST (Repl.) 923 et seq., and 40 DIGEST (Repl.) 533 et seq.

Cases referred to :

- (1) *Cooper v. Cooper* (1874), L.R. 7 H.L. 53; 44 L.J.Ch. 6; 30 L.T. 409; 22 W.R. 713, H.L.; 23 Digest (Repl.) 480, 5474.
- (2) *Blake v. Bayne*, [1908] A.C. 371; 77 L.J.P.C. 97; 99 L.T. 35, P.C.; 23 Digest (Repl.) 232, 2819.
- (3) *A.-G. v. Lord Sudeley*, [1896] 1 Q.B. 354; 65 L.J.Q.B. 281; 74 L.T. 91; 60 J.P. 260; 44 W.R. 340; 12 T.L.R. 354, C.A.; affirmed sub nom. *Lord Sudeley v. A.-G.*, [1897] A.C. 11; 66 L.J.Q.B. 21; 75 L.T. 398; 61 J.P. 420; 45 W.R. 305; 13 T.L.R. 38, H.L.; 23 Digest (Repl.) 474, 5445.
- (4) *Re Dickson, Dickson v. Dickson*, [1890] W.N. 10; 34 Sol. Jo. 181.

Action to rectify a deed of assignment to trustees of a post-nuptial settlement executed in October, 1908, by limiting the assignment thereby made of the interest of the plaintiff as one of the next-of-kin in the personal estate of his brother, Lord Huntingfield, to so much of such interest as he was in fact bound to assign.

The settlement was made between the plaintiff, Walter Vanneck, of the first part, the defendant, his wife, of the second part, and the two defendant trustees of the third part, and by it certain funds were to be held by the trustees upon trusts for the benefit of the husband, the wife, and their children. By cl. 2 of the settlement an obligation was imposed on the wife out of the income of the settled property to maintain a suitable house and provide therein a home for herself and her husband and their children for the time being unmarried, and in cl. 13 there was an assignment by the husband and wife of

"all those the articles of plate, furniture, pictures, books, and all other chattels and effects of household or domestic use or ornament which are now in or about or belong to the joint home of the husband and wife at Darsham aforesaid, and including therein the articles which were bequeathed to the husband by his grandmother, Lady Huntingfield, a list whereof . . . has been made and has been or will be delivered to the trustees, which articles of plate, as specified in such list, are hereinafter referred to as 'the scheduled plate,' to hold the same unto the trustees"

upon the trusts therein mentioned. Clause 8 provided :

"If during the joint lives of the husband and wife they shall not reside together in such home as aforesaid, there shall be paid to the husband during the remainder of the said joint lives out of the income of the husband's fund the annual sum of £65"

subject to a certain possible deduction. By cl. 19 :

"Each of them the husband and the wife shall further bring into settlement and make over to the trustees or trustee all the property of every kind (property consisting of a life interest or of income only or being of a value not exceeding £200 and furniture, plate, jewels, and other chattels of personal, domestic, or household use excepted) to which they should respectively during their joint lives hereafter become entitled in possession by virtue of any gift, devise, or bequest by will or under any settlement or by virtue of any intestacy or other succession, the same to be held as to any property brought into settlement by the wife as part of the wife's fund, and as to any property brought into settlement by the husband upon trust to pay the income to the husband for his life, and after his death to the wife if surviving for her life and after the death of both upon the trusts then subsisting hereunder as to the husband's fund, any such property consisting of real estate or lands or houses to be held upon trust for sale at the discretion of the trustees or trustee, but subject to the consent of the husband or wife as the case may be by whom the same shall be brought

A into settlement during their respective lives . . . any such property consisting of investments may be retained though the investments be not of a kind herein authorised."

B In January, 1915, Lord Huntingfield died intestate and unmarried, and letters of administration to his estate were granted to the Public Trustee. The plaintiff as one of the next-of-kin became entitled to one-sixth share of the intestate's personal estate. The remaining five-sixth shares were divisible among the sisters of the intestate and the children of two deceased brothers. The net value of the whole personal estate after payment of duties was approximately estimated to be £30,000. The value of the pictures, plate, furniture, and other articles of personal or household use, was estimated to be £15,200, but these articles in the result realised more than £21,000. Mr. and Mrs. Vanneck accepting the opinion of their solicitor C that any interest which Mr. Vanneck might have under the intestacy of his brother would be subject to the trusts of the settlement as after-acquired property, instructions were given for a deed of assignment of Mr. Vanneck's entire interest under the intestacy to the trustees, and it was also arranged that Mr. Vanneck should give up the sum of £65 a year, while Mrs. Vanneck agreed to limit her interest D in the fund brought into settlement to £165, and, accordingly, the deed of which rectification was sought was executed in August, 1915. Clause 1 of this deed was as follows :

E "The husband as settlor with the privity of the wife hereby grants, assigns, and conveys unto the trustees first all that the share, estate, and interest of him the husband in the personal estate of the late Baron Huntingfield as one of his next-of-kin and all the moneys, stocks, funds, securities, and property F which have become or shall become vested in or belonging to the husband as such next-of-kin or by any other succession by reason of the death of the said late Baron Huntingfield and secondly all the share or shares, estate, and interest to which the husband has become entitled or which have descended upon the husband as an heir or co-heir of the said late Baron Huntingfield by reason of his death intestate or which the husband has become entitled to by G any other succession by reason of the death of the said Baron Huntingfield to hold the same as to the said first described premises absolutely and as to the said secondly described premises unto and to the use of the trustees, their heirs and assigns, nevertheless upon the trusts and subject to the powers and provisions upon and subject to which the same ought to be held by virtue of cl. 19 of the settlement as property to be brought into and made subject to the trusts, powers, and provisions of the settlement."

H Clause 2 contained a release by the husband of the right to have paid to him under cl. 8 of the settlement the annual sum of £65, cl. 3 contained a release by the wife of her rights to the income of the fund brought in in excess of £165 a year, and by I cl. 4 the trustees were appointed attorneys to receive the share of Mr. Vanneck in the intestate's estate. The next-of-kin, not being in entire agreement as to the administration of Lord Huntingfield's estate, concurred in asking the court to appoint the Public Trustee as administrator, and he acted in that capacity. After the estate had been realised a letter was written on behalf of the Public Trustee to the plaintiff saying that the Public Trustee had been advised by counsel that he could not safely pay over to the trustees of the settlement the portion of the share of Lord Huntingfield's estate which represented proceeds of sale of furniture, plate, &c., as it appeared from the terms of the settlement that they were expressly excluded from the plaintiff's covenant.

Clauson, K.C., and *B. A. Hall* for the plaintiff.

Mathew, K.C., and *J. E. Harman* for the defendant Mrs. Vanneck.

W. H. Cozens-Hardy, K.C., and *J. T. Prior* for the trustees of the settlement.

YOUNGER, J., read a judgment in which he stated the nature of the action and the facts, and said that the provisions of cl. 2 and 13 of the settlement might be of some importance as tending to show that the range of the exception in the covenant in cl. 19 was of articles capable of enjoyment in specie by the husband or the wife of the kind already brought into settlement under cl. 13 for the purposes of the home which was to be provided by the wife. The whole estate of Lord Huntingfield has been converted into cash. The plaintiff has not received, nor has there at any time been available for him to receive, any interest in the estate except a sum in cash. In these circumstances the first question I have to determine is whether the whole interest of the plaintiff in his brother's estate was caught by the covenant, or whether, seeing that some part of the net sum representing Mr. Vanneck's ascertained share in the result of the administration owed its origin to the realisation of articles of the description excepted from the covenant, his obligations under the covenant are reduced by the amount properly attributable to the ascertained value of these articles. The answer to this question depends primarily on the true construction of the covenant, and it is asserted on Mr. Vanneck's behalf that his strict right as one of the next-of-kin of his brother was a right to one-sixth interest in every picture, chair, table, spoon, ring, or necklace, pot or pan, which remained in the hands of the administrator after payment of the intestate's debts and administration expenses. If that view were well founded and it were necessary to decide the case on that footing, I should be of opinion that on the true construction of the covenant in this settlement the exception did not extend so far and was not directed to such an interest. But it would be unsatisfactory to determine the case on so narrow, so debatable, and, it might be suggested, so grotesque a hypothesis. I therefore proceed to deal with the point at issue on more general grounds.

The contention on behalf of the plaintiff is that the next-of-kin of an intestate have at the moment of death, subject only to the claims of creditors, a substantial title to the whole of his personal property, and a clear and tangible interest therein, and for that view he relies on *Blake v. Bayne* (2). On the other hand, counsel for Mrs. Vanneck contends, and with equally high authority to support him, that Mr. Vanneck's only right at the moment of Lord Huntingfield's death was to have the administration completed and the estate ascertained and realised, and then and there to have one-sixth of the proceeds paid to him, with no right of property in nor any right to claim any part of that estate in specie: see per Lord DAVEY in *Lord Sudeley v. A.-G.* (8). Plainly both of these views, divergent as they may seem, must, having regard to their origin, when properly applied, be capable of acceptance. My task is to see which of them is applicable to the problem which in this case has to be solved.

In confirmation of the husband's contention, there is, first, *Cooper v. Cooper* (1), a decision which establishes that the residuary legatee under a will has a clear and tangible interest in the residue, and that, the Statute of Distributions being nothing but a will made by the legislature for an intestate, his next-of-kin stand, with regard to his personal estate, in the same position as does a residuary legatee under a will. The case next establishes, as stated in the headnote, that (L.R. 7 H.L. 53):

"The rule of the Statute of Distributions which requires the conversion of an intestate's estate into money is introduced simply for the benefit of creditors and the facility of division amongst the next-of-kin. But, as regards the substantial title to property, the right of the next-of-kin (subject only to the claims of creditors) is complete."

That being the effect of the decision, it becomes important to see what are the facts of the case with reference to which it was given. A testator had devised an estate called Pain's Hill to trustees. That estate had by the testator been directed to be sold, and a power of appointment among his children had been given to the widow. The widow by deed, the property having in the meantime been sold, appointed the proceeds of sale to her sons in equal shares. Subsequently by her will she gave

A the whole of the estate, mentioning it specifically, to one of her sons, and by the same will she gave benefits to the second son and to the children of the third son, who had died intestate, and whose children on his intestacy had become entitled to that one-third appointed to their father. The question which had to be determined by the House of Lords was whether the interest of these children of the deceased son under the appointment, which interest they took only through the intestacy of their father, was such an interest in the estate of their father as to put them to their election to take either under the grandmother's will or under the appointment; and the answer to that question depended upon what their rights were under their father's intestacy. It was contended by those who appeared for the children that the interest which they took was no more than an undefined and intangible interest. LORD CAIRNS, dealing with that contention, says (*ibid.* at pp. 64, 65):

"My Lords, it was very much pressed on your Lordships, in the extremely able argument we heard at the Bar from the counsel for the appellants, that the interests of a next-of-kin in the estate of an intestate is an undefined and intangible interest; that it is a right merely to have the estate converted into money and to receive a payment in money after the debts and expenses are discharged. My Lords, no doubt the right of a next-of-kin is a right which can only be asserted by calling upon the administrator to perform his duty, and the performance of the duty of the administrator may require the conversion of the estate into money for the purpose of paying debts and legacies. But I apprehend that the rule of law, or the rule laid down by the statute, which requires the conversion of an intestate's estate into money is a rule introduced simply for the benefit of creditors and for the facility of division. For the benefit of creditors and for the facility of division among the next-of-kin the estate is turned into money, but as regards substantial proprietorship the right of the next-of-kin remains clear to every item forming the personal estate of the intestate, subject only to those paramount claims of creditors. My Lords, this right of the next-of-kin I find extremely well expressed in a book which on this subject is a book of high authority—BACON'S ABRIDGMENT—in the part of it which treats of executors and administrators. Speaking of the right of the next-of-kin, and of the statute regulating the succession to an intestate's estate, it says, on the clause of the statute which directs that no distribution shall be within the year after the death of the intestate [*Tit. Executors and Administrators s. 4, vol. iii (7th Edn.) p. 75*]:

"It hath been adjudged that if a person entitled to a distributive share dies within the year, yet it is such an estate vested in him as shall go to his executor or administrator, for the statute doth not make any suspension or condition precedent to the interest of the parties, but it is a clause merely for the benefit of creditors; also this statute, being in the nature of a will for all persons who die intestate, ought in this instance to be resembled to the case of a residuary legatee, in which it is always holden that if such a legatee die before the debts are satisfied, so that it doth not appear to how much the surplus will amount, yet the executor or administrator of such a legatee shall have the whole residue, &c., which remains over and not the executor of the first testator.' "

Again LORD CAIRNS says (*ibid.* at p. 66):

"If we look on the Statute of Distributions, as I think we ought to look on it, as in substance nothing more than a will made by the legislature for the intestate, and liken this to the case of a person having made a will and having directed his debts and expenses to be paid, and having given over his clear residue to his three children and his widow—if, I say, we look at the case as if it had assumed these features—I apprehend your Lordships will be perfectly clear that the residuary legatees under such a will had a clear and

tangible interest in specie in the Pain's Hill estate, just in the same way as the youngest of the three brothers, Frederick John, who directly took one-third of the proceeds of the estate."

The effect of that decision I take to be that the interest which these children took under the intestacy of their father in (inter alia) the one-third which had been appointed to their father by the grandmother was sufficiently specific to require them to elect between the benefits they took under their grandmother's will and the appointed fund which under another name had been disposed of by that will. That fund came to them in the form of money or money's worth; for the purposes of election it was enough that in the result they had it in the form of money's worth.

The next case referred to by counsel for the husband and mainly relied on by him was *Blake v. Bayne* (2) in the Privy Council. The judgment there was delivered by LORD MACNAGHTEN. That was a case in which the claim was made under an administration bond in respect of breaches of duty by the administrator, who was one of three sisters, in administering the mother's personal estate; and the circumstances were that, the debts of the mother having been paid, the management of the property was left in the hands of the administratrix as trustee for the other two sisters and herself, with the result that losses occurred. The other two sisters then commenced an action against the sureties who had given the administration bond in respect of the alleged breaches of duty by the administratrix for which the sureties would be responsible. It was held by the Privy Council that after payment of the intestate's debts the three sisters were entitled to the residue of the estate in equal undivided shares, and that in the circumstances it was not thereafter competent for the two sisters to maintain any claim against the sureties. In delivering the judgment of the board LORD MACNAGHTEN, after reading LORD CAIRNS' judgment in *Cooper v. Cooper* (1), which I have already read, says this ([1908] A.C. at p. 383) :

"The opinion expressed by LORD CAIRNS and the other noble and learned Lords in *Cooper v. Cooper* (1) goes a long way to dispose of the whole case set up on behalf of the plaintiffs. Subject to the payment of the debts, the whole estate was the absolute property of the three next-of-kin. The furniture and effects were theirs; the money was theirs; the houses were theirs. The debts were paid immediately after the death. If the next-of-kin choose to leave the whole estate just as it was in the hands of the eldest sister and under her absolute control (as the evidence shows, and as HOLROYD, J., finds, it was their desire and intention to do), there was no reason why effect should not be given to their wishes. As long as they lived together there was no reason for dividing the furniture. There was no reason for dividing the money. It was applied honestly and equally for their common benefit."

And again he says (ibid. at p. 379) :

"It is important to note the position of the estate when the deed of indemnity was signed. All the debts had been paid. There was no liability outstanding. The mother's estate was clear. The three sisters were equally entitled to it, and every part of it, in the actual state and condition in which it was. Without the consent of her two sisters it was neither the duty nor the right of the administratrix to convert the estate into money for the purpose of division or investment."

I think with regard to that case, and in particular to the passages I have read from LORD MACNAGHTEN's judgment, that all the Privy Council necessarily decided was that on the facts the whole of the personal estate was capable of division and that the value of each separate share after division would be the same as the value of one-third of the whole, and that the parties entitled had agreed to enjoy it in specie. I do not think that LORD MACNAGHTEN intended to say, and there is a great deal to be urged against such a view, that the same result necessarily follows where that

A is not the case, where there has been agreement to take in specie, or where the estate consists of things which lose the whole or some of their value if divided; such things, for instance, as a pair of Oriental vases, which together may be worth much more than twice the value of each of them separately. Moreover, on any other view, the particular basis adopted in *Blake v. Bayne* (2) is not in harmony with the decision in *Cooper v. Cooper* (1), on which, in another part of his judgment, B LORD MACNAGHTEN relies, nor with *Lord Sudeley v. A.-G.* (3). Nor is it in harmony with the ordinary case of a trust for sale and division, where every cestui que trust has the right to have the trust carried out because, if not so carried out, every beneficiary would not receive that which he has a right to claim.

C That consideration brings me to *Lord Sudeley v. A.-G.* (3). In that case the question arose whether a share in New Zealand mortgages, which formed part of the residue of the testator's estate, became specifically the property of his widow, a residuary legatee, who had died. If it had, the value of her interest in these mortgages would be exempted from probate duty payable on her estate in this country; and the House of Lords held that the right of the executors of the widow as a person interested in the residue was not a right to the one-fourth of the mortgages in specie, but was a right merely to require the husband's executors to administer his personal estate and to receive one-fourth of the residue, and that probate duty therefore attached on the widow's interest therein. That case was decided by the House of Lords, but it followed a reported judgment of the Court of Appeal, sub nom. *A.-G. v. Lord Sudeley* (3), and I will read two passages from what the lords justices stated. LOPES, L.J., says ([1896] 1 Q.B. at p. 363):

E "It is to be observed that neither Frances nor her executors could claim any part of this estate in specie; the executors of her husband were not trustees of the estate for her—all she was entitled to was her proportion of the proceeds of her husband's estate after realisation."

KAY, L.J., says (*ibid.* at p. 365):

F "The one-fourth share of his residuary estate, which belonged to Frances, would still be an English asset, because neither she nor her executors would have any right to any of such investments in specie."

When the case came before the House of Lords these judgments were adopted by LORD MACNAGHTEN, and LORD HALSBURY, dealing with the matter, says ([1897] A.C. at pp. 15, 16, 17):

G "It is uncertain until the residuary estate has been ascertained of what it will consist. It may consist of many things—it may consist of only a sum of money—and until that has been ascertained the actual right capable of instant assertion does not exist; and whether the character is that of executor or of trustee seems to me to be immaterial, because the legatee has no right to go and say, 'I will have this or that part of the assets.' If a trustee is to be the character filled the cestui que trust has no right to apply to the trust fund until a trust fund has been constituted, and by the hypothesis the trust fund is not constituted. . . . The whole foundation of the argument is that the New Zealand mortgages are specifically the property of the legatee, which is a proposition which to my mind it is impossible to maintain."

H I LORD HERSCHELL says, with regard to the widow's share in the residuary estate (*ibid.* at pp. 18, 19):

"I agree with my noble and learned friend on the woolsack that the whole fallacy of the argument on behalf of the appellants rests on the assumption that Mrs. Tollemache or they as her executors were entitled to any part of these New Zealand mortgages as an asset—she in her own right or they as executors of their testatrix. I do not think that they have any estate, right, or interest, legal or equitable, in these New Zealand mortgages so as to make them an asset of her estate. What she had a right to—what they as her executors had

a right to—was one-fourth of the clear residue of Mr. Tollemache's estate—that is to say, what remains of his estate after satisfying debts and legacies; and a bequest to them of one-fourth part of his residuary estate does not seem to me to vest in them or in her a fourth part of each asset of which that estate consists, as contended for on the part of the appellants. It seems to me, as my noble and learned friend has pointed out, that until the estate is fully administered it is impossible to say of what assets the residuary estate will consist. . . . Well, in that case, how would it be possible to say that any one of the residuary legatees could point to any part of the assets of the testator and say, 'This is part of my estate,' when it depends entirely upon the method of administration by the trustees in what form the residue becoming divisible will exist when the administration is at an end. . . . In truth, the right she had was to require the executors of her husband to administer his estate completely, and she had an interest to the extent of one-fourth in what should prove to be the residuary estate of the testator, Algernon Tollemache."

LORD MACNAGHTEN says (*ibid.* at p. 19):

"I am of the same opinion. I think the point is a very short one, and I think the claim of the Crown is clear. For my part, I am quite content to adopt the judgments of LOPES, L.J., and KAY, L.J."

LORD SHAND says (*ibid.* at p. 20):

"The claim of Mrs. Tollemache's executors and trustees was really a claim to a share of the residue, and it had never been changed by allocation either by Mr. Tollemache's trustees or by arrangement with the other persons interested, so as to make the right of these executors a right to specific assets. They might have objected to accept the New Zealand mortgages if it had been proposed to allocate these to them as part of the residue, and the other parties interested might also have had valid objections to such an allocation. If Mr. Tollemache's executors had held the entire estate for behoof of his widow, the case might have been different; but, with other persons interested in an undivided and unrealised residue, none of the beneficiaries had in themselves a right of ownership in particular assets of Mr. Tollemache's estate."

LORD DAVEY says (*ibid.* at pp. 21, 22):

"What, then, are the rights of the appellants? Their right, and the only right they could enforce adversely, is to have the administration completed and the residuary estate ascertained and realised, either wholly or so far as may be necessary for the purpose, and to have one-fourth of the proceeds paid to them. . . . My Lords, I am of opinion, on the facts of this case, that Mrs. Tollemache at the time of her death had no right of property in or right to claim any part of the mortgages in specie, and that the appellants, her executors, acquired only a right to have the estate duly administered and to enforce that right by an action for the purpose, but had no right *virtute officii* to have any part of the New Zealand mortgages appropriated to the estate of their testatrix in specie."

The only one other case to which I have been referred is *Re Dickson* (4), a case superficially very like the present case, because in that case there was a covenant by a wife in a settlement of very much the same kind as in this case. What had happened was that the testator, who died in 1888, gave by his will all the residue of his estate to his executors upon trust for sale, and, after payment of his debts and funeral and testamentary expenses, to hold the whole of that residue in trust for Lady D., his wife, who had entered into the covenant. From the report of the case in 84 SOLICITORS' JOURNAL, 181, it appears that before the summons came on the furniture had been sold, but the sale had been made without prejudice to the question in what form Lady D. was entitled to take. STIRLING, J., decided that

A the fact that the lady had an interest under the covenant did not preclude her, being the only legatee, from electing to take the property in specie, and that, therefore, the furniture and other articles were by the very terms of the covenant excluded therefrom.

These are the cases in point. It is unfortunate that *Cooper v. Cooper* (1), which forms the foundation of the argument for the husband here, was not cited in *Lord Sudeley v. A.-G.* (3), especially as it was more relevant to the appellant's case than were some of the cases that were cited. It is unfortunate also that *Lord Sudeley v. A.-G.* (3) was not cited in *Blake v. Bayne* (2). But I think that it is not difficult to arrive at the true distinction between the two lines of authority which at first sight might seem to be in conflict. The distinction I think is that an interest in an intestate's estate is sufficiently specific to raise the case of an election, representing, as that interest does, all the money's worth of the property comprised therein, but that such interest is not sufficiently specific, apart from agreement with the other next-of-kin, where there are more than one, to enable any one of the next-of-kin to say to the administrator: "This or that thing is mine. Hand it over to me." In the present case a sale was necessary. It was necessary to sell at least part of Lord Huntingfield's estate for the purpose of ordinary administration, and no agreement was come to not to sell the whole. It may be that there were infants who had interests, and that no such agreement was possible. In any case, having regard to the correspondence, I do not think that such an agreement was practicable. At all events no such agreement was arrived at. At no moment of time, therefore, was Mr. Vanneck entitled specifically to any part of Lord Huntingfield's estate answering to the description of the property excepted from the covenant. This view has the merit of convenience. Any other view would involve a careful inquiry in each case, and elaborate accounts on insufficient material where any claim to exemption is made by a covenantor under such a covenant as we have here. That consideration, I quite agree, ought not to affect the true construction of the covenant, but it does not weaken the force of that which appears to be the natural construction. In these circumstances it is unnecessary to consider whether there was in this case any such mistake on the part of Mr. Vanneck as would have entitled him to relief had my view of his liability been different, but, in case the matter should be taken further, I will say that, in my view, all the parties to the deed of August, 1915, intended that the whole of Mr. Vanneck's interest under his brother's intestacy should be assigned. I agree that all that Mr. Vanneck was bound to assign was truly covered by his assignment, but I am altogether in the dark as to what the parties would have done if they had known or thought that he was not bound to assign his whole interest in his brother's estate. I am morally certain, however, that, if the assignment had been limited in the way the husband's counsel suggested, either no assignment would have been made at all or the parties would have agreed upon some figures being inserted in the deed to adjust their conflicting claims.

H In the result I am of opinion that the action fails; but as the action was first suggested to Mr. Vanneck by the Public Trustee, I think that he was justified in having the question decided by the court. Accordingly I make no order in the action except that the costs of all parties should be paid out of the fund assigned, the costs of the trustees and of Mr. Vanneck to be taxed as between solicitor and client.

I Solicitors: *Theodore Goddard & Co.; Lawrence, Graham & Co.; R. Voss & Son.*

[Reported by N. TEBBUTT, Esq., Barrister-at-Law.]

A

Re SANDYS. UNION OF LONDON AND SMITHS BANK
v. LITCHFIELD

[CHANCERY DIVISION (Sargant, J.), March 3, 1916]

[Reported [1916] 1 Ch. 511; 85 L.J.Ch. 418; 114 L.T. 690;
32 T.L.R. 355]

B

Settlement—Portions—Time for raising—Regard to be had to interests of persons entitled to estate as well as to those of portioners.

In exercise of a power conferred on him by a settlement, the testator, as tenant for life, appointed the settled estate to trustees on trust to raise by mortgage, sale, demise, or "any other reasonable means" portions amounting to £25,000 for the testator's younger daughters, the trustees having power at their discretion to postpone raising the portions. Interest of four pounds per cent. per annum was payable on the £25,000 during the period of postponement. The total settled estate amounted to some £175,000. On the testator's death the trustees found that the only suitable way of raising the portions was by mortgage at the rate of five per cent. per annum, but the present tenant for life objected to the immediate raising of the portions and offered to increase the rate of interest during postponement to five per cent. if the trustees would postpone raising the portions. On a summons for directions taken out by the trustees,

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Held: in considering whether to effect the mortgage the trustees were bound, bearing in mind the terms of the will, to have regard to the interests of the persons entitled to the estate as well as to the interests of the portioners, and in the circumstances the trustees ought to accept the offer made by the tenant for life and postpone raising the portions for one year, with liberty to apply at the end of the year.

E

Notes. Referred to: *Re Charteris, Charteris v. Biddulph*, [1917] 2 Ch. 379.

As to the time for raising portions, see 34 HALSBURY'S LAWS (3rd Edn.) 499, 500; and for cases see 40 DIGEST (Repl.) 661 et seq.

F

Originating Summons taken out by trustees for directions whether they should exercise their discretion to raise a sum of £25,000 for portions by mortgage of their term.

The facts and arguments appear from the judgment of SARGANT, J.

G

St. John Clerke for the trustees.

Martelli, K.C., and *W. Gordon Brown* for the portioners.

Romer, K.C., and *J. B. Dyne* for the tenant for life.

SARGANT, J.—This is a summons by which the Union of London and Smiths Bank, who are the trustees of a term to which I will refer, ask the direction of the court whether they ought to take any proceedings to raise a sum of £25,000 with interest by mortgage of that term. The trustees have expressly submitted the exercise of any discretion they may have to the court, so that I have not to consider whether the trustees are proposing to do an act within their powers or not. They are themselves asking the court what would be a proper exercise of their discretion. The question seems to me to be one of great importance quite apart from the fact that a large sum of money is involved. Shortly stated, the property with regard to which the application has been made is a considerable estate in Surrey, certain houses in Westminster, and a considerable amount of stocks and securities, which at present prices are worth some £24,000, settled upon trusts corresponding with the uses of the lands, settled to be invested in land to be settled on the like uses as the property. The total value of the freehold estates seems to be something like £150,000, so that there is a total settled estate of something like £175,000.

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A By the settlement, which is the first instrument I have to refer to and which was dated Nov. 7, 1902, the property was settled upon two gentlemen, who were brothers, in succession for their lives, and then it was settled for the eldest of five daughters of the second tenant for life. The second tenant for life was given express power by will or codicil to charge the estate to the extent of £25,000 from the death of the survivor of himself and the prior tenant for life—they are both dead now—for the portion or portions of his four younger daughters. He was also given the usual power to appoint the premises charged for any term of years without impeachment of waste upon the usual trusts by mortgage or otherwise to raise the principal and interest charged and all costs of raising the same. The second tenant for life died in 1910 and the first tenant for life died in April, 1915. By his last will the second tenant for life, in exercise of the power conferred on him to charge the estate, charged all the hereditaments, capital moneys and investments with the sum hereinafter directed to be raised, and appointed that all the said hereditaments should be to the use of the Union of London and Smiths Bank, Ltd., the trustees, for the term of 1,000 years upon trust that “they shall by mortgage or sale or demise of the premises, or any part thereof, for all or any part of the said term, or by receipt of the income thereof, or by sale of timber or minerals, or by all or any of those means, or by any other reasonable means, raise for the portions of my said four younger daughters hereinafter named and their children the sum of £25,000 and interets thereon until the raising or payment thereof at the rate of £4 per cent. per annum”—that was the maximum rate that he could charge under the settlement. Then there is this important proviso :

E “Provided always that my trustees may in their discretion postpone the raising of the said sum of £25,000 or any part thereof for such period as they may think fit, and that the interest at the rate of £4 per cent. per annum payable in respect thereof, or any part thereof, under the trusts of the said indenture of settlement and this my will shall be paid and applied during such period of postponement in like manner as the income of the said sum of £25,000 when raised is hereby directed to be paid and applied.”

F On the death of the tenant for life the trustees at once proceeded to see how they could raise this sum of £25,000, and they found that it would be impossible to raise it by the sale of the securities in question, because, although there were minimum prices quoted as to a large part of the securities, those prices could not in fact be realised, and only a comparatively small portion of the sum could be realised by sale of any of those securities, and that part at a very heavy sacrifice indeed. Further, with regard to the sale of the property, there were very great difficulties of course, as everybody must realise, in selling any part of the property; and as regards a mortgage they found that the only people who were prepared to deal were insurance companies, who not only required at least 5 per cent. interest, but also made it a condition that insurances on the life of the tenant for life should be taken out, because, as is well known, insurance companies like when lending moneys also to command or provide an addition to their ordinary business of life insurance. But lately it has been found by the trustees that they might borrow from one large insurance company, without the onerous obligation of the tenant for life insuring her life. She does not want to insure her life; there is no reason why she should. The capital is perfectly secure. It is not a question of a mortgage on the life interest or anything of that sort, but the sum could be provided at a rate of 5 per cent. per annum if it was not to be paid off for five years.

I The question, therefore, is whether, under those circumstances, the trustees ought or ought not to effect that mortgage. It is a question of effecting that mortgage and not of adopting any of the other means which I have mentioned. The first and ruling consideration with regard to this question is, whether, as contended by counsel for the portioners, the trustees owe a duty only to the portioners and are bound to consider their interests alone without any regard to the effect which the raising of the money may have on the persons entitled to the

estate, or whether they ought also to consider the interests of the persons entitled to the estate. In my opinion, the latter is the true view. It is noticeable that the trustees are only to raise the money by the means stated "or by any other reasonable means." It can be of no importance for the portioners as such whether the means are reasonable or not provided they get their money. The phrase "reasonable means" obviously has reference to this, that the trustees are not to exercise their trust so as unduly to hamper or sacrifice the estate. Further, the power of postponement in the discretion of the trustees seems to me obviously one which is inserted in order that the trustees may be at liberty not to unduly injure the persons interested in the estate. It is difficult to suggest any other adequate reason for its insertion. Generally speaking, any person at all familiar with the way in which real property is settled in this country must recognise that makers of settlements, while desirous that a certain provision shall be made for the younger children, also exercise the greatest care that the general interests of the property as a family estate shall be preserved for the benefit of the head of the family and those who succeed him. In my opinion one of the considerations which may actuate and ought to actuate the trustees under the trusts of this settlement and will is the consideration of not unduly injuring the owners of the estate in the course of raising the provision which the makers of this settlement have thought fit to make for the younger branches of the family. Some stress was laid by counsel for the portioners upon a comparison between the comparative wealth of the eldest daughter and the comparatively narrow means of the younger daughters arising under this settlement. In my opinion, that is not a circumstance which the court can properly take into account. The proportion between the benefits given to the eldest and the younger daughters is fixed by those who were the owners of the property and who were entitled to settle what that proportion should be.

The tenant for life has offered to the trustees as a condition of their discretion being exercised in the direction of postponing the matter for a certain time that she would pay interest at the rate of $4\frac{1}{2}$ per cent. That was the original proposal, and under the pressure of the case as it proceeded, and in deference to a suggestion made by me, she is now willing to increase that rate to 5 per cent. In my judgment that is an offer which the trustees in their discretion ought to accept. It appears to me that at the present time one has to consider really two rates of interest. There is the higher rate of interest which will probably be permanent, and which is due to destruction of capital in consequence of the present war, and there is also the still higher rate of interest which is due to the temporary stringency of money due to the actual existence of the war. Ultimately no doubt the persons interested in the portions will be able to avail themselves of the former rate of interest, that is to say, the higher rate of interest which is likely to be permanent; but I do not think that the trustees in their discretion would be right in insisting upon raising the money during the present circumstances so as to secure for the portioners not merely that extra rate of interest which is likely to be permanent, but also the still higher rate of interest which is a temporary rate due to the temporary stringency. I think that in doing that they would be regarding too exclusively the interests of the portioners alone and not paying sufficient attention to the object with which this power of postponement and the power of choosing the means of raising the money were obviously inserted in the settlement. The order will be that the trustees are at liberty to postpone the raising of the portions for a term of one year, subject to the tenant for life paying as from to-day interest after the rate of 5 per cent. instead of 4 per cent., and there will be liberty to apply at the end of the year.

Order accordingly.

Solicitors: *Biddle, Thorne, Welsford & Gait; Trollope & Winckworth.*

[*Reported by T. DE LA POER BERESFORD, Esq., Barrister-at-Law.*]

PRODUCE BROKERS CO., LTD. v. OLYMPIA OIL AND CAKE CO., LTD.

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Warrington and Scrutton, L.JJ.), November 30, December 1, 1916]

[Reported [1917] 1 K.B. 320; 86 L.J.K.B. 421; 116 L.T. 1; 33 T.L.R. 95]

Custom—Evidence of—Admissibility—To explain contract—Sale of goods—Trade custom—Appropriation of goods.

Evidence of a custom is admissible to explain the language of a written contract, although the admission of that evidence must to some extent vary the terms of the contract since the contract construed without the custom will be different from what it is if construed with the custom. Despite that, evidence of a custom can be given for use as a dictionary to explain what words in the contract mean, e.g., that "twelve" means "thirteen" or "one hundred" means the "long hundred" (120), or to define periods of time or places. In the present case,

Held: to explain a contract evidence was admissible of a custom of the trade in soya beans imported from the east that in the case of re-sales buyers under the Incorporated Oil Seed Association contract impliedly agreed with their sellers that they would accept the original shipper's appropriation, if passed on without delay, provided that it was valid and in order when made, and that the seller under the contract should be under no obligation to make any appropriation other than that of passing a copy of the original shipper's appropriation without delay, even though at the time of being passed on the appropriation might, apart from the custom, be invalid and not in order, as where the ship carrying the goods and the cargo had been lost.

Notes. Referred to: *Westacott v. Hahn*, [1918] 1 K.B. 495; *Manbre Saccharine Co., Ltd. v. Corn Products Co., Ltd.*, [1918-19] All E.R.Rep. 980; *Clark v. Cox, McEuen & Co.*, [1921] 1 K.B. 139.

As to admission of evidence of custom, see 11 HALSBURY'S LAWS (3rd Edn.) 191-196; and for cases see 17 DIGEST (Repl.) 38-48.

Cases referred to:

- (1) *Hutcheson & Co. v. Eaton & Son* (1884), 13 Q.B.D. 861; 51 L.T. 846, C.A.; 1 Digest 733, 2764.
- (2) *Re North-Western Rubber Co. and Hüttenbach & Co.*, [1908] 2 K.B. 907; 78 L.J.K.B. 51; 99 L.T. 680, C.A.; 17 Digest (Repl.) 44, 523.
- (3) *Arnhold, Karberg & Co. v. Blythe, Greene, Jourdain & Co., Ltd.*, [1915] 2 K.B. 379; 84 L.J.K.B. 1673; 113 L.T. 185; 31 T.L.R. 351; 13 Asp.M.L.C. 94; affirmed [1916] 1 K.B. 495; 85 L.J.K.B. 665; 114 L.T. 152; 32 T.L.R. 186; 60 Sol. Jo. 156; 13 Asp.M.L.C. 235; 21 Com. Cas. 174, C.A.; 39 Digest 578, 1813.
- (4) *Humphrey v. Dale* (1857), 7 E. & B. 266; 26 L.J.Q.B. 137; 28 L.T. 284; 5 W.R. 466; 3 Jur.N.S. 213; affirmed sub nom. *Dale v. Humphrey* (1858), E.B. & E. 1004; 6 W.R. 854; 120 E.R. 783; sub nom. *Humphrey v. Dale and Morgan*, 27 L.J.Q.B. 390; 31 L.T.O.S. 328; 5 Jur.N.S. 191, Ex. Ch.; 1 Digest 736, 2779.

Appeal by the buyers under a contract for the sale and purchase of soya beans from an order made by the Divisional Court on a consultative Case stated by arbitrators.

The Case raised questions arising under a contract, dated May 30, 1912, by which the Produce Brokers Co., Ltd. agreed to sell and the Olympia Oil and Cake Co., Ltd., agreed to buy 6,000 (10 per cent. more or less) tons of 2,240 lb. each Harbin and/or Dalny soya beans to be shipped from an Oriental port or ports during

December, 1912, and/or January, 1913, by steamer direct or indirect via Suez Canal or Cape to Hull at £7 18s. 9d. per ton, gross weight, ex ship, usual new bags included. By cl. 3 of the contract it was provided that:

"Particulars of shipment, with date of bill or bills of lading and approximate weight, marks (if any), and number of bags to be declared by original sellers not later than forty days from the date of last bill of lading. . . . In case of re-sales, copy of original appropriation shall be accepted by buyers and passed on without delay. Buyers shall not object to slight deviations in marks so long as the beans can be identified on arrival as the bona fide shipment intended to be delivered on the declaration. . . ."

By cl. 10 of the contract it was provided:

"This contract is to be void as regards any portion shipped that may not arrive by the ship or ships declared against this contract, and also if shipment or delivery be prevented by embargo, hostilities, prohibition of export, or blockade."

The form of contract used was the printed form used by the Incorporated Oil Seed Association for adoption by persons engaged in the oil seed trade in sales of cargoes of Manchurian soya beans with slight variations adopted by the parties. The facts appear in the judgment of SCRUTTON, L.J.

Leslie Scott, K.C., and *C. R. Dunlop* for the buyers.

Leck, K.C., and *MacKinnon, K.C.*, for the sellers.

SCRUTTON, L.J.—A contract was entered into on May 30, 1912, under which the Olympia Oil and Cake Co., Ltd., bought of the Produce Brokers Co., Ltd., 6,000 tons of soya beans to be shipped at an oriental port or ports during December, 1912, and/or January, 1913, by steamer direct or indirect to Hull at a price per ton gross weight ex ship. The Produce Brokers Co., Ltd., bought a cargo complying in date and in quantity with the terms of that contract from the East Asiatic Co., and they received less than forty days from the date of the bill of lading an appropriation of that cargo by the *Canterbury* to the contract which they had with the East Asiatic Co. On Feb. 4, 1913, the *Canterbury* was lost, and on that day, knowing of the loss, the Produce Brokers Co. declared the cargo by the *Canterbury* under their contract to the buyers, the Olympia Oil and Cake Co. The buyers took the view that they could not declare a cargo which they knew to be lost at the time it was declared, and the matter, as provided in the contract, went to arbitration of the Incorporated Oil Seed Association, first of all to three arbitrators and then on an appeal to the board of appeal of that association. The board of appeal, being asked to do so in the course of the proceedings, stated for the opinion of the court in its consultative jurisdiction a Special Case in which they asked certain questions. The first of them was whether, regard being had to the terms of the contract of May 12, 1912, a tender or appropriation could validly be made if at the material time, and whether to the knowledge of the sellers or not, the vessel and her cargo had already become a total loss. That Special Case came before the Divisional Court of the King's Bench, composed of my brothers AVORY, ROWLATT, and SHEARMAN ([1915] 1 K.B. 233). My brothers AVORY and SHEARMAN took the view that you could not make a declaration if the goods were lost, whether you knew it or not. My brother ROWLATT declined to express an opinion as to what would happen if you made a declaration and at the time did not know the goods were lost. He agreed that if you knew they were lost it could not be a good declaration. The Special Case stated nothing about customs of trade, and the decision was on the construction of the contract. The Special Case, therefore, was sent back to the board of appeal of the association answering the first question in the negative—that is, that a declaration could not be validly made.

The next step was that the arbitrators made their award and the board of appeal made its award and in making their award they unreservedly accepted the answers

on the construction of the contract. But they found that there was a long established and well-recognised custom the trade that buyers impliedly agree that they will accept the original shipper's appropriation if passed on without delay, provided that the original shipper's appropriation was valid and in order at the time of being made by the original shipper to his buyer, and then that their sellers should be under no obligation to make any appropriation other than that of passing on a copy of the original shipper's appropriation without delay, even though that appropriation at the time of being passed on might, apart from such custom and implied agreement, be invalid and not in order. Thereupon the buyers complained that the board of appeal said that they were unreservedly accepting the answers of the Divisional Court upon the construction of the contract, but that what in fact they were doing was to snap their fingers at those answers by finding a custom of the trade which rendered them of no use. The buyers contended that the board of appeal could not find such a custom of trade, and came to the Divisional Court for the second time to set aside the award as invalid, inasmuch as it relied on a custom which contradicted the contract.

The Divisional Court was hampered or assisted, whichever word you like to use, by two decisions of the Court of Appeal, one in *Hutcheson & Co. v. Eaton & Son* (1) and the other in *Re North-Western Rubber Co. and Huttenbach & Co.* (2) in which it had in effect been said that arbitrators acting on a contract must deal with the contract, and could not take into account or find a custom which modified the contract. The Divisional Court were, of course, bound by the two decisions of the Court of Appeal, and that court, therefore, said that it was not for the arbitrators to find this custom, and that they would follow the precedent established in *Huttenbach & Co.'s Case* (2) and themselves would hear evidence on affidavit and cross-examination to ascertain whether there was such a custom or not. Meanwhile they stated that they did not know whether or not the award was valid until they had ascertained whether there was such a custom. The case then went to the Court of Appeal. The Court of Appeal in a judgment, of which I must respectfully say I have never seen the like before, said, not in effect, but in terms, that they allowed that they were going to give a judgment which they knew was wrong and would set out the reasons why it was wrong, but they stated that they were bound by the two decisions of their own court in *Huttenbach & Co.'s Case* (2) and in *Hutcheson & Co. v. Eaton & Sons* (1) to give the judgment which they did give. They declared that it was not for the arbitrators to find the custom of the trade, and that the judgment of the Divisional Court to hear evidence to find the custom was correct. An appeal was brought to the House of Lords ([1916] 1 A.C. 314), and the House of Lords, being at liberty to deal with *Hutcheson & Co. v. Eaton & Son* (1) and with *Huttenbach & Co.'s Case* (2), said that they entirely adopted the reasons of the Court of Appeal, agreed that their judgment was wrong for the reasons that they had given, and, therefore, they reversed the decision of the Divisional Court—that is to say, held that they themselves would hear whether there was a custom. It must be taken that there was such a custom, they said, and they remitted the question whether the custom was contradictory to the contract or could be proceeded upon to the Divisional Court again.

When the matter came back to the Divisional Court for the third time ([1916] 2 K.B. 296), the points being taken before them that the custom contradicted the contract, that the contract was unreasonable, but that by reason of certain facts alleged to be in the Special Case the award was bad, the Divisional Court rejected all preconsidered considerations and said that the award must stand. Thereupon the buyers appealed to this court. The obvious comment that I make is the one that LORD LOREBURN made—that this is a very expensive cargo of soya beans, because, besides the original price, it has now had to stand the expense of six hearings in courts of law and of two hearings before the Incorporated Oil Seed Association. I respectfully agree with LORD LOREBURN's remark that to decide a dispute in this way by a combination of commercial men and courts of law is about

the very worst way that you could do it. Our labour is a little helped by the fact that, whereas before the Divisional Court it was argued that the custom was unreasonable, counsel for the buyers in this court has given up that contention, and, indeed, considering that it is obvious that a large number of commercial people act upon this custom, it would be a little difficult for judges to hold that the course of procedure followed by commercial men was unreasonable.

The question which we have to consider is: "Is the custom alleged one which contradicts the written contract, and which, therefore, cannot be relied upon or given in evidence?" I think that it is first of all necessary to try to understand what the original contract means in order to see whether the custom contradicts it. Counsel for the buyers has not argued that the custom contradicts any particular clause of the contract so that if the two were read together they would appear to be inconsistent. But, as I understand him, he says that the custom is inconsistent with the scheme, the tenor, the frame, and the nature of the contract—that it does not fit in with the general idea of the contract. The contract is this. A cargo of soya beans is to pass from sellers to buyers at an English port, payment on delivery. But if the question be asked what cargo of beans is indicated, the reply is that it is a cargo which is to have been shipped at an oriental port during a certain period, and, therefore, some time before it is delivered. There is, accordingly, a period between the time when the cargo is shipped and when it is delivered, during which it will be at the risk of sea perils. It would consequently be expected that there should be some provision in the contract showing who is to bear the risk of sea perils involving total loss of the cargo, partial loss of the cargo, damage to part of the cargo, and loss of profits on the cargo. The mere shipment of the cargo does not appropriate it to the contract—that is to say, a man who has sold a cargo, supposing that the original seller to him had shipped a cargo at an oriental port during the named period, would not by that alone be bound to deliver it under this contract, and it would consequently be expected by anyone familiar with commercial transactions that there might be some provision by which the seller was either bound to or might during the voyage or at the time of shipment appropriate the cargo to the contract, not in the sense of passing the property in the cargo, but in the sense of binding himself to deliver that cargo against that contract. There is to be found in the contract a provision that particulars of shipment with date of bills of lading be declared by original sellers not later than forty days from the date of the last bill of lading. Where the parties to this contract, the sellers, are themselves the shippers, they would be absolutely bound under that clause to make the declaration within forty days from the date of the last bill of lading. The effect of that clause appears to be that where the sellers are not the original sellers or the shippers, if they are under any duty to declare, they must declare a cargo which fulfils the description given and that the original sellers have declared it within forty days of the date of the bill of lading. This contract does not in terms say anything about sellers declaring who are not the original sellers. But it assumes that such a declaration will be made, for it says that the buyers shall have at least three clear days after appropriation, which can only be appropriation by declaration under the contract to give the necessary orders for the port of destination at the port of call. Then it goes on to deal with the case of re-sales—that is to say, where there is a sale of something which has been already sold, and where the sellers under this contract are selling something which they have already bought. A copy of the original appropriation is to be accepted by buyers if passed on without delay. It is not necessary in this case to decide what I am about to say. But my own strong impression is that on the meaning of this contract, where sellers under the contract have received an appropriation from original sellers, this clause binds the buyers under the contract to accept that declaration, whether the cargo is lost or not. As I say, however, it is not necessary in this case to decide that. When in *Arnhold, Karberg & Co. v. Blythe, Greene, Jourdain & Co., Ltd.* (3) I had to consider the effect of the cases on this subject,

A I was then in a position in which I was bound, as a judge of the King's Bench Division, by the decisions of the Divisional Court in the cases which have been mentioned. I there said that the cases were binding on me on the point to be decided. I am not now in a position where I am bound by the decision of the Divisional Court, and, without deciding the point, I should like to state my strong impression that for the reasons I have given on the particular point which the court

B would have to decide as to the meaning of that particular clause in the case of re-sale, the decision of the Divisional Court was wrong ([1915] 1 K.B. 233). But, as I say, it is not necessary to decide it, because the question in the case is whether, supposing the view of the Divisional Court is right, the custom found by the arbitrators is inconsistent with it or not, or so contradictory of it that it cannot be brought forward.

C The rule whether evidence of a custom is admitted to vary a written contract is perhaps easier to state than to apply, because in a sense any admission of custom varies a written contract. The contract construed without the custom will be different from what it is if construed with the custom, and in that sense every admission of custom varies the written contract. That is pointed out by Lord CAMPBELL in a passage which has been read from his judgment in *Humphrey v. Dale* (4) where he points out (7 E. & B. at p. 275) that, if by the side of the written contract without the added incident you write the same contract with it, the two would seem to import different obligations and be different contracts. But it is quite clear that, though the meaning of the written contract is varied, you may use the custom, first of all, as a dictionary to explain what words in the contract mean—where the contract says “twelve” you may show that by custom “twelve” means

E “thirteen,” where the contract says “one hundred,” you may prove by custom that “one hundred” means the “long hundred”—one hundred and twenty, and where the contract says payment at “thirty days,” as in the case of an ordinary bill of exchange or promissory note, you may find that “thirty days” means “thirty-three days,” or that “three months” means “three months and three days.” You may use it also to define places. Thus, “alongside” without a custom may mean a certain area, and “alongside” with a custom may mean a much larger area. You may use custom to define method of performance. The method of performance without the custom might be limited to certain means, and the method of performance with the custom might be much wider.

F

In my view, you may justify the use of the custom proposed in this case in several ways, which, though they vary the meaning of the written contract, do not contradict it in the sense in which Lord CAMPBELL points out that it might be inadmissible. One of the ways in which I think you may use it is with reference to cl. 10, which runs thus:

G

“This contract is to be void as regards any portion shipped that may not arrive by the ship or ships declared against this contract. . . .”

H What is the meaning of “ship or ships declared against this contract”? May you declare a ship against this contract which is lost at the time you declare it? By custom of trade you may do so if you are not the original seller, but the seller who has bought, and you are declaring a ship which has been declared to you by the original seller. I think also you may perhaps use it as explaining a sentence in cl. 3: “copy of original appropriation shall be accepted by buyers”—that is to say,

I that it is a good appropriation though the ship and cargo that you are appropriating are lost, if you have had them declared to you by original buyers. It is a little difficult for me to express why I think the custom is not contradictory of the original contract, because I am of opinion that the original contract in all probability means the same as the custom. But, taking the view of the first Divisional Court ([1915] 1 K.B. 233), that without the custom the contract means what they say it does, in my opinion, the custom is admissible, not as contradicting the contract, as varying its meaning, it is true, but as varying its meaning by explaining what will be a good declaration. That is, I think, substantially the line taken by the

Divisional Court. I am of opinion, therefore, that the result they have arrived at is right for the reasons that I have stated, and I think that there is always a satisfaction when the courts construe a business document in the way in which business men themselves construe it. For these reasons I think that this appeal fails and should be dismissed with costs.

LORD COZENS-HARDY, M.R.—I agree.

WARRINGTON, L.J.—I agree.

Appeal dismissed.

Solicitors: *William A. Crump & Son*, for *Andrew M. Jackson & Co.*, Hull; *Waltons & Co.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

Re WINN. BURGESS v. WINN

[CHANCERY DIVISION (Eve, J.), November 1, 1916]

[Reported 86 L.J.Ch. 124; 115 L.T. 698; 61 Sol. Jo. 99]

Will—Beneficiary—Description—Description by relationship—Misdirection of specific legatee—Effect on construction of subsequent residuary bequest to same person—“Nephews and nieces”—Nieces by affinity, but not by blood.

The fact that a testator has in his will attached what was in fact a misdescription to a legatee does not operate to give to a subsequent residuary bequest a meaning which would include the person so misdescribed.

A testator bequeathed the proceeds of a close of land and of the residue of his real estate, after a life interest, in trust “to pay and divide the same to and among all my nephews and nieces (including the said C.B. and T.B.) in equal shares.” C.B., T.B., and E.L. were in fact nieces, not of the testator, but of the testator’s deceased wife, and on each of them in the earlier part of his will the testator had conferred benefits, referring to them as “my nieces.”

Held: only nephews and nieces of the testator were entitled to participate in the bequest.

Smith v. Lidiard (1) (1857), 3 K. & J. 252, and *Wells v. Wells* (2) (1874), L.R. 18 Eq. 504, applied.

Notes. Considered: *Re Davidson, National Provincial Bank, Ltd. v. Davidson*, [1949] 2 All E.R. 551. Referred to: *Re Ridge, Hancock v. Dutton*, [1933] All E.R. Rep. 449; *Re Daoust, Dobell v. Dobell*, [1944] 1 All E.R. 443.

As to description of beneficiaries in a will by relationship to testator, see 34 HALSBURY’S LAWS (2nd Edn.) 296-298; and for cases see 44 DIGEST 807-826.

Cases referred to:

- (1) *Smith v. Lidiard* (1857), 3 K. & J. 252; 69 E.R. 1102; 44 Digest 822, 6729.
- (2) *Wells v. Wells* (1874), L.R. 18 Eq. 504; 43 L.J.Ch. 681; 31 L.T. 16; 22 W.R. 893; 44 Digest 823, 6736.
- (3) *Re Jodrell, Jodrell v. Seale* (1890), 44 Ch.D. 590; 59 L.J.Ch. 538; 63 L.T. 15; 38 W.R. 721, C.A.; affirmed sub nom. *Seale-Hayne v. Jodrell*, [1891] A.C. 304; 61 L.J.Ch. 70; 65 L.T. 57; 44 Digest 561, 3789.

Also referred to in argument:

Merrill v. Morton (1881), 17 Ch.D. 382; 50 L.J.Ch. 249; 43 L.T. 750; 29 W.R. 394; 44 Digest 823, 6737.

Re Cozens, Miles v. Wilson, [1903] 1 Ch. 138; 72 L.J.Ch. 39; 87 L.T. 581; 51 W.R. 220; 47 Sol. Jo. 51; 44 Digest 823, 6739.

- A *Wharton v. Barker* (1858), 4 K. & J. 483; 4 Jur.N.S. 553; 6 W.R. 534; 70 E.R. 202; 44 Digest 883, 7397.
- Re Parker, Parker v. Osborne*, [1897] 2 Ch. 208; 66 L.J.Ch. 509; 76 L.T. 421; 45 W.R. 536; 44 Digest 819, 6705.
- Re Helliwell, Pickles v. Helliwell*, [1916] 2 Ch. 580; 86 L.J.Ch. 45; 115 L.T. 478; 60 Sol. Jo. 619; 44 Digest 819, 6707.
- B *Re Corsellis, Freeborn v. Napper*, [1906] 2 Ch. 316; 75 L.J.Ch. 607; 95 L.T. 583; 54 W.R. 536; 50 Sol. Jo. 499; 44 Digest 819, 6706.

Adjourned Summons taken out by trustees to determine the construction of a will.

The testator, Thomas Winn, by his will dated Nov. 16, 1875, after appointing two persons—now represented by the applicants—trustees and executors of his will, devising his dwelling-house and garden then in his occupation to “my niece Catherine Bell (daughter of the late Robert Bell), now residing with me,” in fee simple and giving to the said Catherine Bell his furniture absolutely and making a devise of cottages to his brother John Winn, and giving and bequeathing the legacy of £19 19s. apiece “to each of my nephews and nieces following”—namely, Amelia Bales and Ann Bales (daughters of his late sister Jane Bales), John Wood, Samuel Wood, and Thomas Wood (children of his late sister Ann Wood), the first respondent Hannah Winn, the second respondent Alice Winn, Samuel Winn, Elizabeth Winn, William Edgar Winn, and John Thomas Winn (children of his brother John Winn), “and my niece Ellen Lacy” (whose correct name was, however, Eleanor Lacey)—gave and bequeathed the legacy of £600 to his trustees upon trust for investment and to pay the interest arising as to a moiety or half part thereof “to the said Catherine Bell” during her life for her separate use and the remaining moiety or half part thereof to “my niece Thomasin Bell” during her life for her separate use, and from and after the death of the said Catherine Bell the testator bequeathed £300 (being one half of the £600) to Sybil Anne Rowlands and Ada Blance Rowlands, daughters of “my nephew Edward Rowlands” (but whose correct name was Edward Samuel Rawlins), and from and after the decease of Thomasin Bell the testator bequeathed the remaining half of the £600 unto Samuel Winn, William Edgar Winn, and Thomas Winn in equal shares. The testator devised a close of land, then in the occupation of William Cuthbert, and the residue of his real estate (if any) to his trustees upon trust for sale and investment and for payment of the interest and annual income of the proceeds to Edward Rowlands during his life, and after his decease to stand possessed of the same proceeds “in trust to pay and divide the same to and among all my nephews and nieces (including the said Catherine Bell and Thomasin Bell) in equal shares.” The testator’s will contained a bequest of the residue of his personal estate (subject to the payment of the legacies thereinbefore bequeathed) to Edward Rowlands. The testator died on May 2, 1876, and his will was duly proved. The close of land in the occupation of William Cuthbert had been sold, and the proceeds were the subject of the present originating summons. There were living at the date of the testator’s death twelve of the testator’s nephews and nieces by consanguinity, and at that date there were living eight nephews and nieces of the testator’s deceased wife, who were the children of her brother and the testator’s relations by affinity. Catherine Bell, Thomasin Bell, and Eleanor Lacey (in the will called “Ellen Lacy”), who were described in the testator’s will as “my nieces,” were in fact the nieces of the testator’s deceased wife. Edward S. Rawlins, the life tenant, died on May 8, 1915. The testator left no ultimate residuary personal estate. The trustees of the testator’s will caused an originating summons to be issued to which two nieces, daughters of the testator’s brother John Winn were made respondents, together with Robert Atkinson, who claimed to be interested in the proceeds of sale of the close of land both as administrator of Eleanor Lacey, deceased, mentioned in the will as Ellen Lacy, and as personal representative of his deceased mother, Phyllis Atkinson, one of the other nieces of the testator’s deceased wife, asking whether all the nephews and nieces of the testator’s deceased

wife other than Catherine Jane Beckett, in the testator's will described as Catherine Bell, and Thomasin Bell or their representatives or estates were entitled to share equally with all the nephews and nieces of the testator (as well as Catherine J. Beckett and Thomasin Bell) in the proceeds of sale of the close of land.

John M. Stone (for *G. H. J. Hurst*, serving with His Majesty's forces) for the trustees of the testator's will.

E. E. H. Brydges for the testator's nephews and nieces by consanguinity.

Owen Thompson for the legal personal representative of a deceased niece of the testator's wife.

EYE, J.—The question is whether in this will the expression "my nephews and nieces" means the testator's own nephews and nieces or whether it is to be extended so as to include his wife's nephews and nieces.

I will endeavour, as I have been invited to do, to approach the question without any preconceived impression as to the meaning of the words "my nephews and nieces," and on the footing that they can be so used as to include, not only nephews and nieces, but persons who are not nephews and nieces. What is there in this will to show that they are used in this wider sense? Counsel on behalf of the wife's relatives argues that there is such a user of the word "niece" in the earlier parts of the will as to demonstrate clearly that the testator when he used the same word in the residuary bequest did not intend to restrict its application to his own nieces. There are three instances in the will, before the residue is dealt with, where the testator has conferred benefits upon ladies who were nieces of his wife, and in each case he has referred to the beneficiary as "my niece." Catherine Bell, Thomasin Bell, and Ellen Lacy were all nieces of the testator's wife, but the testator speaks of them, in the instances I have referred to, as "my niece." Does this fact impress the words "my nephews and nieces" in the residuary bequest with the wider significance I have mentioned?

There are, as it appears to me, two direct authorities on the very point. Each of the learned judges who decided *Smith v. Lidiard* (1) and *Wells v. Wells* (2) expressed a clear and unqualified opinion that the mere fact that the testator had in the earlier part of his will attached to a legatee what was in fact a misdescription did not operate to give to the residuary bequest a meaning which would have included in that gift the person so misdescribed in the earlier part of the will. I do not regard anything that was said either in the Court of Appeal or in the House of Lords in *Re Jodrell* (3) as overruling these cases, and, in a case which is as nearly identical with those cases as any one case raising a point of construction can be with another, I am not going to be so presumptuous as to differ from the conclusions of PAGE WOOD, V.C., and SIR GEORGE JESSEL as therein expressed. In my opinion, treating those cases with the respect they ought to be treated with, and not overlooking the warning protests raised by LORD HALSBURY in *Re Jodrell* (3) against a too servile adoption of prior decisions as authorities on points of construction, I ought here to follow these two cases, and accordingly I hold that there is not sufficient in this will to satisfy me that the testator intended to include his wife's nephews and nieces in residuary bequests.

But there is another element in this bequest which would, I think, have led one to the conclusion at which I have arrived. The residuary gift is "to and among all my nephews and nieces (including the said Catherine Bell and Thomasin Bell)." These were two of the wife's nieces to each of whom a bequest had been made in the earlier part of the will as "my nieces." Counsel for the personal representatives of a deceased niece of the wife argues that the parenthetical clause was introduced to indicate that those two ladies were to take a share in the proceeds of the residue notwithstanding that they had already been benefited by the testator's earlier dispositions, but that argument provokes the observation that there is no mention of Ellen Lacy in the parenthesis, and the introduction of the parenthesis is, I think, more consistent with the suggestion that the testator appreciated that the expression

A he had used would not extend to the ladies named unless they were so named. The result is that, in my judgment, only nephews and nieces of the testator can participate in the residue.

Solicitors: *Willis & Willis*, for *Edward Fryer & Webb*, West Hartlepool; *J. E. Anthony*.

[Reported by W. P. PAIN, Esq., Barrister-at-Law.]

Re STOODLEY. HOOSON v. LOCOCK

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Warrington, L.J., and Bray, J.), January 13, 1916]

[Reported [1916] 1 Ch. 242; 85 L.J.Ch. 226; 114 L.T. 445;

60 Sol. Jo. 221]

Will—Codicil—Partial revocation of will—Gift of "residue not bequeathed by the above will"—Residue directed in will to be held in trust.

A gift of residue in a will is revoked by a different gift of residue in a codicil to the will, even though the codicil purports to deal with residue of property undisposed of by the will.

By his will a testator, after making various bequests, devised and bequeathed all his real and personal estate not thereby otherwise disposed of upon trust for conversion and to pay his funeral and testamentary expenses and debts and the legacies and to hold the residue of the moneys and the income thereof in trust as to one-third thereof for a certain society and as to the remaining two-thirds for a named person. By a codicil the testator, after referring to his will, provided as follows: "The residue of my estate not bequeathed by the above will I give and bequeath to M. A. L. absolutely, and I appoint her sole executrix of this codicil."

Held: the codicil took effect on the general residuary estate of the testator, revoking the gift by the will of the residuary estate and operating as a gift thereof to M. A. L. absolutely.

Earl of Hardwicke v. Douglas (1) (1840), 7 Cl. & Fin. 795, applied.

Notes. As to partial revocation of a will by a later will or codicil, see 34 HALSBURY'S LAWS (2nd Edn.) 79, 80, para. 111, for irreconcilable gifts, see *ibid.* 218, 219, para. 278; and for cases see 44 DIGEST 324-330.

Case referred to:

(1) *Douglas v. Leake* (1835), 5 L.J.Ch. 25; reversed sub nom. *Earl of Hardwicke v. Douglas* (1840), 7 Cl. & Fin. 795; West, 555; 9 E.R. 597, H.L.; 44 Digest 338, 1674.

Also referred to in argument:

Re Barrance, Barrance v. Ellis, [1910] 2 Ch. 419; 79 L.J.Ch. 544; 103 L.T. 104; 54 Sol. Jo. 651; 44 Digest 383, 2174.

Re Joseph Isaac, Harrison v. Isaac, [1905] 1 Ch. 427; 74 L.J.Ch. 277; 92 L.T. 227; 44 Digest 745, 6035.

Davis v. Bennett (1861), 30 Beav. 226; 54 E.R. 875; on appeal: (1862), 4 De G.F. & J. 327; 44 Digest 609, 4358.

Brocklebank v. Johnson (1855), 20 Beav. 205; 24 L.J.Ch. 505; 25 L.T.O.S. 56; 1 Jur.N.S. 318; 3 W.R. 341; 52 E.R. 581; 44 Digest 608, 4349.

Shipperdson v. Tower (1842), 1 Y. & C.Ch. Cas. 441; 6 Jur. 658; 62 E.R. 961; 44 Digest 607, 4341.

Kermode v. Macdonald (1866), L.R. 1 Eq. 457; 35 L.J.Ch. 358; affirmed (1868) 3 Ch. App. 584; 37 L.J.Ch. 879; 19 L.T. 179; 17 W.R. 4, L.C.; 44 Digest 340, 1693.

Doe d. Hearle v. Hicks (1832), 8 Bing. 475; 6 Bli.N.S. 37; 1 Cl. & Fin. 20; 1 Moo. & S. 759; 131 E.R. 476, H.L.; 44 Digest 337, 1671.

Lee v. Delane (1850), 4 De G. & Sm. 1; 16 L.T.O.S. 102; 14 Jur. 861; 64 E.R. 707; 44 Digest 333, 1632.

Appeal from a decision of EVE, J., on an originating summons for the construction of a will.

The testator, Thomasin Albert Stoodley, clerk in holy orders, by his will, dated Dec. 21, 1912, appointed the plaintiffs executors and trustees, and, after giving sundry specific and pecuniary legacies and giving and devising real estate and a share in property in his marriage settlement to the vicar of Ilminster for charitable purposes, the will proceeded as follows :

"I devise and bequeath all my real and personal estate not hereby otherwise disposed of unto my trustees upon trust that they shall sell, call in, and collect the same and shall out of the moneys to arise thereby and all other moneys forming part of my estate pay my funeral and testamentary expenses and debts and the legacies other than specific bequeathed by this my will or any codicil hereto and shall hold the residue of the said moneys and the income thereof in trust as to one equal third part thereof for the Society for Promoting Christian Knowledge and as to the two remaining equal third parts for the vicar for the time being of Ilminster aforesaid to be applied by him as to part thereof towards providing an adequate vestry for the parish church and as to the remainder towards extending the nave of the said church one bay westwards."

A codicil to the testator's will, dated Feb. 17, 1915, but signed on Feb. 19, 1915, was as follows :

"This is a codicil to the will of me Thomasin Albert Stoodley. . . . The residue of my estate not bequeathed by the above will I give and bequeath to Mabel Abbie Locock . . . absolutely, and I appoint her sole executrix of this codicil."

The testator died on Feb. 27, 1915. The plaintiffs took out an originating summons to which M. A. Locock, the trustees of the Society for Promoting Christian Knowledge, and the Rev. Prebendary James Street, the vicar for the time being of Ilminster, were made defendants, asking for the decision of the questions whether the gift to M. A. Locock by the codicil revoked in whole or in part the residuary gift contained in the will of the testator to the society and vicar of Ilminster, or, alternatively, what portion of the testator's estate passed to the defendant M. A. Locock under the codicil. The summons was adjourned into court and on July 7, 1915, EVE, J., held that the words in the codicil were not so clear and the meaning so unambiguous as to lead to the conclusion that the testator contemplated the revocation of the residuary gifts in his will, and that the intention as expressed in the codicil was to give Miss Locock such portion, if any, of the residue as might ultimately turn out not to have been effectually disposed of by the will and no more. From that decision the defendant M. A. Locock now appealed.

Upjohn, K.C. (with him *Maugham, K.C.*, and *Vaisey*), for the defendant M. A. Locock.

Clayton, K.C. (with him *A. J. Spencer*, for *F. H. L. Errington*, serving with His Majesty's forces) for the defendant, the Society for Promoting Christian Knowledge.

Hewitt, K.C. (with him *F. E. Farrer*), for the defendant vicar of Ilminster.

Whinney for the executors of the will.

A **LORD COZENS-HARDY, M.R.**—This is an appeal from the decision of EVE, J., on the construction of a codicil which has one merit, that of brevity, and that is the only merit in it which I have been able to discover.

The testator was a clergyman of the Church of England and was apparently possessed of considerable property. He first of all disposed by his will of a great number of chattels, furniture, and so on, gave certain pecuniary legacies, and there were also specific devises. Then we come to the gift of the residue, which was in these words [HIS LORDSHIP read the residuary gift, which is printed ante p. 762, and continued:] That is the will which the testator made on Dec. 21, 1912. Then he made a codicil on Feb. 17, 1915, and this is the whole of the language of it:

C “This is a codicil to the will of me Thomasin Albert Stoodley, of No. 73, Wimborne Road, Bournemouth, the said will having been made in December, 1912, and being in the possession of J. H. Pitchforth, solicitor, of No. 9, Bush Lane, Cannon Street, E.C. The residue of my estate not bequeathed by the above will I give and bequeath to Mabel Abbie Locock, of No. 39, Carlton Road, Putney, S.W., absolutely, and I appoint her sole executrix of this codicil.”

D The point which has arisen on this appeal is whether the effect of the codicil is to deprive the charities of the interest in the residuary estate; that is to say, to the Society for Promoting Christian Knowledge, one-third, and to the vicar, two-thirds; or whether Miss Locock fails to take anything under the codicil. Apart from authority, this is a case which would have given me considerable doubt, but in a case of this kind the point has been many years ago elaborately argued—in fact, twice argued—in the House of Lords. When a decision has been given laying down a certain principle, we ought to follow it. The principle which I think is laid down in the case to which I shall presently refer is that if you find a residue given by will, and then there is a codicil, called a codicil, giving that residue to a different person or in a different mode, it is really a revocation of the gift of the residue by the will. That in the present case this was a testamentary instrument and that the testator had a testamentary intention is quite clear. He appointed Miss Locock “sole executrix of this codicil,” and we were told that she and the two executors named in the will jointly proved the will.

Two views on this question were taken in *Earl of Hardwicke v. Douglas* (1). LORD COTTENHAM, when he was Master of the Rolls, held in that case that the legatee under the codicil took nothing; and that the codicil had no effect, but when the case came before the House of Lords the noble Lords present were LORD COTTENHAM himself, by whom the original decision was given, and LORD BROUGHAM and LORD LYNTHURST. LORD BROUGHAM and LORD LYNTHURST reversed the decision of LORD COTTENHAM on the ground that the second codicil was a revocation of the gift of the residue, and that the persons entitled to the residue were the original legatee and another person taking in moieties according to the terms of the codicil.

H It has been suggested that the decision is not on any question of principle, but on the ground that the testator there had, and it was admitted that he had, the will before him at the date when the codicil was made. I am bound to say that it is impossible for us to vary the construction of the codicil in the present case on the ground that in one case the will that is referred to in the codicil was physically before the testator, and in the other case it was not physically before him, although he knew that there was a will, and he knew that there had been a will which contained those bequests and devises. Then, again, it is said that there was a clearer indication in that case that the terms of the gift of the residue in the will were present to the testator's mind. I decline to assume that the testator had no idea, when he made his codicil, what were the residuary gifts in his will. It is rather an elaborate one—one-third of the residuary estate to the Society for Promoting Christian Knowledge, and the other two-thirds to the vicar for the time being of Ilminster. I do not think that we ought to treat *Earl of Hardwicke v. Douglas* (1) otherwise than as a guide to direct us in the present case.

How has that decision of the House of Lords been dealt with? Has it ever been questioned or interfered with or doubted by text-writers or by persons of authority? In dealing with a decision of the House of Lords at that time one looks, and is bound to look, at what has been laid down by LORD ST. LEONARDS in SUGDEN'S LAW OF PROPERTY at pp. 217 and 218. He discusses that case and says:

"But where an intention can be collected to make a new disposition by a codicil giving a residue, it will operate against a disposition of the residue by the will, although there is no express revocation, and the gift in the codicil is of the residue not thereinbefore or by the will disposed of. This was decided in the case of *Earl of Hardwicke v. Douglas* (1)."

He then goes through all the facts of that case and refers to LORD COTTENHAM'S decision as Master of the Rolls. He also refers to the difference of opinion in the House of Lords and says that the decision of LORD BROUGHAM and LORD LYNTHURST was the best construction, and was one that manifestly carried out the intention of the testator. Has the decision of the House of Lords ever been doubted by text-writers? JARMAN ON WILLS (6th Edn.), p. 173, says this:

"So if the residue of personal estate be given by will to A., and by codicil to B., the former gift is revoked. And this was so held in *Earl of Hardwicke v. Douglas* (1) though the gift by codicil was of personal estate 'not hereinbefore or by my will or any other codicil disposed of.' The words were construed to mean 'not hereinbefore or by my will disposed of by way of particular legacies,' thus leaving something for the gift to operate upon; literally construed they left nothing."

I therefore think that unless we can find some special circumstances, which I cannot find in this case, we must take the view that EVE, J.'s decision cannot be upheld.

The point which I have felt some doubt about is this. There was a time, not many years ago, when a gift of residue like this to a charity was extremely likely to fail so far as the impure personal estate was concerned, and, if that had been so, then it might have been held that the original gift in the will remained and that the codicil operated only upon the residue so far as it consisted of impure personal estate. But that is not the law now, and, therefore, is not a matter that creates a difficulty. I do not think that we can consider this will in any different way on the assumption that the testator, who was not a lawyer, but was a clergyman, was thinking of the old law. He was, of course, thinking of nothing of the kind, and we must construe his language as we find it. Then it was said that this will might fail so far as the residue was concerned, because, even assuming that the Society for Promoting Christian Knowledge could not take, the vicar of the parish might disclaim. No authority has been cited for that proposition, and it does not require any discussion. It is elementary law that a gift to a charity never fails for the want of a trustee, because the court would see that a proper trustee was appointed, and would take care, if necessary, that it should be done under the direction of the Attorney-General. Further, it was said that suppose with regard to the gift to the vicar, which involves a large alteration and elongation of the nave of the church, there was a difficulty because a faculty would not be granted. I am not inclined to suppose such a thing, and it is not necessary to discuss or consider it. The gift in the will, as it seems to me, and the gift in the codicil can stand only in this sense, that the will gave the whole residue, after the specific and pecuniary legacies and after the payment of debts, to charities, and I find, according to the language of the codicil, the testator says this:

"The residue of my estate not bequeathed by the above will I give and bequeath to Mabel Abbie Locock, of No. 39, Carlton Road, Putney, S.W., absolutely."

That is a gift which must prevail, and revokes the gift of the residue which was disposed of to the charities in the manner that I have described. We must, therefore,

reverse the decision of EVE, J., and make a declaration accordingly. The appeal will be allowed, and the costs of the appeal ought to come out of the estate as between party and party, except as to the trustees, who will have their costs as between solicitor and client.

WARRINGTON, L.J.—The testator in this case made a codicil on Feb. 17, 1915, in these terms :

"The residue of my estate not bequeathed by the above will I give and bequeath to Mabel Abbie Locock, of No. 39, Carlton Road, Putney, S.W., absolutely, and I appoint her sole executrix of this codicil."

Reading the codicil by itself, I have not the remotest doubt that what the testator meant to bequeath to Miss Locock was the residue of his estate in the ordinary sense. The difficulty is caused when one comes to look at the will, because it is said that when one looks at the will one finds that there is no residue not bequeathed by the will, and, therefore, there is nothing for the codicil to operate upon. I look at the will and I find there that the testator appointed certain persons as executors, and then in the words "I bequeath" gave several specific and pecuniary legacies; and in the words "I give and devise" he made certain specific devises of real estate. He then inserted a general devise and bequest of his real and personal estate in these terms [His LORDSHIP read the bequest, which is printed ante p. 762, and continued:] The contention on the part of the two charities which would benefit by the will is that in the events that have happened—and one may say something more than that, but, at all events, in the events that have happened—the codicil is ineffective, because the whole of the testator's property is bequeathed by the testator's will, and therefore there is nothing left on which the codicil can operate. The result of that would be to impute to the testator that he sat down and wrote his codicil giving the residue of his estate to Miss Locock knowing at the same time that it could have no effect. It seems to me too absurd to suppose that the testator was thinking when he made this codicil that possibly there might be some difficulty in applying some of the moneys included in the residue to the improvement in the fabric of the church, or still less to impute to him forgetfulness of the fact that he had made a will—which, by the way, he refers to specially by date in the codicil—or that he could have forgotten that he had made the will and that will contained a gift of residue. I cannot impute such a thing to the testator.

Then one has to see whether, without imputing such an absurd intention to the testator, one can give a reasonable construction to the codicil which will give effect to it, and I think one can. There is no difficulty at all in referring the word "bequeathed" contained in the codicil to gifts other than those of the residue itself with which the codicil is dealing. The codicil deals with the residue so far as not bequeathed by the will. It is absurd to suppose that, having bequeathed the residue by the will, he intended that the words "not hereinbefore bequeathed" should extend to the residue itself. One may quite well so construe the codicil as to give to the word "bequeathed" a meaning that would exclude the gift of the residue. I think, therefore, that, independently of authority, I should have come to the conclusion on the true construction of the codicil that it did take effect upon the general residuary estate of the testator. But when one comes to look at the authority which has been cited to us, *Earl of Hardwicke v. Douglas* (1), any possible difficulty one might have had on the construction of the words themselves is entirely removed. That was, in my view, an extremely strong case. The testator there having made by his will an effectual gift of residue, by his codicil used these words: "All the rest and residue of my property, not hereinbefore (or by my will or any other codicil) disposed of, I give and bequeath," in a manner other than that in which he had given the residue by the will. That is a case, therefore, in which it would have been difficult to have given to the codicil such a construction as I have suggested can be given to it in this case, because he used

the words there "disposed of" and not "bequeathed." I think, therefore, both on the words of the will and the codicil themselves and on the authority of *Earl Hardwicke v. Douglas* (1), the judgment of the learned judge in the court below was wrong and ought to be reversed.

BRAY, J.—I agree. I do not think that the present case can really be distinguished from *Earl of Hardwicke v. Douglas* (1). The opposing views in that case were these: First, that there was a manifest intention of the testator and on the other side were the words which, perhaps, literally construed, would not have given effect to the intention, and what the learned judges had to decide was which view should prevail. I think that that appears quite plainly from the speech of **LORD BROUGHAM** in the House of Lords, where, after referring to the nature of the case and the particular words used, he says (7 Cl. & Fin. at p. 811)—and his speech had been settled between him and **LORD LYNTHURST**—

"The one construction makes the testator give 'all the residue of his property over the particular legacies given in the will and codicils,' which is a sensible construction, and leaves something for the words to act upon. The other construction makes him give all the residue over the legacies and over all the residue; that is, all that remains after the legacies and after what remains over the legacies; which is not a sensible construction, and leaves nothing whatever."

On the other hand, the Lord Chancellor differed and said this (*ibid.* at p. 813):

"As the opinion which I have formed differs from that at which they have arrived in their superior judgment, I think it right, as it involves a question of principles, to state to your Lordships the ground on which I originally formed an opinion in favour of the respondent."

Then, after stating he could not doubt what the real intention was, he says (*ibid.* at p. 814):

"The difficulty is, how far we are justified in coming to a conclusion which shall give effect to that probable intention; and I must say I find no words in this codicil which can lead to such a conclusion. It is more from the situation of the parties and the probability of the case that I infer that that probably was the intention of the testator than from anything I find in the testamentary papers; but if the words do not bear it, it is contrary to all rule to speculate upon the intention; for the ground of conclusion ought not to be found in anything but the expressions which are used."

If that opinion had been adopted, our decision in this case must have been in favour of the charities; but the learned Lords differed from him on what seems to me to be a question of principle.

Looking at it in the same way in this case, one cannot doubt that it was the intention of the testator by this codicil to give a substantial benefit to this lady. The words are:

"The residue of my estate not bequeathed by the above will I give and bequeath to Mabel Abbie Locock, of No. 39, Carlton Road, Putney, S.W., absolutely, and I appoint her sole executrix of this codicil."

That is the whole of the codicil. The codicil was not brought into existence for any other purpose except to make this lady a substantial gift, and to say that we are to construe it as if the intention of the testator was to give her nothing, which is the barest possibility, certainly does not commend itself to me and is not an intention which I can infer. On those grounds I think the appeal should succeed.

[Their Lordships made a declaration that the gift contained in the codicil revoked the residuary gift contained in the will and operated as a gift to the defendant M. A. Locock of the residuary moneys and income by the will directed

to be held in trust for the Society for Promoting Christian Knowledge and the vicar for the time being of Ilminster.]

Appeal allowed.

Solicitors: *Rider, Heaton, Meredith & Mills*, for *Osborne, Ward, Vassall & Co.*, Bristol; *Bridges, Sawtell & Co.*; *Wansey, Stammers & Co.*, for *E. Lee Michell*, Wellington, Somerset; *J. H. Pitchforth*.

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

Re FORREST. BUBB AND NEWCOMB AND OTHERS

[CHANCERY DIVISION (Sargant, J.), July 7, 1916]

[*Reported* [1916] 2 Ch. 386; 85 L.J.Ch. 784; 115 L.T. 476;
32 T.L.R. 656; 60 Sol. Jo. 655]

Will—Gift to servants—"Servants"—Legacy to—Usual meaning—Persons who minister to wants or comfort—Farm labourers not included.

Where a testator who had a house, where domestic servants were employed, and 700 acres of land, on which farm hands were employed, bequeathed to each of his servants who should have been in his service for three years prior to his decease and should be still in his service one year's wages free of legacy duty,

Held: the gift did not include farm servants engaged in the usual way for twelve months, but merely included servants who ministered in some way to the testator's personal comfort or his wants.

Semble: The word "servants" simpliciter is not necessarily confined to persons employed in the testator's house, but applies to all persons who minister to his wants or personal comfort.

Booth v. Dean (1) (1833), 1 My. & K. 560, and *Thrupp v. Collett* (No. 2) (2) (1858), 26 Beav. 147, applied.

Notes. Not followed: *Re Drake, Drake v. Green*, [1921] All E.R.Rep. 157. Referred to: *Re Countess of Rosse, Parsons v. Earl of Rosse* (1923), 93 L.J.Ch. 8. As to gifts by will to "servants," see 34 HALSBURY'S LAWS (2nd Edn.) 323-325, paras. 373, 374; and for cases see 44 DIGEST 899-903.

Cases referred to:

- (1) *Booth v. Dean* (1833), 1 My. & K. 560; 2 L.J.Ch. 162; 39 E.R. 793; 44 Digest 903, 7630.
- (2) *Thrupp v. Collett* (No. 2) (1858), 26 Beav. 147; 5 Jur.N.S. 111; 53 E.R. 853; 44 Digest 902, 7620.
- (3) *Re Ravensworth, Ravensworth v. Tindale*, [1905] 2 Ch. 1; 74 L.J.Ch. 353; 92 L.T. 490; 21 T.L.R. 357, C.A.; 44 Digest 903, 7633.
- (4) *Re Earl of Sheffield, Ryde v. Bristow*, [1911] 2 Ch. 267; 80 L.J.Ch. 521; 105 L.T. 236, C.A.; 44 Digest 903, 7634.

Also referred to in argument:

- Bulling v. Ellice* (1845), 9 Jur. 936; sub nom. *Belling v. Ellise*, 5 L.T.O.S. 475; 44 Digest 901, 7613.
- Armstrong v. Clavering* (1859), 27 Beav. 226; 54 E.R. 88; 44 Digest 902, 7615.
- Blackwell v. Pennant* (1852), 9 Hare, 551; 22 L.J.Ch. 155; 19 L.T.O.S. 336; 16 Jur. 420; 68 E.R. 631; 44 Digest 901, 7612.
- R. v. Inhabitants of Worfield* (1794), 5 Term Rep. 506; 101 E.R. 285; 34 Digest 52, 269.

Nowlan v. Ablett (1835), 2 Cr.M. & R. 54; 1 Gale, 72; 5 Tyr. 709; 4 L.J.Ex. 155; 150 E.R. 23; 34 Digest 36, 131.

Originating Summons by the testator's executor asking whether seven outdoor employees took a year's wages under the following legacy given by the will of the testator, George F. Forrest, who died on Dec. 28, 1914, and whose will was dated Apr. 7, 1913:

"I give and bequeath to each of my servants who shall have been in my service for three years prior to my decease and shall be still in my service one year's wages free of legacy duty."

The testator lived at the Bungalow, Andoversford, Gloucester. His brother, Major C. E. Forrest, D.S.O., was his residuary legatee, but was killed in action a year after the testator's death. At the time of his death the testator owned an estate of about 700 acres at Pegglesworth in Gloucestershire and had a farm there. He had four domestic servants in his house, as to whom no question was raised, but he also employed six labourers and an under-keeper on his estate, who had been in his employment for more than three years at the time of his death. Each of these labourers was engaged for the usual farm labourers' service of twelve months, and was paid weekly from 13s. to 16s. a week and allowed the use of a cottage rent free, the value of the cottage being about 1s. 6d. a week.

C. F. Turner for the plaintiff, *W. N. Bubb*, sole executor of the will of the testator.

Tyldesley Jones, for Major Forrest's representatives, who were his widow and Reginald J. Winterbotham, admitted that the under-keeper was entitled under the legacy, and also declined to raise any objection to the claims of the six labourers on the ground that their wages were paid weekly, and said he would argue that farm servants did not take under a gift to "servants."

Herbert J. H. Mackay for the seven employees.

SARGANT, J.—The question in this case is who are entitled under a bequest by the testator "to each of my servants who shall have been in my service for three years prior to my decease and shall be still in my service one year's wages free of legacy duty." He had a small estate in Gloucestershire of some 600 or 700 acres, and he had an ordinary establishment there, comprising three or four indoor servants, a stud groom, and an underkeeper. He himself farmed almost the whole of his property, if not the whole of it, and in his farming he employed six labourers at ordinary labourers' wages. It is conceded that they were, as is customary in that part of the country, hired yearly and at a wage determined by the year, although in fact they were paid by the week. Therefore no such point arises here as arose in cases like *Re Ravensworth* (3) and *Re Earl of Sheffield* (4). These labourers are not excluded merely because they were not paid by the year. As regards the under-keeper, Mr. Tyldesley Jones has not contested that he was a "servant" within the meaning of the words I have read, but the question arises whether the six labourers were servants in the service of the testator within the meaning of those words.

I confess that when I first read the will I had a clear view that, although these six persons were servants in some sense they were not servants in the service of the testator within the true meaning of the words used in the will, and that the testator was referring to persons who ministered in some way to his personal comfort or his wants—persons of the class of domestic servants, though not necessarily only those employed in the house. After having heard all the cases read I am a good deal more puzzled than I was at first. But in the result I adhere to my first impression, and I observe that it is the view taken by *SIR JOHN LEACH, M.R.*, in *Booth v. Dean* (1). I think also that it is the view which was very clearly indicated by *SIR JOHN ROMILLY, M.R.*, in *Thrupp v. Collett* (No. 2) (2). It is true that in such cases as *Re Ravensworth* (3) and *Re Earl of Sheffield* (4)—certainly in the latter case—there were some claimants who were in the same

A position, or very nearly the same position, as the six claimants in this case, and that they were not excluded on the ground that they were in that position; but the point was never argued; they were excluded for other reasons, and it may well be that the counsel who argued against their inclusion chose to base his argument merely upon those reasons. I cannot find in the cases anything which amounts to a decision or even to an indication of opinion that persons in the position of farm labourers would come within the *prima facie* meaning of the word "servants" in such a will as this. I think that in this case the narrower meaning of the word "servants" is that in which the term has been used by the testator, and that these six persons do not take under the bequest.

C Solicitors: *Field, Roscoe & Co.*, for *Bush & Co.*, Cheltenham; *Jackson, Elwell & Cowan*, for *Jessop & Son*, Cheltenham; *Waterhouse & Co.*, for *Winterbotham, Gurney & Co.*, Cheltenham.

[*Reported by L. MORGAN MAX, Esq., Barrister-at-Law.*]

Re DOLOSWELLA RUBBER AND TEA ESTATES, LTD., AND REDUCED

E [CHANCERY DIVISION (Neville, J.), November 28, 1916]

[*Reported* [1917] 1 Ch. 218; 86 L.J.Ch. 223; 115 L.T. 853]

Company—Capital—Reduction—Subdivision of partly paid shares—Proportion of amounts paid and unpaid altered by subdivision—Reduction of liability on unpaid shares—Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 41 (1) (d); s. 46 (1) (a).

A company proposed to subdivide its £500 shares, upon which £185 had been paid up, into five shares of £100, of which two were to be surrendered to the company, and the remaining three were to be treated as paid up to the extent of £61 13s. 4d. each.

Held: though s. 41 (1) (d) of the Companies (Consolidation) Act, 1908 [now s. 61 (1) of the Companies Act, 1948], precluded a subdivision of partly paid shares by which the proportions of paid and unpaid capital on the new shares were altered, yet the court, if it approved of the scheme, might sanction it under the provisions of s. 46 (1) (a) [now s. 66 (1) (a) of the 1948 Act] which permitted a company to reduce the liability on its shares in respect of capital not paid up.

I **Notes.** *Re Walker Steam Travel Fishing Co., Ltd., Petitioners*, 1908 S.C. 123, in which the Scottish court refused to confirm a reduction similar to that sanctioned in the present case, was not cited to NEVILLE, J. The Companies (Consolidation) Act, 1908, has been repealed, but similar provisions as to reduction of capital are now made by the Companies Act, 1948, s. 66.

As to confirmation of reduction of capital by the court, see 6 HALSBURY'S LAWS (3rd Edn.) 156–160, paras. 327–336; and for cases see 9 DIGEST 149–175. For the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Case referred to in argument:

Re Vine and General Rubber Trust, Ltd. (1913), 108 L.T. 709; 57 Sol. Jo. 610; 9 Digest (Repl.) 176, 1134.

Petition to sanction scheme for reduction of capital.

The Doloswella Rubber and Tea Estates, Ltd., was registered as a company on Feb. 20, 1913, the capital being £350,000, divided into 700 shares of £500 each.

There was no other class of shares, and no issue of debentures, and at the date of the petition the only creditors of the company were for wages and small current expenses. The object of the company was to plant and develop about 8,000 acres of rubber and tea-bearing lands in Ceylon. Owing to the war and the prevailing scarcity of labour, the directors were unable to plant more than about 4,000, and the capital at their disposal was, therefore, too large. The position in August, 1915, was that 640 shares had been issued, on which £185 per share had been called up and paid, and on Aug. 15, 1915, the directors issued a circular containing a proposal to reduce the capital intended to be issued for the present to £192,000. The scheme provided that the £500 shares should be subdivided into shares of £100 and each holder of a £500 share would receive five £100 shares. Of those he was to surrender two to the company absolutely, to be issued again if the future needs of the company required, and to retain the other three. The £185 paid on the original share was to be treated as a payment of £61 13s. 4d. on each of the three shares retained, leaving upon each an uncalled amount of £38 6s. 8d. The directors' summary of the effect of the scheme was as follows:

3,200 shares of £100 each to be created against the existing 640 shares of £500 each, of which—	
1,920 shares, £61 13s. 4d. paid up, to be issued to shareholders	£118,400
£38 6s. 8d. uncalled liability on each share	73,600
1,280 shares uncalled, to be surrendered to the company	128,000
300 shares unissued, against the existing 60 shares of £500	30,000
3,500 shares	£350,000

In respect of the 1,280 shares for possible future issue it was provided that upon surrender to the company all personal liability of the present holders was to be absolutely extinguished. Article 58 of the company's articles of association gave the company power from time to time by special resolution to reduce the capital either by paying off or by cancelling capital which had been lost or was unrepresented by available assets, or to reduce outstanding liability on the shares, or otherwise, as might seem expedient. It might also, by the same article, subdivide its shares. By art. 27 it was provided that the directors might accept from any member a surrender of all or any part of his shares upon such terms and conditions as might be agreed upon. A special resolution approving the proposals was passed by a large majority at a meeting held on Aug. 25, 1915, and was confirmed by the shareholders at a subsequent meeting held on Sept. 22. The court was now asked to sanction the scheme.

Clayton, K.C., and Sir M. D. Warmington for the company.—The only difficulty here is under s. 41 (1) (d) of the Companies (Consolidation) Act, 1908 [now Companies Act, 1948 s. 61 (1)] which provides:

"A company limited by shares, if so authorised by its articles, may alter the condition of its memorandum as follows (that is to say) it may . . . (d) Subdivide its shares, or any of them, into shares of smaller amount than is fixed by the memorandum, so, however, that in the subdivision the proportion between the amount paid and the amount, if any, unpaid on each reduced share shall be the same as it was in the case of the share from which the reduced share is derived."

but the desired reduction can be effected by s. 46 (1) (a) [now Companies Act, 1948, s. 66 (1)], which provides:

"Subject to confirmation by the court, a company limited by shares, if so authorised by its articles, may by special resolution reduce its share capital in any way, and in particular (without prejudice to the generality of the foregoing power) may . . . (a) Extinguish or reduce the liability on any of its shares in respect of share capital not paid up."

A NEVILLE, J.—It seems to me, and I do not know if I have overlooked any difficulty, that you can bring this petition under s. 46 (1) (a) of the Companies (Consolidation) Act, 1908. Having surrendered your two £100 shares to the company, and having got them out of the way, what you are doing is extinguishing a liability. If it were necessary to do it by agreement between classes of shareholders, you might call in s. 120 [which made provisions similar to those of s. 206 of the 1948 Act], which would, subject to the confirmation of the court, permit members of each class to deal with their shares. Section 120 would, however, involve the summoning of another meeting, and s. 46 (1) (a) seems to me to cover it. I will therefore make the order, and not consider that I have called in aid s. 120.

Solicitors: *Stephenson, Harwood & Co.*

[Reported by G. HAYES, Esq., Barrister-at-Law.]

Re MUIRHEAD. MUIRHEAD v. HILL

[CHANCERY DIVISION (Eve, J.), May 3, 12, 1916]

[Reported [1916] 2 Ch. 181; 85 L.J.Ch. 598; 115 L.T. 65]

Apportionment—Accrual of periodical payments—Payment by instalments—Distribution when due in accordance with Apportionment Act as applied on occurrence of event bringing it into operation—Will—Tenant for life and remainderman—Debentures and shares—Interest and dividends earned before, but declared after, death of life tenant—Apportionment Act, 1870 (33 & 34 Vict., c. 35), ss. 2, 5.

Whenever there are periodical payments accruing when an event calling for apportionment under the Apportionment Act, 1870, occurs, the Act must be applied, and when subsequently the accruing payments become due and payable they must be distributed in accordance with the Act as applied on the occurrence of the event which brought it into operation. The Act does not cease to apply merely because the accruing payments ultimately become due and payable by instalments, some of which go entirely to one destination.

The testator, who died on Dec. 18, 1913, and was at that date registered as holder of five debentures and 1,126 shares of a limited company, by his will gave his converted residuary estate upon trust for payment of the dividends and income to his wife for life and after her decease for his nephews and nieces. The beneficial ownership of the shares and debentures was claimed by the testator's brother, A. M., and actions in which that question had been raised were compromised by an agreement, dated May 20, 1915, by which it was agreed that the debentures and shares should be transferred to A. M. at a percentage of their face value, and that he should be entitled to all interest and dividends become due or declared on the same since the testator's death. On July 10, 1915, £7,630 was accordingly paid to the testator's executors, who had transferred the shares and debentures to A. M. The testator's widow died on July 24, 1915. Half-yearly interest became due on the debentures in March and September, 1914 and 1915, and dividends on the shares in July and September, 1914, and September, 1915. Dividends on railway companies' stock and shares, forming part of the testator's residuary estate, were declared, after the date of the death of the testator's widow, in respect of the half-year ending on June 30, 1915, and paid to the plaintiff, one of the testator's executors. By consent the value of the debentures and shares was taken at par.

Held: at the death of the tenant for life on July 24, 1915, there were dividends accrued and accruing *de die in diem* on the investments from Dec. 31, 1914,

and the Act made the whole of those dividends apportionable as on July 24, the estate of the tenant for life taking the proportion that had accrued down to that date, the remainderman taking the proportion accruing subsequent to that date; the apportionment was not to be disregarded and the Act to be treated as no longer applicable because the fund which was the subject-matter of the apportionment was afterwards made payable in instalments, the earliest of which went entirely to the estate of the tenant for life in part satisfaction of her apportioned part of the fund.

Re Oppenheimer, Oppenheimer v. Boatman (1), [1907] 1 Ch. 399, applied.

Per **Curiam**: The Apportionment Act, 1870, has no application to payments which accrue due before the happening of the event calling for apportionment: *Ellis v. Rowbotham* (2), [1900] 1 Q.B. 473, explained.

Notes. Considered: *Re Henderson, Public Trustee v. Reddie*, [1940] 1 All E.R. 623. Applied: *Re Winder's Will Trusts, Westminster Bank, Ltd. v. Fausset*, [1951] 2 All E.R. 362.

As to apportionment of income received by a personal representative, see 16 HALSBURY'S LAWS (3rd Edn.) 282, 283; and for cases see 20 DIGEST 280-284. For the Apportionment Act, 1870, see 13 HALSBURY'S STATUTES (2nd Edn.) 867.

Cases referred to:

- (1) *Re Oppenheimer, Oppenheimer v. Boatman*, [1907] 1 Ch. 399; 76 L.J.Ch. 287; 96 L.T. 631; 14 Mans. 139; 20 Digest 282, 414.
- (2) *Ellis v. Rowbotham*, [1900] 1 Q.B. 740; 69 L.J.Q.B. 379; 82 L.T. 191; 48 W.R. 423; 16 T.L.R. 258; 31 Digest (Repl.) 286, 4208.

Also referred to in argument:

- Bates v. Mackinley* (1862), 31 Beav. 280; 31 L.J.Ch. 389; 6 L.T. 208; 8 Jur.N.S. 299; 10 W.R. 241; 54 E.R. 1146; 40 Digest (Repl.) 719, 2118.
- Wright v. Tuckett* (1860), 1 John. & H. 266; 70 E.R. 747; 40 Digest (Repl.) 716, 2092.
- Re Maxwell's Trusts* (1863), 1 Hem. & M. 610; 1 New Rep. 549; 32 L.J.Ch. 333; 9 L.T. 224; 9 Jur.N.S. 350; 11 W.R. 480; 71 E.R. 267; 20 Digest 280, 398.
- Re Earl of Chesterfield's Trusts* (1883), 24 Ch.D. 643; 52 L.J.Ch. 958; 49 L.T. 261; 32 W.R. 361; 20 Digest 368, 1065.
- Re Godden, Teague v. Fox*, [1893] 1 Ch. 292; 62 L.J.Ch. 469; 68 L.T. 116; 41 W.R. 282; 3 R. 67; 40 Digest (Repl.) 763, 2477.

Adjourned Summons.

The testator, Henry James Muirhead, by his will, dated Oct. 24, 1912, appointed his wife, Gertrude Julia Muirhead, and his brothers, Alexander Muirhead and Francis Lauder Muirhead (the plaintiff), executors and trustees thereof. After making specific devises and specific and pecuniary bequests, the testator devised and bequeathed his residuary estate to his trustees upon trust for sale and conversion as they should think fit. The testator declared that his trustees should pay his debts; legacies, annuities, and duties and stand possessed of his residuary estate in trust to invest and pay the dividends, interest, and income of the investments unto the testator's wife during her life if she should so long remain his widow. From and after the decease or second marriage of his wife the trustees were to stand possessed of the residuary estate and investments for the time being representing the same upon trust (subject to a power of appointment which was not exercised) to divide the same into eighteen equal parts and to appropriate two of such parts to his three nephews and niece, the second, third, and fourth defendants respectively, if he or she should be living at the death of his wife, and to appropriate one of the remainder of such parts to each of the testator's twelve other nephews and nieces, if he or she should be living at the death of the testator's wife, as in the testator's will mentioned. The testator empowered his trustees to postpone during such period as they should think fit the sale and conversion of his residuary estate, and declared that all the net rents, profits, and income arising

A from his estate until conversion should for all the purposes of his will and as
between all persons interested thereunder and as well during the first year after
his death as afterwards be applied as if the same were income arising from the
proceeds of sale and conversion or the investment of such proceeds, no part thereof
being liable to be retained as capital. The testator died on Dec. 18, 1913, and his
B will was duly proved by Gertrude J. Muirhead and the plaintiff, Francis L. Muir-
head. Alexander Muirhead renounced probate and disclaimed the trusts of the
will. The testator was at his death the registered holder of 1,126 shares of £10
each and transferee under a deed of transfer of five debentures of £500 each of
Muirhead & Co., Ltd. In July, 1914, Alexander Muirhead, by his action against
the testator's executors and the company, claimed that the 1,126 shares and five
C debentures were his property, and in January, 1915, the company, by their action
against the testator's executors, claimed an account of the company's moneys
alleged to have been misapplied by the testator as a director of the company.
These actions, by an agreement dated May 20, 1915, between the parties to them,
were compromised with the approval of the court subsequently obtained on June 7,
1915, on the terms that Alexander Muirhead was to pay to the testator's executors
sums of £2,000 (being 80 per cent. of the face value of the debentures) and £5,630
D (being 50 per cent. of the face value of the 1,126 shares in the company) and on
payment, which was in fact made on July 10, 1915, of such sums the debentures
and shares were to be vested in Alexander Muirhead, and he was to be entitled to
all interest and dividends on the debentures and shares which had become due or
been declared since the testator's death. On July 10, 1915, the testator's executors
invested £7,000, part of the two sums of £2,000 and £5,630, in the purchase of
E £7,000 $4\frac{1}{2}$ per cent. War Loan Stock, and placed the £630, being the balance, on
deposit at a bank. Gertrude J. Muirhead died on July 24, 1915, and the first
defendant, Charles Edward Cecil Hill, was the surviving executor under her will.
There were due at the date of his, the testator's death, or became due since that
date, for interest on the five debentures at $4\frac{1}{2}$ per cent., less income tax, the follow-
ing sums—viz., £56 5s. on Mar. 31, 1914, Sept. 20, 1914, and Mar. 31, 1915,
F respectively. Also a further half-year's interest, £56 5s., payable on Sept. 30,
1915—that is, after the death of the testator's widow—in respect of the half-year
from Mar. 31, 1915, to Sept. 30, 1915. Dividends free of income tax on the 1,126
shares had been declared since the testator's death—viz., an interim dividend of
£281 10s. on July 30, 1914, a final dividend of £563 on Dec. 17 in respect of the
year ending Sept. 29, 1914, and a dividend of £563 declared in December, 1915,
G for the year ending Sept. 29, 1915. The residuary estate of the testator included
the following stocks and shares—viz., £4,000 consolidated ordinary stock of the
Central Argentine Railway, Ltd., and on Sept. 30, 1915, a final dividend thereon
for the year ending on June 30, 1915, was declared and a dividend of £106 was
paid to the plaintiff executor of his will on Nov. 2, 1915; £11,820 ordinary stock
of the Buenos Ayres Great Southern Railway Co., Ltd., and on Sept. 29, 1915,
H a dividend for the half-year ending June 30, 1915, was declared and the dividend,
£208 16s. 5d., was paid to the plaintiff on Oct. 27, 1915; £1,100 4 per cent. exten-
sion shares 1915 of £10 each of the Buenos Ayres Western Railway, Ltd., and on
Sept. 30, 1915, interest for the half-year ending June 30, 1915, was declared payable,
and such interest, £194 6s. 8d., was paid to the plaintiff.

I By this originating summons of the executor of the will of the testator, to which
the executor of his widow and a number of the nephews and nieces of the testator
were defendants, the question was raised whether the defendant Charles E. C. Hill,
as the executor of Gertrude J. Muirhead, was entitled to have the sums of £2,000
and £5,630, paid under the terms of compromise of May 20, 1915, apportioned as
between capital and income, and to have an apportioned part of such sums paid
to the estate of Gertrude J. Muirhead in respect of the interest and dividends
accruing on the shares and debentures the subject of the compromise between the
date of the testator's death and the date of the payment of such sums of £2,000 and

£5,630. The originating summons also raised the question whether the dividends and interest declared and paid since the death of Gertrude J. Hill on the stock and extension shares of the railway companies were payable to her executor or were apportionable as between the estate of the testator's widow and the remaindermen.

Stafford Crossman for the plaintiff.

Maugham, K.C., and *J. M. Gover* for the executor of Gertrude J. Muirhead.—We concede that the value of the debentures and shares shall be taken at their par value, whereas Alexander Muirhead paid a percentage of that value only.

Edward Clayton, K.C., and *C. J. W. Farwell* for residuary legatees.

W. S. Eastwood for other defendants interested in residue.

On the first question a declaration was made by the court, *Eve, J.*, expressing the opinion that Alexander Muirhead had bought the debentures and shares with the interest and dividends thereon, and that an apportioned part of the aggregate of the sums of £2,000 and £5,630, bearing the same proportion to the whole of the aggregate as the amount of the interest and dividends which accrued between the death of the testator and May 20, 1915, on the five debentures and the 1,126 shares (including apportioned parts of the interest and dividends which were accruing at the death of the testator and on May 20, 1915, respectively) bore to the capital value on May 20, 1915, of the debentures and shares, was payable to the defendant Charles E. C. Hill as the executor of Gertrude J. Hill, the capital value of such debentures and shares on May 20, 1915, being by consent, with the approbation of the judge as to such of the defendants as were infants, treated as their par value, the said sums to be apportioned accordingly. On the second question in the originating summons judgment was reserved, and on May 12, 1916, the following judgment was read.

EVE, J.—Down to the date of her death on July 24, 1915, the late Mrs. Gertrude J. Muirhead was tenant for life of her husband's residuary estate. Part of the estate was invested in ordinary stock of the Central Argentine Railway, Ltd., and the Buenos Ayres Great Southern Railway Co., Ltd., and in extension shares of the Buenos Ayres Western Railway, Ltd. In September, 1915, each of these railway companies declared a dividend on the investment, payable in the following month, for the half-year ending on the preceding June 30. The question is whether these dividends, amounting in all to a sum of £509 and upwards, belong to the legal personal representative of the late tenant for life or to those who on her death became entitled to the income of the testator's estate. It is conceded that the claim of the widow's representative must be established under the Apportionment Act, 1870, or otherwise fail.

By s. 2 of that Act it is provided that from and after the passing of the Act

"all rents, annuities, dividends, and other periodical payments in the nature of income . . . shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly."

Section 5 enacts that the word "dividends" includes

"all payments made by the name of dividend, bonus, or otherwise out of the revenue of trading or other public companies divisible between all or any of the members of such respective companies, whether such payments shall be usually made or declared at any fixed times or otherwise; and all such divisible revenue shall, for the purposes of this Act, be deemed to have accrued by equal daily increment during and within the period for or in respect of which the payment of the same revenue shall be declared or expressed to be made."

It has been argued on behalf of the remainderman that the language I have read does not operate to make these dividends part of the estate of the late tenant for life, because, if the claim of her estate is well founded, the entirety goes to her estate, and, there being no apportionment or division necessary, there is nothing to bring the Act into operation or to which its provisions can apply.

I do not think it is unreasonable to test this argument by one or two concrete cases. It is admitted here that in the events which have happened the Act applies to the dividends accruing on the investments for the half-year ending Dec. 31, 1915, and that the widow's estate will take such proportion of these dividends as accrued between June 30 and July 24; but, if the argument above stated be sound, the result is that her estate takes a share of dividends earned over a period partly within and partly beyond her lifetime, but has no part of the dividends earned in an antecedent period wholly within her lifetime. Or again, had the widow died on June 29, it is conceded that the Act would have applied, and her estate would have taken the whole dividend for the half-year ending June 30, less an apportioned part for the last day of the half-year which would have gone to the remainderman; but, had she died on June 30, her estate would have taken no share of the half-year's dividend, because there would have been no part of it apportionable to the remainderman, and the Act would in these circumstances not have been applicable.

Unless I am compelled to do so, I cannot attribute to the legislature any results so fanciful, so whimsical, and so illogical, and I do not feel so compelled. In my opinion, whenever there are periodical payments accruing when the event calling for apportionment occurs the Act is at once brought into operation and must be applied, and when subsequently the accruing payments become due and payable they must be distributed in accordance with the Act as applied on the occurrence of the event which brought it into operation. The Act does not cease to apply because the accruing payments ultimately become due and payable by instalments, some of which go entirely to one destination. In the present case, at the death of the tenant for life on July 24, 1915, there were dividends accrued and accruing *de die in diem* on these investments from Dec. 31, 1914, and the Act made the whole of these dividends apportionable as on July 24, the estate of the tenant for life taking the proportion that had accrued down to that date, the remainderman taking the proportion accruing subsequent to that date. I am quite unable to see upon what principle that apportionment is to be disregarded and the Act to be treated as no longer applicable because the fund which is the subject-matter of the apportionment is afterwards made payable in instalments, the earliest of which go entirely to the estate of the tenant for life in part satisfaction of her apportioned part of the fund. I do not think *Ellis v. Rowbotham* (2) has anything to do with the point I have to consider here. What that case decided was that the Apportionment Act has no application to payments which accrue due before the happening of the event calling for the apportionment. None of the payments here accrued due until three months and more after the death of the late tenant for life. The conclusion at which I have arrived, that the whole of these dividends belong to the widow's estate, is in accordance with the order made in *Re Oppenheimer* (1), though it does not appear from the report of that case that the point here raised on behalf of the remainderman was argued.

Solicitors: *Fowler & Co.; Cronin & Son; Trinder, Capron & Co.*

[Reported by W. P. PAIN, Esq., Barrister-at-Law.]

MEEKING v. MEEKING AND OTHERS

[CHANCERY DIVISION (Astbury, J.), October 18, 19, 1916]

[Reported [1917] 1 Ch. 77; 86 L.J.Ch. 97; 115 L.T. 623]

Mistake—Document—Rectification—Disentailing deed—Jurisdiction of court—Claimant by title paramount per formam doni—Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), s. 47.

Where a mistake has been made in a disentailing deed, by reason of which the deed as executed does not represent the intention of the parties to it, a court of equity is not deprived of its jurisdiction to rectify the deed by s. 47 of the Fines and Recoveries Act, 1833.

Dicta in *Hall-Dare v. Hall-Dare* (1) (1885), 31 Ch.D. 251, applied, and dicta in *Bankes v. Small* (2) (1887), 36 Ch.D. 716, reconciled. *Re Ottley's Estate* (3), [1910] 1 I.R. 1, not followed.

A court of equity will not refuse to rectify in such a case on the ground that a person claims by title paramount per formam doni from the creator of the estate tail.

Hinton v. Hinton (4) (1755), 2 Ves. Sen. 631, distinguished.

Notes. As to rectification, see 26 HALSBURY'S LAWS (3rd Edn.) 914-921; and for cases see 35 DIGEST 127 et seq., and 40 DIGEST (Repl.) 581-587. For Fines and Recoveries Act, 1833, see 20 HALSBURY'S STATUTES (2nd Edn.) 397.

Cases referred to:

- (1) *Hall-Dare v. Hall-Dare* (1885), 31 Ch.D. 251; 55 L.J.Ch. 154; 54 L.T. 120; 34 W.R. 82; 2 T.L.R. 100, C.A.; 40 Digest (Repl.) 584, 587.
- (2) *Bankes v. Small* (1887), 36 Ch.D. 716; 56 L.J.Ch. 832; 57 L.T. 292; 35 W.R. 765; 3 T.L.R. 740, C.A.; 38 Digest (Repl.) 856, 699.
- (3) *Re Ottley's Estate*, [1910] 1 I.R. 1; 38 Digest (Repl.) 857, *688.
- (4) *Hinton v. Hinton* (1755), Amb. 277; 2 Ves. Sen. 631, 638; 27 E.R. 187, L.C.; 38 Digest (Repl.) 856, 696.
- (5) *A.-G. v. Day* (1749), 1 Ves. Sen. 218; 27 E.R. 992, L.C.; 38 Digest (Repl.) 856, 695.

Also referred to in argument:

- Bonhote v. Henderson*, [1895] 1 Ch. 742; 72 L.T. 556; affirmed [1895] 2 Ch. 202; 72 L.T. 814; 35 Digest 133, 332.
- Bentley v. Mackay* (1862), 4 De G.F. & J. 279; 31 L.J.Ch. 697; 7 L.T. 143; 8 Jur.N.S. 1001; 10 W.R. 873; 45 E.R. 1191, L.J.J.; 35 Digest 135, 343.
- Frank v. Mainwaring* (1839), 2 Beav. 115; 48 E.R. 1123; 38 Digest (Repl.) 856, 697.
- Mills v. Fox* (1887), 37 Ch.D. 153; 57 L.J.Ch. 56; 57 L.T. 792; 36 W.R. 219; 21 Digest 310, 1134.
- Wheeler v. Heseltine* (1801), 2 Bos. & P. 560.
- Dowse v. Reeve* (1801), 2 Bos. & P. 578.
- Phillips v. Jones* (1803), 3 Bos. & P. 362.
- Milbanke v. Jolliffe* (1772), 2 Bos. & P. 579; 126 E.R. 1450; 19 Digest 382, 2043.

Witness Action by the plaintiff, Violet Emily Mildred Meeking, claiming rectification of an indenture of disentailing assurance, dated July 21, 1893, between Charles Meeking, of the first part, Bertram C. C. S. Meeking, of the second part, and Marshall Pontifex, of the third part, by the insertion of the words "in fee simple" immediately after the name of Marshall Pontifex in the habendum to him as grantee to uses.

Charles Meeking, the father, by his will settled property to the use of his son Charles Meeking for life with remainder to Bertram C. C. S. Meeking in tail. Charles Meeking, the father, died in 1872, and in 1893, in contemplation of the marriage of Bertram C. C. S. Meeking, a disentailing deed was executed, and a

re-settlement made of the same date. The disentailing assurance was enrolled pursuant to the Fines and Recoveries Act, 1833, on July 29, 1893. By the disentailing deed the property was conveyed to the grantee to uses, Marshall Pontifex, but the words "in fee simple" were omitted after his name by mistake. It was recited, however, in the re-settlement that the property had been conveyed by the disentailing deed of the same date to Marshall Pontifex in fee simple, and the two deeds were executed by all parties under the belief that the usual disentailment had been effected. Under the re-settlement, at the date of this action in the events which had happened, the property was limited to the use of the first and other daughters of Bertram C. C. S. Meeking successively according to seniority in tail male with various remainders over. The three persons parties to the disentailing assurance had all died prior to the commencement of this action. Bertram C. C. S. Meeking had two children only, the plaintiff, his elder daughter Violet Emily Mildred Meeking, and the defendant Daisy Finola Meeking. Charles Meeking, the son, remarried in 1907 and had as issue of that marriage the defendant Sybille Marie Annie Meeking, who under the disentailing deed as executed and the will of Charles Meeking, the son, would take an interest in the property. The defendant Violet Charlotte Johnson was the wife of Bertram C. C. S. Meeking, who on Dec. 18, 1912, had re-married, her second husband being Herbert Johnson. The remaining defendants, including Herbert Johnson, were the present trustees of the re-settlement of 1893 and also of the will of Charles Meeking, the son. The question arose whether s. 47 of the Fines and Recoveries Act, 1833, deprived a court of equity from exercising the ordinary jurisdiction to rectify the disentailing deed, and, further, whether, if the court was not so deprived of its jurisdiction by that section, the court ought not to exercise its discretion to rectify against the defendant Daisy Finola Meeking, an infant, on the ground that she was not a party to the disentailing assurance and could claim by title paramount per formam doni.

Frank Russell, K.C., and *Ashworth James* (for *Tyldesley Jones*, serving with His Majesty's forces) for the plaintiff, a daughter of Bertram Meeking.

Micklem, K.C., and *Fairfax Luxmoore* for the defendant Daisy Finola Meeking, younger daughter of Bertram Meeking.

E. Beaumont (for *J. Beaumont*, on His Majesty's service) for the defendant Sybille Marie Annie Meeking, a party interested.

Sheldon for the defendant Violet Charlotte Johnson, mother of the plaintiff and first defendant, who had re-married.

ASTBURY, J.—This is an action of an unusual character to rectify a disentailing assurance which was executed on July 21, 1893. There is no dispute as to the facts.

One Bertram Meeking, who was about to marry the defendant, Violet Charlotte Johnson, was tenant in tail under a settlement created by his grandfather's will under which his father was tenant for life. The father and son, in contemplation of the son's intended marriage, agreed to disentail the property and to re-settle it, which was done by the document in question and a re-settlement of the same date. By a slip in drawing up the disentailing indenture, the words "in fee simple" were omitted after the name of one Marshall Pontifex in the habendum to him as trustee to uses. In the re-settlement of the same date it is recited that the disentailing indenture conveyed, released, and confirmed unto Marshall Pontifex the estate in question to hold to him "in fee simple," which is what had been intended, but which by a slip had not been done, and the whole of the two documents were obviously drawn on the assumption that the disentailing was intended to be effected in fact and an entire re-settlement made in pursuance of the intended marriage. Bertram Meeking died in April, 1900, leaving two daughters, the plaintiff and the defendant Daisy, who, in the event of this assurance not being rectified, would take under the limitation in the will of the grandfather of Bertram. Charles, the father, re-married in 1907, and had as issue of that marriage one child, the defendant Sybille Marie, who is interested in contending, and whose counsel has contended on her behalf that this action does not lie. Marshall Pontifex died in

September, 1910, and Charles, the father, in March, 1912, and in the same year the defendant Violet Meeking re-married. With regard to the question how this slip in the drawing up of the disentailing assurance arose, I have the uncontradicted evidence of counsel who prepared the draft and of the defendant Violet, now Violet Johnson. Their evidence had been taken by affidavit by arrangement, counsel for none of the parties objecting to that method of procedure, and neither of them has been cross-examined. What they prove without a shadow of doubt is that Mr. Bertram Meeking and his father, in consideration of the proposed marriage, intended to disentail the estate, gave instructions for a disentailing deed in the usual form to be prepared, and counsel prepared it in the belief that it was in the usual form, and intended to insert the usual words of inheritance in the habendum, but by some slip omitted to do so, and the documents were executed by all parties on the faith of their being effective for the purpose for which they were intended, the signatures of Mr. Bertram Meeking and his father being witnessed by their own solicitor, who had joined in the instructions for the preparation of the deed. The defendant Daisy is an infant, and by her counsel has very properly raised all the objections which I think could be raised to the success of this action.

Those objections fall under two heads. First, it is said that under s. 47 of the Fines and Recoveries Act, 1833, there is no power in this court to give the relief which is asked, and, secondly, it is contended that if such jurisdiction exists it is a case where the court ought not to exercise it because the granting parties to the deed are dead, and that Miss Daisy Meeking is now entitled by title paramount per formam doni under her great-grandfather's will. The Fines and Recoveries Act, after providing that nothing contained in the Act shall lessen or take away the jurisdiction of any court to amend any fine or common recovery or any proceeding therein in cases not provided for by the Act, enacted in s. 15 that from and after Dec. 31, 1833, every tenant in tail, whether in possession, remainder, contingency, or otherwise, should have full power to dispose of for an estate in fee simple or for any less estate the entailed property, and s. 40 [amended by Married Women's Property Act, 1907, s. 3, and Law of Property Act, 1925, s. 167] provided that every disposition of land under the Act by a tenant in tail should be effected by one of the assurances, not being a will, by which such tenant in tail could have made the disposition if his estate had been an estate at law in fee simple absolute, provided, nevertheless, that no disposition by a tenant in tail should be of any force either at law or in equity unless made or evidenced by deed, and that no disposition by a tenant in tail resting only in contract, whether express, implied, or otherwise, and whether supported by valuable consideration or not, should be of any force at law or in equity under the Act. Section 41 [repealed by Law of Property (Amendment) Act, 1924] provided that no assurance by which any disposition of land should be effected under the Act by a tenant in tail should have any operation under the Act unless enrolled within six months as therein provided. Section 47 is the principal section under which it is contended that the relief claimed in this case cannot be granted. That section is as follows:

"In cases of dispositions of lands under this Act by tenants in tail thereof and also in cases of consents by protectors of settlements to dispositions of lands under this Act by tenants in tail thereof, the jurisdiction of courts of equity shall be altogether excluded, either on the behalf of a person claiming for a valuable or meritorious consideration, or not, in regard to the specific performance of contracts, and the supplying of defects in the execution either of the powers of disposition given by this Act to tenants in tail, or of the powers of consent given by this Act to protectors of settlements, and the supply under any circumstances of the want of execution of such powers of disposition and consent respectively, and in regard to giving effect in any other manner to any act or deed by a tenant in tail or protector of a settlement which in a court of law would not be an effectual disposition or consent under this Act; and no

A disposition of lands under this Act by a tenant in tail thereof in equity, and no consent by a protector of a settlement to a disposition of lands under this Act by a tenant in tail thereof in equity, shall be of any force unless such disposition or consent would in case of an estate tail at law be an effectual disposition or consent under this Act in a court of law."

B It is contended that this section prohibits a court of equity from supplying any defect in the execution of a power of disposition given to a tenant in tail and the supplying under any circumstances of a want of execution of such power of disposition, and that the omission by way of slip in the drawing up of the document in question is a defect in execution or a want of execution which unrectified renders the deed incapable in a court of law in passing the property for the purposes of the disentailing and re-settlement.

C There is no case that has been found where a slip in the disentailing portion of a deed which, if unrectified, would prevent it from being an effective disentailing assurance has been rectified by the court since the passing of this statute. There are three cases, however, which have been criticised and very properly dealt with in great detail which it is necessary to discuss. In *Hall-Dare v. Hall-Dare* (1) a disentailing and a re-settlement had been effected in one deed, and there was a mistake in the re-settlement portion of the deed which did not affect the validity of the disentailing portion of the document. An application was made to rectify the mistake, which the Court of Appeal, consisting of three very eminent judges, held, reversing the judgment of Bacon, V.C., ought to be effected. It is only right to say that in the court below counsel for the plaintiff, who was asking for rectification, said that, if in that case the document had been defective as a disentailing deed, the plaintiff could not have come to the court, but that, on the contrary, the deed was not defective as a disentailing assurance, but only qua the re-settlement. In the Court of Appeal the same counsel argued that s. 47 did not touch the case at all, because the claim was to rectify, not a disposition of land by a tenant in tail within the meaning of s. 47, but to rectify a mistake in a document of re-settlement, and that all that the action sought was to supply a re-settlement omission which, if made by a separate deed, need not have been enrolled at all. The defendant submitted the contrary, and the three judges in the Court of Appeal, although it is perfectly true that their judgments only in fact ordered a rectification of that portion of the enrolled deed which effected the re-settlement, expressed themselves one and all in language which, as far as I am concerned, I find it impossible to treat as consistent with an intention to hold that the rectification permissible was confined to the re-settlement portion of the deed, and that it did not equally apply to the disentailing assurance. In fact, I do not think it is going too far to say that the court in giving judgment did not accede to the view that, as the mistake was only in the re-settlement portion of the deed, it was, therefore, unnecessary to consider s. 47. It is true that in one sense the remarks that I am going to refer to are obiter, because it cannot be denied that the operation of the judgment was to rectify the re-settlement part of the deed and not to disturb the language in which the actual disentailing assurance was couched, but, although obiter in that sense, I find it quite impossible to believe that the learned judges, who expressed themselves as they did, had any doubt as to the application of their views to the deed as a whole.

I LORD HALSBURY, after referring to the fact that all parties intended to execute and did execute the re-settlement in the full belief that it carried out their instructions, said this, referring to s. 47 (31 Ch.D. at pp. 257, 258):

"Now, the Act of Parliament has not in express terms excluded the jurisdiction of the court to rectify instruments on the ground of mistake. It provides a different mode of barring estates tail, and has provided that in future the particular instrument to be enrolled shall be the instrument containing the legal dispositions of the parties, and by which alone the rights of the parties are to be determined. So express is the enactment, that the legislature,

having before it the knowledge that the Court of Chancery had thought right to give effect to other documents than proper legal instruments, goes out of its way to exclude the jurisdiction of the court with regard to supplying and remedying defective executions of powers and other matters, and contains express provisions, the result of which is that the effect of the instrument and the rights of the parties shall be determined by the instrument which has been enrolled, and that there shall be no other instrument outside the enrolled deed which shall affect the legal dispositions made by the tenant in tail and the protector of the settlement. Now, it seems to me, with all respect to the learned Vice-Chancellor, that [s. 47] has no reference to the present application, which is an application to amend an instrument on the ground that it is not the instrument which the parties intended to execute and believed they were executing. The purport of the Act is that there shall be one instrument, attended with certain formalities, including enrolment, and that nothing but that instrument shall be effectual as a disposition of the estate comprised in it. But what has that to do with the question whether that instrument as executed carries out the real intention of the parties? It appears to me to be entirely beside the question. The legislature having before it the jurisdiction of the Court of Chancery to rectify deeds, and by s. 47 excluding, as it does, in terms the jurisdiction to give effect to acts outside, or deeds outside and beyond the particular instrument, has provided what shall be the mode by which the transaction of barring an estate tail can be effected, but has omitted any reference to the well-known power of rectification. It must, therefore, have been intended to leave this jurisdiction unaffected."

I cannot conceive how language can be plainer than that, that the power of rectification is not touched by s. 47, and that it does not come within the prohibition against supplying defects in the execution of powers which was a well-known branch of equity jurisdiction different from the exercise of its power to order rectification. A little lower down, the learned judge said (*ibid.* at p. 258):

"What the court is asked to do is not to alter a deed, but to restore the instrument which has been enrolled to the form which the parties who executed it intended it should be in at the time when they executed it. It is a fallacy, therefore, to call this an alteration of a deed, and I cannot help thinking that the Vice-Chancellor has taken too narrow a view of the Act."

LINDLEY, L.J., said (*ibid.*):

"If it had been intended by the Act to deprive the court of the power of rectification, it ought to have been so stated in words which could not be mistaken. It would be too monstrous to construe s. 47 so as to preclude the court from setting aside for fraud a disentailing deed after enrolment."

I do not quite follow that, because I do not see any direction in s. 47 which could be construed as containing any such preclusion. He continued (*ibid.* at pp. 258, 259):

"The same observation appears to apply to cases where, by mistake or accident, a deed is executed and enrolled in a form which is not intended. Can it be said that the parties in such circumstances are to have no remedy? Looking at the language of s. 47, it appears to have been directed to a different class of cases altogether. If the legislature had meant to make a deed when enrolled unalterable [that must be the disposition referred to in the section] there would be something in the argument as to the words 'act or deed,' but I cannot find any such intention in the Act. The object of the Act was to change the form of conveyance; and, it being inconvenient that an enrolled document should have different effects at law or in equity, the section goes on to say in substance that the enrolled deed shall not be affected by equitable doctrines. That section assumes, however, that the document enrolled

represented the intention of the parties when they executed it, and was the deed which they intended to execute."

Pausing there for a moment, I think that an imperfect deed which as such is the deed of the parties and an imperfect deed which as such is not the deed of the parties are two different things. The section, as it appears to me, is dealing with imperfect documents and assurances which are as such the deeds of the parties to them, and, according to the view as I find it expressed in *Hall-Dare v. Hall-Dare* (1), the section is not dealing with documents which are imperfect in the sense that in their imperfect form they are not the deeds of the parties to them at all. That, I think, is the meaning of LINDLEY, L.J.'s language when he says (*ibid.* at p. 259):

"The section assumes that the document enrolled represents the intention of the parties when they executed it, and was the deed which they intended to execute. The deed when altered will really be the deed of the parties, and there is nothing to exclude the jurisdiction of the court to rectify the deed so as to make it conform to their intentions."

I understand that means that rectifying a deed so as to make it the true act of the parties is clearly not specific performance within the meaning of s. 47, and, secondly, that it is not supplying a defect in the execution of the power under the Act, which refers, as I have said, to a well-known practice of the court of treating a document which is, in fact, defective as operative under the circumstances. Further, rectification does not seem to me to be the "supplying" under any circumstances "of a want of execution of such power." The parties either did or did not execute the assurance within the meaning of this statute. In this case they did execute the assurance, and the court is not asked to supply any non-execution. Lastly, the fourth head under the section is:

"and in regard to giving effect in any other manner to any act or deed of a tenant in tail . . . which in a court of law would not be an effectual disposition."

I am not asked, in my judgment, to give effect in any other manner to any act or deed of a tenant in tail which would not be effectual to pass the estate in a court of law which is not a disposition within the meaning of the Act.

FRY, L.J., whose judgment is of extreme importance having regard to the fact that he was party to the decision which I propose to deal with in a moment, after referring to the fact that at the time when the Act was passed fines and recoveries were records of the common law courts, and consequently they had large powers of rectifying them, said (*ibid.* at p. 259):

"Then the new mode of disentailing by deed and consent, with a particular provision for evidencing by deed both the disposition and the consent of the protector of the settlement, puts the deed in the category of deeds which before the Act were in the power of the Court of Chancery to rectify."

Stopping there for a moment, I cannot doubt what the learned judge intended by those words. It seems to me that he says in explicit terms that when disentailing could only be effected by fines and recoveries recorded in courts of common law, full powers of rectification were possessed by the courts in which the records were kept, and that when a new method, namely, a deed, was adopted as an alternative, that deed was to be for all purposes, except such as are expressly prohibited, within the jurisdiction of the court which specially dealt with documents of that character. A well-known jurisdiction which has been exercised for many generations ought not to be lightly treated as being excluded by words in respect of which there is any ambiguity. Then FRY, L.J., said (*ibid.* at p. 260):

"The only section which requires to be considered is s. 47. That section no doubt excludes the jurisdiction of equity in certain cases which are therein specified. Of these it is noteworthy that the first is specific performance; next

comes the defective execution of powers. It is said that rectification is a branch of specific performance, but it is not so, at all events under this section. . . . It appears to me, therefore, that rectification was not excluded by s. 47. I cannot but observe that, if the legislature had meant to touch the jurisdiction to rectify, one would expect to find it mentioned in the same manner that specific performance is. But not a word is said about it. In my judgment the scope of the Act is to make the enrolled deed conclusive, but it would be monstrous and highly unjust to say that the instrument on parchment is to be conclusive of the rights of the parties for all time, however great the mistake or blunder, and however clear the evidence of it. On the other hand, if the deed is capable of amendment, it is most beneficial that it should be conclusive of the rights of the parties so that it is the only instrument to which the parties need have recourse. Whether reformed or not, it alone must be looked to."

I have read these judgments more than once, and I am unable to come to the conclusion that all the three judges who took part in them did not intend to hold absolutely and in terms that the equitable jurisdiction of rectification was not prejudiced or excluded by the provisions of s. 47. Whether obiter or not, these are opinions which, in the absence of definite decision to the contrary, I feel myself incapable of disregarding.

The next case, and in fact the only other English case which seems to me to be relevant on this point, is *Bankes v. Small* (2). Here again the actual decision has nothing to do with the question that I have to determine in this case. A tenant in tail in remainder barred his estate tail without the consent of the protector, and afterwards conveyed his estate and interest to a purchaser, covenanting that he would, at the request of the purchaser, execute every such disentailing or other assurance as might be necessary to vest the premises in the purchaser. The protector having died, the purchaser applied to the vendor to execute a disentailing deed to enlarge the tail fee into a fee simple, and it was held by the Court of Appeal that s. 47 of the Act did not interfere with the jurisdiction of the court to decree as against a tenant in tail specific performance of a "contract" for disentailment entered into by him, but only prevented the court from treating the contract as being in equity a disposition taking effect under the Act so as to bind the issue in tail and remainderman. The question under s. 47 was raised at the request of the court, and *COTTON, L.J.*, said (86 Ch.D. at p. 722):

"Where a person had entered into a contract for value to bar his estate tail, a court of equity would decree specific performance against him, and direct him to execute such assurance as would effectually bar the estate tail, i.e., to levy a fine, or, if the case was one which required a common recovery, then to suffer a common recovery. But if he died without having done so, then, as against his issue in tail or the succeeding remainderman, a court of equity would not interfere at all—that is to say, it would not give effect to a contract to suffer a recovery as if a recovery had been suffered; it would not treat what had been agreed to be done as having been done. I need not do more than refer to the case of *A.-G. v. Day* (5), where it was held by LORD HARDWICKE that although a court of equity would grant specific performance as against a tenant in tail who had entered into a contract to bar the estate tail, yet it would not do so as against the issue in tail, for they take by a title paramount per formam doni."

I will deal with that from another point of view later on. Then the learned judge proceeds (*ibid.*):

"There is another point also which has to be considered. The courts of equity where there was either valuable or meritorious consideration gave effect to imperfect executions of powers."

A Stopping there for a moment, the learned judge is certainly not in that sentence referring to rectification. He proceeds (*ibid.*):

“and did so, not only as against the person who had actually executed the instrument which was intended to be but was not a due execution of the power, but also as against those persons whom he could by a proper exercise of the power have defeated.”

B The learned judge, having read s. 47, continued (*ibid.* at p. 723):

“Now, looking at what I have stated to be the law, and looking at the mere construction of this clause, its object, in my opinion, was to prevent a court of equity from holding that a contract to execute a disentailing assurance was, as against the issue in tail and remaindermen, as effectual in equity as if a disentailing deed had in fact been executed, and from remedying, according to the principles applicable to defective executions of powers, any defects in the execution of a deed intended to bar an estate tail.”

C I understand that sentence to mean that, in the view of COTTON, L.J., s. 47, where it prohibits the supplying of defects in the execution of a power of disposition, prohibited, and only prohibited, courts of equity from giving effect to the defective execution of powers to disentail as they were in the habit of doing in other cases of defective execution of powers. I do not think the learned judge had in his mind any question of rectification at all, especially having regard to the fact that *Hall-Dare v. Hall-Dare* (1) had been cited in the argument. A little further on in his judgment he said (*ibid.* at pp. 723, 724):

E Let us look at the language of the section. The introductory words: ‘In cases of dispositions of lands under this Act by tenants in tail thereof and also in cases of consents by protectors of settlements to dispositions of lands under this Act by tenants in tail thereof,’ show that the section only applies where there has been an attempt by a tenant in tail to dispose of land under the Act. It does not deal with the case of a mere contract to execute a disposition under the Act, but deals only with a deed intended to be operative under the Act, but which from some defect is not so operative. . . . In my opinion on the mere construction of that section, having regard to the law that existed before the Act, both with regard to contracts to suffer recoveries and with regard to giving effect to defective executions of powers, the section does not take away the jurisdiction of a court of equity to compel a tenant in tail to do what he has agreed to do.”

G That is to say, does not prevent the enforcement of specific performance of contracts. Then he cites the view on this point of LORD ST. LEONARDS in his book on the Real Property Statutes published in 1852, where the learned author said (at p. 226):

H “It cannot be too strongly impressed on purchasers that their title will depend upon the legal validity of the dispositions. Under the [Fines and Recoveries Act] nothing can be supplied, and no defect can be made good so as to make the attempted deed effectual.”

I I think what he means there is that, if the deed, as executed and as intended to be executed by the parties, is a defective execution and ineffectual accordingly, there is no power in the court to treat it as otherwise than it is. The only decision that can be found in that judgment is that s. 47 has not deprived the court of equity of power to decree specific performance of contracts to disentail.

FRY, L.J., comes to the same conclusion. He said (*ibid.* at pp. 729, 730):

“This language appears to me to indicate an intention not to exclude jurisdiction in respect of contracts generally, not to interfere with the law or the equity relating to contracts, but only to provide that no disposition by a tenant

in tail resting in contract shall have any force either at law or in equity under the Act. Then, when we come to s. 47, we find that the jurisdiction of the courts of equity is excluded in respect of four subject-matters of jurisdiction: first, in respect of specific performance of contracts; secondly, in respect of supplying defects in execution of powers . . .”

In that expression I feel satisfied that the learned judge did not intend to include rectification as his judgment in *Hall-Dare v. Hall-Dare* (1) was before him and was not referred to by him. He continued:

“Thirdly, in supplying want of execution of powers; and, fourthly, in regard to giving effect in any other manner to any act or deed by a tenant in tail or protector which in a court of law would not be an effectual consent or disposition under the Act. But the whole of the section is governed by the initial words, ‘In cases of dispositions of lands under this Act by tenants in tail thereof and also in cases of consents by protectors of settlements to dispositions of land under this Act by tenants in tail thereof.’ . . . But it appears to me to be clear that if the legislature had been minded to take away the jurisdiction of courts of equity to enforce contracts entered into by tenants in tail that they would thereafter bar the estate tail very different language from that which is used in this section would have been used.”

That is very much the same as he had said in the earlier case, that if it had been intended to take away the well-known jurisdiction of rectification the statute would have said so.

Up to this point there does not seem to me to be anything in *Bankes v. Small* (2) in conflict with the judgments in *Hall-Dare v. Hall-Dare* (1), but there is a passage of FRY, L.J.’s judgment which, it is said, is inconsistent with what he said in that case. I do not so read it. It is as follows (*ibid.* at p. 730):

“I have come, therefore, to the conclusion that the true meaning of this section is to exclude all jurisdiction to treat as effectual in equity under the Act, either on the ground of specific performance, relief against defective execution or non-execution of powers, or on any other ground, an assurance intended to operate under the Act which is not effectual under the Act.”

I think what the learned judge meant there was that you cannot relieve against the defective execution or the non-execution of a power to disentail which has not been exercised, nor on any other ground can the court of equity treat as effectual under the Act an assurance which as such is not so, referring, that is, to deeds which are imperfect as such and which as such are the deeds of the parties, and not to deeds which, having regard to accidental imperfection, are not, unless and until rectified, the deeds of the parties at all. So much for the only two decisions that have been found in this country relevant to this question.

But there is a decision of WYLIE, J., in the Irish courts which, although not binding on me, is deserving of every respect. That was in *Re Ottley’s Estate* (3), where the learned judge expressed the view, although he did not base his judgment on it, that the judgments in *Hall-Dare v. Hall-Dare* (1) should be qualified in the way extended for by counsel for the defendants in this case. The learned judge said ([1910] 1 I.R. at p. 8):

“Now, reading those judgments apart from the particular facts of the case, they would seem to decide that, notwithstanding s. 47 of the Fines and Recoveries Act, the court has the same power to rectify a disentailing deed so as to make it conform to the intention of the parties as in the case of any other deed. But in reading and applying those judgments it seems to me that we must have regard to the nature of the rectification applied for and granted in that case, which was to insert in the deed limitations to the second and other sons of the tenant for life which had by mistake been omitted before the limitations over to collaterals. And what distinguishes that case from the present

A case is that the amendment in that case had no effect upon the deed as a disentailing assurance. It was an effective disentailing deed, whether the rectification applied for was granted or not; but here the amendment applied for is for the very purpose of changing the deed, which at present it is assumed does not bar the entail, into an effective disentailing assurance. In a later case of *Bankes v. Small* (2), where an action was brought to compel a tenant in tail to execute a disentailing deed pursuant to his contract, the effect of s. 47 was again discussed."

The learned judge, after reading the passage from *Fry*, L.J.'s judgment (36 Ch.D. at p. 730) which I have already read, continued:

"Now, comparing this statement of *Fry*, L.J., with the observations which I have quoted from his judgment in *Hall-Dare v. Hall-Dare* (1), it seems to me to show that when the Court of Appeal laid down broadly in that case that the power of a court of equity was to rectify a deed was not affected by s. 47 in the case of a disentailing deed, they had not present to their minds such a rectification in the form of a deed as would change a non-effective into an effective disentailing assurance."

I am unable to come to the same conclusion as *Wylie*, J., did. I have no reason to suppose that the learned judges who took part in *Hall-Dare v. Hall-Dare* (1) were not perfectly capable of appreciating the meaning of the language which they so decidedly made use of, and I am unable to believe that if the judges who decided *Bankes v. Small* (2), to whom *Hall-Dare v. Hall-Dare* (1) had been cited, had intended to express themselves in a way which was inconsistent with the judgments in that case they would not have said so in plain terms. I cannot believe that *Fry*, L.J., can have intended indirectly to overrule his own previous expression of opinion. I, therefore, come to the conclusion, as far as the Act is concerned, that I am not prohibited by s. 47 from directing the rectification which the plaintiff seeks.

The second point which has been taken is that if I have jurisdiction to rectify this document I ought not to exercise it against the defendant, the daughter of Mr. Bertram Meeking, on the ground that she was not a party to the transaction in question, but claims by title paramount per formam doni. For that proposition *A.-G. v. Day* (5), *Hinton v. Hinton* (4), and cases of that character have been cited. *LORD HARDWICKE* in the latter case said (2 Ves. Sen. at p. 634):

"It is truly said, that if a man, seised of an estate tail with or without remainders over, contracts for sale, and receives the purchase money, and dies in the first case without levying a fine, or without a recovery in the last case, this court would not carry into execution against the issue in tail: as was the case of Mr. Savill, of Medley, who when tenant in tail chose rather to live in gaol, and be served in plate there, than to perform his agreement; but the ground of that is, the issue in tail in the one case or remainderman in the other claim per formam doni from the creator or author of the estate tail, and therefore though in the power of the tenant in tail to be barred by a particular conveyance, that not being done, the court cannot take away that right they derive, not from the tenant in tail, but from the author."

I do not think that that applies to rectification at all. Rectification is only made on the ground that the inaccurately expressed document, which was executed as an assurance, is not in its inaccurate form the deed of the parties at all, and if a proper case is made out on the evidence, and I think it is obviously made out here, the duty of the court is to put the document in the form in which it must be in order for it to be and remain the deed of the parties to it. Miss Meeking, the defendant, is not quite in the position in which the issue were in *Hinton v. Hinton* (4). This disentailing assurance was part of a marriage contract, and, for all I know, the marriage might never have taken place if the disentailing and

re-settlement had not been arranged and carried out, but, however that may be, it does not seem to me that the reasoning of *Hinton v. Hinton* (4) applies to rectification at all, and I think it has been amply made out in the present case that the transaction was based on the obvious intention to make an effective disentailing assurance and re-settlement, and that none of the parties to the present case is in a position either to contest this or prevent rectification being decreed. That being so, the relief claimed by the plaintiff must be granted.

Solicitors: *Pontifex, Pitt & Johnson*.

[Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.]

Re KING. JACKSON v. ATTORNEY-GENERAL

[CHANCERY DIVISION (Younger, J.), July 12, 13, 17, 18, 24, 1917]

[Reported [1917] 2 Ch. 420; 87 L.J.Ch. 3; 117 L.T. 529; 33 T.L.R. 535;
62 Sol. Jo. 9]

Will—Gift to servants—"Persons in my service at my decease"—Testator found lunatic by inquisition—Servants engaged on behalf of testator by authority of committee.

Charity—Practice—Compromise of proceedings—Citation of charity—No appearance—Power of Attorney-General to assent on behalf of absent charity.

By a sixth codicil, dated Jan. 22, 1908, which revoked the material bequests in the will and five previous codicils, the testator bequeathed to each person in his service at his death a sum equal to one year's wages in addition to any legacy thereinbefore bequeathed as well as the wages then due. The testator gave legacies to various charities and directed that his residuary personal estate should be held on trust to be divided among four charitable institutions to be selected by his trustees. On Mar. 21, 1908, the testator was found a lunatic by inquisition, and on April 7, 1908, the Official Solicitor was appointed committee of his person. He resided in a house maintained under the authority of the Master in Lunacy and O. was appointed to be his companion and attendant with authority to engage servants. At the testator's death on Mar. 5, 1915, besides O. a coachman, butler, gardener, cook, and housemaid were employed at the house, all having been engaged by O. On Mar. 15, 1915, the heir-at-law and next of kin sought to set aside the sixth codicil in a probate action in which the Attorney-General was made a party and citations were served on the charities which, however, did not enter an appearance and were not represented. During the hearing a compromise was arrived at, the terms of which were signed by the Attorney-General and the other counsel, and thereupon a decree was made in favour of the will and all the six codicils, the claimants under the sixth codicil, under the terms, to give up one-third of their legacies. The charities were informed of the compromise and the decree, but made no objection.

Held: (i) neither O. nor the other servants engaged by him were persons in the service of the testator at the time of his death and consequently were not entitled to the legacies; (ii) the Attorney-General had authority to assent to a compromise on behalf of absent charities who had been cited, but did not appear, and accordingly, the charities were bound by the compromise.

Notes. Distinguished: *Re Silverston, Westminster Bank, Ltd. v. Kohler*, [1949] 1 All E.R. 641.

A As to the rules of construction where there is a gift in a will to the servants of the testator, see 34 HALSBURY'S LAWS (2nd Edn.) 323, 324; and for cases see 44 DIGEST 903. As to compromise of proceedings where the Attorney-General is a party and the charity is cited but does not appear, see 4 HALSBURY'S LAWS (3rd Edn.) 447; and for cases see 8 DIGEST (Repl.) 522.

Cases referred to:

- B (1) *Re French* (1868), 3 Ch. App. 317; 37 L.J.Ch. 537; 18 L.T. 139; 16 W.R. 657, L.J.; 33 Digest 187, 834.
- (2) *Re Lawson, Wardley v. Bringlee*, [1914] 1 Ch. 682; 83 L.J.Ch. 519; 110 L.T. 573; 30 T.L.R. 335; 58 Sol. Jo. 320; 44 Digest 900, 7593.
- (3) *Ware v. Cumberlege* (1855), 20 Beav. 503; 3 Eq. Rep. 656; 52 E.R. 697; 8 Digest (Repl.) 517, 2472.
- C (4) *Wytcherley v. Andrews* (1871), L.R. 2 P. & D. 327; 40 L.J.P. & M. 57; 25 L.T. 134; 35 J.P. 552; 19 W.R. 1015; 23 Digest (Repl.) 118, 1207.
- (5) *Ritchie v. Malcolm*, [1902] 2 I.R. 403; 23 Digest (Repl.) 118, * 373.
- (6) *Re Lart, Wilkinson v. Blades*, [1896] 2 Ch. 788; 65 L.J.Ch. 846; 75 L.T. 175; 45 W.R. 27; 40 Sol. Jo. 656; 44 Digest 562, 3794.

D Also referred to in argument:

- Re Ponsonby* (1842), 3 Dr. & War. 27; 33 Digest 215, 1228i.
- Grosvenor v. Drax* (1883), 2 Knapp, 82; 12 E.R. 410, P.C.; 33 Digest 229, 1408.
- Strangeways v. Read*, [1898] 2 Ch. 419; 67 L.J.Ch. 581; 79 L.T. 245; 46 W.R. 671; 14 T.L.R. 508; 42 Sol. Jo. 654; 33 Digest 187, 836.
- A.-G. v. Exeter Corpn.* (1827), 2 Russ. 362; 38 E.R. 372, L.C.; 8 Digest (Repl.) 521, 2550.
- E *A.-G. v. Boucherett* (1858), 25 Beav. 116; 53 E.R. 580; 8 Digest (Repl.) 522, 2560.
- Re Cardwell, A.-G. v. Day*, [1912] 1 Ch. 779; 81 L.J.Ch. 443; 106 L.T. 753; 28 T.L.R. 307; 56 Sol. Jo. 361; 8 Digest (Repl.) 534, 2803.
- Re Faraker, Faraker v. Durell*, [1912] 2 Ch. 488; 81 L.J.Ch. 635; 107 L.T. 36; 56 Sol. Jo. 668, C.A.; 8 Digest (Repl.) 419, 1102.

F **Adjourned Summons** to determine the construction of a will.

The testator, William Henry King, by his will and five codicils thereto appointed certain funds over which he had a power of appointment as therein mentioned, and devised and bequeathed all his real and personal property, subject to a specific gift of certain shares, to his wife (who died in his lifetime), and to the payment of certain pecuniary legacies. By the sixth codicil to his will, dated Jan. 22, 1908, his wife being then dead, the testator appointed fresh trustees of his will and codicils, and revoked all the appointments, devises, bequests, and legacies contained in his will and the five previous codicils (except the bequest of the shares), and, after certain dispositions and specific bequests, not material to the case, he bequeathed his residuary personal estate to his trustees upon trust for sale and conversion, and, after payment of his funeral and testamentary expenses and debts and legacies, upon trust to divide the proceeds of sale and conversion between four charitable institutions in Great Britain to be named and selected by his trustees; and he bequeathed pecuniary legacies to various persons and to various charities, and among others a legacy of £2,000 to the treasurer of the Primitive Methodist Chapel in Durham Street, Rochdale. He also bequeathed

I "To each person in my service at my decease a sum equal to one year's wages (in addition to any legacy hereinbefore bequeathed as well as to the wages then due to him or her)."

On Mar. 21, 1908, after an inquisition, the testator was found to be of unsound mind, and on April 7, 1908 the Master in Lunacy appointed the Official Solicitor to have the custody of the person of the lunatic, and the custody of his estate was committed to another person. The testator at the time he made the sixth codicil and also till after the last-mentioned order was residing at Garstang in Lancashire.

But in September, 1908, under the authority of the Master in Lunacy, he went to a house at Torquay, where he resided until his death on Mar. 5, 1915. The Official Solicitor, as committee of the person, in April, 1908, appointed W. H. Oldfield to be companion and attendant on the testator, and at the time of his death there were employed at his house at Torquay, besides the attendant, a coachman, butler, gardener, cook, and housemaid, all of whom had been engaged by Mr. Oldfield on behalf of the testator and with the authority of the committee. On Mar. 15, 1915, J. R. King, as heir-at-law and next of kin of the testator, commenced an action (*King v. Jackson*) in the Probate Division, in the matter of the estate of the testator, against the trustees under the sixth codicil, claiming that the court should pronounce against the sixth codicil and for the will and first five codicils. Citations to see proceedings were served upon the Attorney-General and (among others) the legatees under the sixth codicil, including the charitable institutions (except two of them who had in previous codicils received the same legacy), and upon (amongst others) the treasurer of the Primitive Methodist Chapel, but neither the Primitive Methodist Chapel nor any other of these institutions entered any appearance in the action or were represented by counsel at the trial. The action was heard by HORRIDGE, J., and a special jury, and on Mar. 20, 1916, during the hearing, a compromise was agreed upon by all the persons and institutions represented by counsel, including the Attorney-General, the terms of which were signed by him and the other counsel. Thereupon a final decree was pronounced for the force and validity of the will and six codicils, and probate thereof was granted to the defendants in the action, the executors appointed by the sixth codicil. The terms of compromise were that probate should be decreed of the will and six codicils upon these (among other) terms:

"1. The beneficiaries under the sixth codicil, including the named charities, to relinquish in favour of the plaintiff one-third of the amounts devised or bequeathed to them in the sixth codicil, including one-third of the value of Brooklands. The executors to carry this term into effect . . . (3) The plaintiff to receive one-third of the residue of the estate after payment of the specific legacies above mentioned in addition to the before-mentioned amounts relinquished in his favour."

So soon as that compromise was arrived at, steps were taken to inform the charitable legatees of what had happened. No complaint or remonstrance on the part of these charities was made. On Jan. 11, 1917 the present summons was taken out by the executors and trustees appointed by the sixth codicil asking, among other things, whether the bequest in favour of persons in the testator's service took effect in favour of Mr. Oldfield and the servants employed at the house where the testator was residing at his death; whether those legatees were entitled to be paid in full notwithstanding the compromise; and whether the Primitive Methodist Chapel and the other charities, where proper officers were cited but did not appear in the probate action, were entitled to have their legacies under the sixth codicil paid in full having regard to the fact that the Attorney-General was a party to the probate action and to the compromise. The claim of the persons employed at the residence of the testator was first argued.

Stamp for the plaintiffs.

Austen-Cartmell for the Attorney-General.

H. Terrell, K.C., and P. F. Wheeler for J. R. King, the heir-at-law and next of kin.

Owen Thomson for the Primitive Methodist chapel.

H. D. Grazebrook for specific legatees.

Graham Mould for other parties.

YOUNGER, J. [after stating the facts relating to this part of the case and saying that, as the sixth codicil had been admitted to probate, it must be accented as a fact that the testator was of sound mind when he made it].—The question is

whether the servants in attendance on the testator at his decease took the benefit of the bequest. One of them, Mr. Oldfield, was appointed directly by the committee of the person of the testator to look after his household. The others, some of whom discharged very intimate personal services to the testator, were appointed by Mr. Oldfield. But none of them was in any sense appointed by the testator himself, nor were any of them in any other sense in his service at the time of his death. The question is whether any of them can claim this legacy as being a person in his service at his decease. In my opinion they cannot. I think that these persons were either in the service of the committee of the person or, as counsel for the Attorney-General put it, they were in the service of the court; but I do not think that there was at the testator's death any person who was in his service within the meaning of these words. The committee of the person under a scheme in lunacy was apparently allowed a certain sum by means of which he was to provide for the comforts of the testator, and, amongst other things, the engagement of a proper staff of servants; and counsel for the heir-in-law cited an authority *Re French* (1) which shows that the committee of the person is not liable to account for the actual disposition of moneys placed in his hands for the purpose so long as he discharges the duty of maintaining the lunatic, which it is not disputed, has been properly done in this case. It appears to me, therefore, that these people cannot be said to have been in the service of the lunatic as persons either appointed or paid by him. They were in fact paid for by the committee of the person out of the money allowed to him for that and other purposes, and were also appointed mediately or immediately by him.

In those circumstances it appears to me that these persons do not answer the description of persons "in my service at my decease," unless the words can be read as meaning "attending upon me at my death." And it has been suggested that they may bear that meaning. But when one remembers that the testator was of sound mind when he made this codicil, and that he made it presumably with reference to servants who had been engaged and would in ordinary course continue to be engaged by himself, I see no reason for extending the ordinary meaning of the words which he used. In these circumstances I think that neither Mr. Oldfield nor any of the other servants is entitled to the benefit of the legacy. I ought perhaps to refer to the decision of EVE, J., in *Re Lawson* (2), where the gift was "to each of my domestic servants who shall have been in my service for two years prior to my decease." EVE, J., did allow the legacy to a male nurse who was first engaged by a receiver appointed under s. 116 of the Lunacy Act, 1890. It is, however, obvious from the report either that there were special circumstances which enabled the judge to hold without question that the servant in that case was in the service of the testator, or that the point was not taken or pressed in argument. It is not certainly discussed in the judgment, and I do not think the decision can be considered as an authority either one way or the other on the point which has been definitely argued before me. Moreover, the difference between a receiver and a committee of the person may be, and I think properly is for this purpose, very marked. The answer to the question raised by the summons will be that the bequest did not take effect in favour of Oldfield or of the other persons claiming it.

[The question whether the absent charities were bound was next argued.]

Cur. adv. vult.

July 24, 1917. YOUNGER, J., read the following judgment and after stating the facts continued:—The questions that I have now to determine are whether these charitable institutions are bound by the assent of the Attorney-General which was given on their behalf, and whether, even if they were not so bound, it is open to them now in these proceedings to renudiate the compromise come to in the Probate Division. With regard to the first question, I think the most authoritative statement as to the position of the Attorney-General in such matters is to be found in the judgment of SIR JOHN ROMILLY, M.R., in *Ware v. Cumberlande* (3). SIR JOHN

ROMILLY, having been asked by the Attorney-General of the day to state what was the practice with regard to the Attorney-General's intervention in charity matters, made this statement (20 Beav. at pp. 510-512):

"It is difficult to lay down any general rule which shall be adapted to every case; there must be a great deal of discretion in these matters. The general principle which regulates them I take to be something of this description:—the Attorney-General represents all absent charities, and it is sufficient to have him here to represent all absent charities. But absent charities may obviously be of two different characters; they may either be under gifts to specified individual charities, or to charity generally. In case the gift is for charity generally, no one can represent it but the Attorney-General, and he must be here to represent such general charities. When there are specified individual charities then the Attorney-General's presence is not universally necessary; but it is required by the court upon various occasions, as, for instance, where any rules are required for the regulations of the internal conduct of the charity itself, such as the establishment of a scheme and the like; there the Attorney-General is necessary for the purpose of aiding and assisting the court in directing and sanctioning the general system and principle that ought to govern charities of those descriptions. But there are other cases where there is no question as to the conduct or management of the charities, but only whether the charity is entitled to a particular legacy or not. In those cases, the Attorney-General is rather in the nature of a trustee for those charities, and the court prefers having before it the parties beneficially interested, for the purpose of putting their interests before the court in the light which they consider most favourable to them. In those cases I think it preferable that the charity itself should appear, rather than that the Attorney-General should represent it. This appears to me one of that latter class of cases, and therefore it would be better that the charity should appear. Having stated that as my general view of the case, it is very obvious, as counsel will see, that there may be mixed cases in which it is impossible to lay down a rule beforehand, and in which this court must act on the matter before it in such manner as, according to the best exercise of its discretion and judgment, it may think best calculated to promote justice."

It appears to me to follow very clearly from these observations of SIR JOHN ROMILLY that in a case like the present, where the charity was in fact cited, as it was properly cited, but did not think fit to appear, and the Attorney-General did remain a party to the proceedings as he was properly a party to them, certainly there was the same power and authority left in him to make any arrangement by way of compromise or otherwise with regard to the absent charity which had been cited but did not appear as there would have been to approve such a compromise had it been made in the presence of that charity. That was, of course, what did in fact happen. These respondents were cited. They did not appear. The Attorney-General did in the compromise which was arrived at take upon himself the duty of protecting not only the charitable purposes indicated—the unnamed charities interested in residue—but he also took it upon himself to protect and bind the interests of the charities which were specially named as pecuniary legatees, and he compromised the proceedings on behalf of all. That compromise was duly notified to all of these charities, and no objection was ever taken (nor is now taken) to the propriety of that compromise. And accordingly it appears to me clear that it is binding upon them all.

But I desire, if I may, to deal with this case on broader grounds, and I will assume, contrary to what I have stated to be my opinion, that the Attorney-General's consent in this case did not bind the absent charities. Now, there is authority for the proposition that in a probate suit it is not necessary for a person to be a party to it in order to be bound by its result. But there is also clear authority for the proposition that that rule, otherwise apparently a general rule, has

A no application to a case where the parties to the proceedings think fit to take upon themselves the responsibility of compromising it. An absent party, who would include one that had been cited but did not appear, is not, it appears, bound by a compromise of the proceedings made subsequently in the action. That principle is laid down very clearly by LORD PENZANCE in *Wytcherley v. Andrews* (4), where he says (L.R. 2 P. & D. at pp. 328, 329):

B "On the other hand, there is a practice in this court by which any person having an interest may make himself a party to the suit by intervening; and it was because of the existence of that practice that the judges of the Prerogative Court held that if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result and not be allowed to re-open the case. That principle is founded on justice and common sense, and is acted upon in courts of equity, where, if the persons interested are too numerous to be all made parties to the suit, one or two of the class are allowed to represent them, and if it appears to the court that everything has been done bonâ fide in the interests of the parties seeking to disturb the arrangement it will not allow the matter to be re-opened. That has been undoubtedly the rule also in the Prerogative Court, but I do not find that it has ever been applied to cases of compromise. It is one thing to say that a person who stands by and lets another fight his battle must be bound by the result of the contest; and it is quite another thing to say that, without any notice that there was going to be a compromise and without any knowledge that the suit was not proceeding to its natural end, he must nevertheless be bound by any agreement which the parties to the suit may choose to enter into. That would be carrying the rule very far indeed. I find no authority for carrying it to that length, and I am not disposed to extend it beyond the limit within which it has been confined in former cases."

F Accordingly, as a result of that opinion of LORD PENZANCE in that case, one of the next of kin of a testator who had not been a party to previous proceedings in which an application to set aside his will had been dismissed and the will had been admitted to probate by a compromise made with one of the next of kin who was a party to the proceedings, was permitted to re-open the proceedings and to claim, notwithstanding the probate which was the result of that compromise, to have it set aside on cause shown. That principle was also followed in *Ritchie v. Malcolm* (5). The result appears to be that the parties in a case like the present who were not present in the Probate Division may seek to recall the probate which was the result of a compromise there if they have ground for having that probate set aside.

H The position of the charities here, however, is very different. Their claim is to stand by the probate, not to have it set aside. The sixth codicil, they say, was proved in solemn form, and by virtue of the order which followed thereon they are entitled to receive everything which in due course of administration that codicil gives them, free from any obligation to submit to a deduction made under some agreement to which they were not parties; and that although upon the propriety or even the necessity of that agreement they offer no criticism. The position, of course, is plausible; it is not, however, I think, tenable. It is not, to my mind, true to say that the codicil was admitted to probate merely on the evidence adduced of due execution. It was in fact so admitted as one term of an agreement without which probate would at the best have followed only after prolonged litigation, and at the worst might never have followed at all. In truth and in substance, therefore, anyone now seeking to claim under that codicil as proved is claiming the advantage of that agreement. And it would appear primâ facie to follow that if he takes that advantage he must submit to bear his assigned portion of the burden by means of which that advantage was secured. If it is said that in a case like the present in which the claimants have no interest to recall the probate it would

result from that view that they in effect are held bound by a compromise to which they were no party, notwithstanding LORD PENZANCE's decision to the contrary, the answer is that is not so. The only effect of LORD PENZANCE's principle is that a person not bound by a compromise, who is dissatisfied with the act of the court which follows thereon, is at liberty to institute fresh proceedings and by the strength of his own case to have that act of the court recalled. LORD PENZANCE did not decide that that act would be recalled without more so soon as it appeared that all persons interested in the estate were not bound by the compromise upon which it followed. It stands until on cause shown it is recalled. So here, even if it is said that the charity having no interest to recall the probate must take it as they find it, and if they seek to claim under it they must submit to bear their assigned burden, that does not mean that if they are prepared affirmatively to establish either that the particular burden assigned to them was unfair or that it should not have been imposed upon them at all they are without remedy. If, for instance, in the present case the charity were as against the plaintiff in the probate action to establish affirmatively that the testator was of sound disposing mind at the date when he executed his sixth codicil or if they were able to show—I do not think that they could—that, even if he was not, the payment to the plaintiff in that action by way of compromise should have been made exclusively out of residue, and that no part of it should have been charged against their legacies, I see no reason why in a proper proceeding they should not do so, and why they should not, if successful, receive in the result their legacies intact. But that burden is upon them, and until assumed and discharged they must bear their part of the compromise, just as they would have had in effect to do if their position had been that they took nothing under a probate following a compromise by which they were not bound. In that case they could claim nothing from the estate until they had successfully asserted their right to have that probate recalled and have their own title established. I would only add that this conclusion is, I think, supported by such a decision as that of CHITTY, J., in *Re Lart* (6). This is not the first time in which this court, as the court of administration, has found it difficult to work out compromises of probate proceedings entered into without full regard to the interests of absent parties. I hope that the fact that this difficulty has not in the present case, even as regards the individual legatees, materialised, will be no encouragement to increase the number, already large enough, of such arrangements.

Solicitors: *Hargreaves & Crouthers*, for *Johnson & Tilly*, Lancaster; *G. & G. Keith*; *Mann & Crimp*, for *Kitsons, Hutchings, Easterbrook & Co.*, Torquay; *Treasury Solicitor*.

[Reported by N. TEBBUTT, Esq., Barrister-at-Law.]

Re INDO-CHINA STEAM NAVIGATION CO.

[CHANCERY DIVISION (Eve, J.), May 17, 25, 1917]

[Reported [1917] 2 Ch. 100; 86 L.J.Ch. 723; 117 L.T. 212]

B Company—Shares—Register—Rectification—Blank transfer executed by transferor—Name of transferee filled in—Insufficient stamp duty—No notice to company—Application by company to rectify register—"Person aggrieved"—Power of court to determine title to shares—Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 32.

C H. sold sixty shares in the N. company to M. H. & Co., Ltd., and handed over the certificate and a transfer in blank under seal executed by him. Subsequently M. H. & Co., Ltd., filled in the name of G., who was their clerk, as the transferee and lodged the transfer, which purported to be for a nominal consideration of 10s. and was stamped with a 10s. stamp only, together with the certificate, for registration with the N. company who were unaware of the insufficiency of the stamp duty. On receipt of the usual notice of intended transfer H. raised an objection to registration, but owing to changes in staff the matter was overlooked and G.'s name was placed on the register of members. The certificate, however, was not handed to him. Subsequently, in view of the objection taken by H., the register of members was altered by reinserting the sixty shares under the name of H. The articles of the N. company did not require transfers of shares to be by deed, but by an instrument in writing signed by both the transferor and the transferee. M. H. & Co., Ltd., paid a penalty and procured the stamping of the transfer with the proper ad valorem duty. As neither H. nor G. would move in the matter the N. company applied by summons under s. 32 of the Companies (Consolidation) Act, 1908, for rectification of the register by restoring and retaining the name of G. on the register and H. and G. were made respondents.

F **Held:** the court had jurisdiction to determine the rights of the respondents and decide the question of title to the shares as soon as there was a person aggrieved within the section and the application was properly made; further, although the N. company as against G. could have refused to register the transfer so long as it was insufficiently stamped, H. was not entitled to maintain that the transfer was void, he having been paid the full consideration; and, the registration of the transfer to G. having been made without notice of the insufficiency of the stamp duty, the subsequent alteration of the register was nugatory and G.'s name ought to be retained on the register as holder of the shares.

H **Notes.** Section 32 of the Companies (Consolidation) Act, 1908, has been replaced by s. 116 of the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 549.

As to rectification of the register of members of the company, see 6 HALSBURY'S LAWS (3rd Edn.) 316 et seq., and for cases see 9 DIGEST (Repl.) 215 et seq.

Case referred to:

I (1) *Maynard v. Consolidated Kent Collieries Corpn.*, [1903] 2 K.B. 121; 72 L.J.K.B. 681; 88 L.T. 676; 52 W.R. 117; 19 T.L.R. 448; 47 Sol. Jo. 513; 10 Mans. 386, C.A.; 9 Digest (Repl.) 383, 2473.

Also referred to in argument:

Re Tahiti Cotton Co., Ex parte Sargant (1874), L.R. 17 Eq. 273; 43 L.J.Ch. 425; 22 W.R. 815; 9 Digest (Repl.) 218, 1388.

Re Tees Bottle Co., Ltd., Davies' Case (1876), 33 L.T. 834; affirmed on appeal (see 38 L.T. 147); 9 Digest (Repl.) 218, 1391.

Ortigosa v. Brown (1878), 47 L.J.Ch. 168; 38 L.T. 145; 9 Digest (Repl.) 434, 2840.

Ireland v. Hart, [1902] 1 Ch. 522; 71 L.J.Ch. 276; 86 L.T. 385; 50 W.R. 315; 18 T.L.R. 253; 46 Sol. Jo. 214; 9 Mans. 209; 9 Digest (Repl.) 397, 2546. A

France v. Clark (1884), 26 Ch.D. 257; 53 L.J.Ch. 585; 50 L.T. 1; 32 W.R. 466, C.A.; 9 Digest (Repl.) 380, 2452.

Adjourned Summons.

The applicants, the Indo-China Steam Navigation Co., Ltd., by their originating summons issued on Jan. 10, 1917, against the respondents, Frank Ernest Green and Cyril Oswald John Hopkinson, asked for an order that, notwithstanding the claim of the respondent Hopkinson to be owner of sixty fully-paid deferred ordinary shares of £5 each in the company therein mentioned, the company might be authorised to rectify the register of members of the company by restoring and retaining the name of Frank E. Green to and on the register as holder of the shares. B

The facts are stated in the judgment. C

Clayton, K.C., and *C. W. Turner* for the applicants.

Gore-Browne, K.C., and *Whinney* for Green.

Maugham, K.C., and *Owen Thompson* for Hopkinson.

Cur. adv. vult. D

May 25, 1917. **EYE, J.**, read the following judgment: In the month of January, 1916, the respondent Cyril O. J. Hopkinson sold to Mortimer, Harley & Co., Ltd., in whose employ he then was as a general manager, 930 fully-paid deferred ordinary shares of £5 each in the capital of the Indo-China Steam Navigation Co., Ltd., for sums amounting in all to £18,541 17s. 6d. Of these shares, 870 were transferred to the purchasers or their nominees, but in respect of the remaining sixty all they received was the certificate and a transfer in blank executed by the vendor. To this transfer I shall have occasion to refer more particularly by and by, but in order to explain the attitude which the vendor, who does not dispute that he has been paid for the shares and who sets up no title to retain the same on the ground of lien or otherwise, has since adopted, I interrupt the narrative of events to state that immediately after this transaction of sale and purchase the purchasers purported to determine Hopkinson's engagement as their manager and commenced proceedings against him, alleging that in this and other transactions he acted in breach of his duty towards them, and in these proceedings, still pending in the King's Bench Division, Hopkinson by counterclaim seeks to recover a large sum as damages for wrongful dismissal and in respect of other matters of which he complains. This position of affairs he treats as a sufficient justification for his opposing on technical grounds the making of any order on this summons which would have the effect of transferring to the nominee of the purchaser the shares which he sold to them and for which they paid him the purchase price. E

I resume the statement of facts. Early in April the purchasers filled in the name of the respondent Frank Ernest Green—a clerk in their employ—as transferee in the transfer executed by Hopkinson, and about May 20, the transfer with the certificate of the sixty shares was lodged with the Navigation company for registration. This company, in accordance with its usual practice, gave notice of the lodging of the transfer to the transferor, and, on his raising an objection to the registration being proceeded with, some correspondence followed, and the matter was allowed to fall into abeyance for a time. The subsequent events are disclosed in a letter of Nov. 16, addressed by the solicitors of the Navigation Co. to Mr. Hopkinson's solicitors in which they write: F

“In May last, when the transfer to Mr. Green was put forward, our clients communicated with Mr. Hopkinson in the usual way, and at his request promised to delay registration of the transfer until they heard further from him. Owing, however, to changes of staff in London, this correspondence was overlooked and the transfer was passed and Mr. Green's name was placed upon the register in July. The new certificate has not been handed to him, however, G

A and, on the correspondence with Mr. Hopkinson being discovered, the London secretaries, being under the impression that the registration of Mr. Green might not be justified, in fact amended the register. We are advised, however, that this amendment is nugatory and that Mr. Green is, therefore, the registered owner of the shares, and it is consequently proposed to hand the certificate over to him unless within fourteen days your client takes steps to establish his right to the shares."

B Hopkinson's advisers in reply to this communication declined to accede to the view that the striking out of Green's name was nugatory, and, after stating their opinion that Hopkinson was then on the register and that there was therefore nothing for him to do, they concluded thus :

C "If Mr. Green wishes to be registered as the owner of the shares, he has a very simple remedy by application to the court by originating summons to be placed on the register, and this we submit is the proper course for him to pursue."

D But neither Green nor Hopkinson would move in the matter, and, after waiting for some weeks, the company issued this summons under s. 32 of the Companies (Consolidation) Act, 1908, and served it upon both of them asking for an order that, notwithstanding the claim of Hopkinson to be the owner of the shares, the company may be authorised to restore Green's name to the register as the holder thereof. In other words, the company applies to the court under s. 32 (1) to rectify the register by reinserting therein the name which was improperly struck out of, and is now without sufficient cause omitted from, the register, and on such application the court has power under s. 32 (3) to decide any question relating to the title of
E any person who is a party to the application to have his name entered in or omitted from the register. I point this out because one objection raised on Hopkinson's behalf was that, in view of the attitude adopted by the company in treating Green as the registered holder, there were no grounds for any application under the section by the company or Green, and that, in the absence of an application by Hopkinson, there was nothing to discuss, and the summons ought therefore to be
F dismissed. But in my opinion there is nothing in this objection. If it is a good answer to the company's summons, it would be an equally good one to a summons by Green, but had he been the applicant it could hardly have been advanced seriously in view of the challenge contained in the letter from Hopkinson's solicitors and the invitation to Green to adopt this very procedure. But the short and
G conclusive answer to the objection is this, that the section is brought into operation as soon as there is a person alleging himself to be aggrieved by an improper entry in or omission from the register, and thereupon it is open to the person so aggrieved or to the company, or to any member of the company, to come to the court under the section. Hopkinson had taken up the position of the person aggrieved some weeks before the summons was issued, and in these circumstances I have no doubt that
H the application is properly made, and that I have jurisdiction to determine the rights of the respondents upon the summons.

I Returning now to the transfer which Hopkinson signed and handed with the certificate to Mortimer, Harley & Co., it is under seal, and it is not disputed that as a deed it is void and inoperative by reason of the additions made in it subsequent to its execution by Hopkinson, but the articles of association of the Navigation company do not require shares to be transferred by deed, but by an instrument in writing in the usual common form signed both by the transferor and transferee, and it is conceded that when Hopkinson took the purchase moneys and handed the blank transfer and certificate to Mortimer, Harley & Co. he must be taken to have agreed to transfer the shares and to have authorised them to complete the transaction by such additions to the document as would enable them to have the shares legally vested in them or their nominees or assignees. He cannot and does not complain in these circumstances of the insertion of Green's name as transferee, but his point is that, in inserting 10s.

instead of the true purchase price as the consideration for the transfer, Mortimer, Harley & Co. or Green acted in excess of or contrary to any implied power or authority conferred on them or him by the delivery of the transfer, and that it is now competent for him to set up the case that the transfer so completed does not and cannot confer any right on the transferee to be registered as the legal owner of the shares. I think there are several answers to this objection. In the first place, there is no evidence that the amount of the consideration was not already inserted when the transfer was handed to Mortimer, Harley & Co. It is true, on the other hand, that there is no evidence that it was, but this is accounted for by the fact that Hopkinson never suggested this particular objection until the summons came on to be heard, and the doubt could not then be cleared up as Green is absent on active service in the Navy, and the consideration and other written matter in the transfer is in his handwriting.

But, even assuming that the incorrect consideration was filled in after Hopkinson had executed and handed over the transfer, and that the transfer was, therefore, inadequately stamped with a duty of 10s., and inoperative while so inadequately stamped as a transfer, I cannot see how Hopkinson, with the full consideration money in his pocket and without attempting to set up any right or title to or any interest in the shares, could have been heard in this court successfully to assert the right to remain on the register in respect of the shares in breach of the contract of sale evidenced by his execution of the document and admitted by him to have been made. No doubt had he, or, for that matter, anybody else, given notice to the Navigation company that the consideration was not truly disclosed and that the transfer was not duly stamped according to law, the directors of that company would have refused to register the transfer (see *Maynard v. Consolidated Kent Collieries Corpn.* (1)) until satisfied on the point; but this refusal could, and, of necessity, would, have been withdrawn on their being satisfied that the proper duty had been paid, and thereupon, without any further reference to Hopkinson, the transfer would have been registered. The fact that, as between the Navigation company and Green the former could properly have refused to register the transfer so long as it was insufficiently stamped could not, in my opinion, entitle Hopkinson to maintain the attitude that the transfer was void and his signature a nullity. The most he could do was to assert that which was undoubtedly the fact, that the registration of the transfer while inadequately stamped could not operate to bring about a legal transfer of the shares into the name of the transferee. But the fact is that the Navigation company, so far from having notice of the insufficiency of the stamp duty paid on the transfer, were informed by a declaration subscribed by the manager of Mortimer, Harley & Co. and by Green that it was sufficiently stamped with a 10s. stamp, and thereupon registered the transfer and inscribed Green's name in the register as the holder of the shares. Although for reasons unconnected with this question of the stamp duty his name was subsequently struck out, this striking out was a wholly unauthorised act and must be disregarded. The transfer was subsequently stamped with the proper ad valorem duty, and the penalty for neglect to do this in the first instance has been paid. The position, therefore, when the summons came on to be heard was this, that Green's name was on the register, and the transfer by virtue of which Hopkinson's name was taken off and Green's entered had been validated by the payment of the additional duty. In these circumstances it is, in my opinion, impossible for Mr. Hopkinson to claim, as in effect he does, to have Green's name struck out and his own restored, and I make the order for which the company asks in the summons, and I further order Hopkinson to pay the costs of the company and of Green.

Solicitors: *Freshfields; Wansey, Stammers & Co.; Atkey, Clarke & Atkey.*

[Reported by W. P. PAIN, Esq., Barrister-at-Law.]

Re DEBTOR (No. 686 of 1916)

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Warrington and Scrutton, L.JJ.),
March 2, 1917]

[Reported [1917] 2 K.B. 60; 86 L.J.K.B. 745; 116 L.T. 581;
[1917] H.B.R. 123]

Bankruptcy—Receiving order—Moneylender's petition—Re-opening of transaction—Debt exceeding £50 after allowance for relief—Moneylenders Act, 1900 (63 & 64 Vict., c. 51), s. 1—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 1 (1) (g), s. 3, s. 4.

On a petition in bankruptcy for a receiving order by a moneylender founded on non-compliance with a bankruptcy notice in respect of a judgment obtained against the debtor, although the judgment cannot be set aside nor its due execution be restrained, the registrar has power to re-open the transaction and give relief under the Moneylenders Act, 1900, but if after allowance for such relief there still remains a debt due to the petitioning creditor amounting to £50 or more, a receiving order ought to be made on the petition. An adjournment of the hearing to allow the petition to be amended and re-presented so as to state the true figures, the registrar having found that there remained a debt of over £50, held not to be a judicial exercise of his discretion.

Notes. Applied: *Re Debtor (No. 549 of 1928)*, [1928] All E.R. Rep. 505; *Re Debtor (No. 21 of 1937)*, *Petitioning Creditor v. Debtor*, [1938] 2 All E.R. 356.

As to adjournment of the hearing of a bankruptcy petition, see 2 HALSBURY'S LAWS (3rd Edn.) 309 et seq., and for cases see 4 DIGEST (Repl.) 159 et seq. As to bankruptcy proceedings for moneylenders' loans, see 27 HALSBURY'S LAWS (3rd Edn.) 46, and for cases see 35 DIGEST 212 et seq. For the Bankruptcy Act, 1914, s. 1 (1) (g), s. 5 (2), s. 109 (2), see 2 HALSBURY'S STATUTES (2nd Edn.) 325, 333, 420; for the Moneylenders Act, 1900, s. 1, see 16 HALSBURY'S STATUTES (2nd Edn.) 370, and for provisions as to bankruptcy proceedings for moneylenders' loans, see Moneylenders Act, 1927, s. 9, 16 HALSBURY'S STATUTES (2nd Edn.) 390.

Cases referred to:

- (1) *Re Debtor, Ex parte Debtor*, [1903] 1 K.B. 382; 88 L.T. 401; 51 W.R. 370; 19 T.L.R. 288; 47 Sol. Jo. 334; 10 Mans. 130, C.A.; 4 Digest (Repl.) 356, 3236.
- (2) *Wilton & Co. v. Osborn*, [1901] 2 K.B. 110; 70 L.J.K.B. 507; 84 L.T. 694; 17 T.L.R. 431; 35 Digest 212, 375.
- (3) *Re Gentry*, [1910] 1 K.B. 825; 79 L.J.K.B. 585; 102 L.T. 553; 54 Sol. Jo. 377; 17 Mans. 104; sub nom. *Re Debtor, Ex parte Petitioning Creditors and Official Receiver*, 26 T.L.R. 374, C.A.; 4 Digest (Repl.) 128, 1142.
- (4) *Re Vitoria, Ex parte Vitoria*, [1894] 2 Q.B. 387; 63 L.J.Q.B. 795; 71 L.T. 48; 42 W.R. 529; 10 T.L.R. 491; 38 Sol. Jo. 532; 1 Mans. 236; 9 R. 536, C.A.; 4 Digest (Repl.) 145, 1306.
- (5) *Re Fraser, Ex parte Central Bank of London*, [1892] 2 Q.B. 633; 67 L.T. 401; 36 Sol. Jo. 714; 9 Morr. 256, C.A.; 4 Digest (Repl.) 353, 3214.
- (6) *Re Lennox, Ex parte Lennox* (1885), 16 Q.B.D. 315; 55 L.J.Q.B. 45; 54 L.T. 452; 34 W.R. 51; 2 T.L.R. 60; 2 Morr. 271, C.A.; 4 Digest (Repl.) 355, 3231.

Also referred to in argument:

Re Lowe, Ex parte Low (1830), 62 L.T. 263; 38 W.R. 560; 6 T.L.R. 201; 7 Morr. 25, D.C.; 4 Digest (Repl.) 128, 1145.

Appeal by petitioning creditor from the decision of the registrar in bankruptcy

refusing to make a receiving order against the debtor and adjourning the petitioning creditor's petition.

The facts appear from the judgment.

E. W. Hansell, for the petitioning creditor.

A. S. Comyns Carr for the debtor.

LORD COZENS-HARDY, M.R.—This is an appeal by the petitioning creditor raising a curious and an important point of law.

The petitioning creditor is a moneylender. He had had several transactions with the debtor which resulted in this—that there were cash advances made by the petitioning creditor to the debtor with respect to which some small sums have been paid off, but a large amount of interest was calculated. Judgment was obtained for an amount, in round figures, of £710 in December, 1915, and a bankruptcy notice was served for the amount of the judgment debt, following, in that respect, precisely the language of the Act. That bankruptcy notice was for an amount of £660, giving credit for certain sums which had been paid off. That bankruptcy notice was not complied with, and, therefore, on Dec. 23, there was an available act of bankruptcy. That has not been really questioned. A petition was presented on Dec. 27, in the usual form, based upon the act of bankruptcy—namely, the non-compliance with the bankruptcy notice. No attempt was made to impeach the validity of the bankruptcy notice. I do not mean it to be supposed by saying that, that I think in the circumstances of this case the bankruptcy notice could not have been questioned. However it was not questioned, even if it could be. But the debtor, when the application came on for a receiving order, gave notice to dispute the debt, and she said that these moneylending transactions were “harsh and unconscionable” within the meaning of the Moneylenders Act, 1900, and that is her defence. On the “harsh and unconscionable” point the learned registrar thought that it was established. But, he said, looking merely at the actual cash advances, giving credit for every payment which the debtor has made as against the capital, saying nothing today about interest at all, that he was satisfied that there was much more than £50—£440 I think was his figure, £280 of which was for principal only. But the registrar said that he thought that the debtor had been attacked by the moneylender in a manner which was not quite fair and right, because he put the debtor's judgment debt at a figure which might, in proper proceedings, be reduced.

Of course the registrar in bankruptcy cannot set aside the judgment; he cannot restrain an execution upon the judgment. But, according to the decision of this court in *Re Debtor* (1), he can say, and, in the view of the Court of Appeal, ought to say, that, if there is any question whether the petitioning creditor's debt will, when the Moneylenders Act, 1900, is applied to it, be below £50, that destroys the right of the petitioning creditor altogether. That case came before this court nearly fourteen years ago. It is quite true that the main point that was decided in that case was the very important one whether the view taken by RIDLEY, J., in *Wilton & Co. v. Osborn* (2) was right, to the effect that, under the Moneylenders Act, 1900, no transaction could be set aside unless it was such that a court of equity would have set it aside. That decision was disapproved in this court (in *Re Debtor* (1)) and it is now established as the settled law that a harsh and unconscionable transaction can be set aside, even if it is not such that a court of equity would have given relief. In *Re Debtor* (1) the petitioning creditor's debt was £60, more or less, and it was there alleged that interest had been charged on one loan at the rate of 200 per cent. per annum, and on another loan at not less than 80 per cent., and there was the strongest possible ground on the face of things for saying that a debt of £60 would, as a matter of fact, be reduced below £50. And this court held, and the decision binds us, that as to the right to combine the Bankruptcy

Act proceedings with the application under the Moneylenders Act, 1900, the Court of Bankruptcy is a court which can and ought to consider this reduction. We did not send the case back to the registrar to consider what was the amount due, but only to consider whether the amount due to the petitioning creditor amounted to £50, that being one of the statutory conditions required before the petition can be presented. The order made by this court is quit clear upon that point. That is the only order of the court.

The specific point raised in the present case does not seem to have been argued in the Court of Appeal in *Re Debtor* (1). Our attention was directed to the much more important point of the general operation of the Act. But, nevertheless, in that case there seems to be a clear decision upon the point. It was not a mere dictum. It was necessary to the decision itself—namely, that, for the purpose of seeing whether the statutory requirements, without compliance with which no receiving order can be made, had in fact been complied with. We did not say, and, in my view, we could not with any propriety say, that it is the registrar's duty on the petition at this stage to find what is the amount in pounds, shillings, and pence, of the moneylender's debt in respect of which he may be ultimately entitled to prove. We simply said: Let it go back to the registrar to see whether the first of the statutory conditions has been established; namely, Is there a debt due to the petitioning creditor amounting to £50? If there is not, then, of course, the petition is dismissed; if there is, then the petition will stand. But the registrar has said that, under the circumstances, although he thought that there was more than £50 due, assuming everything else in favour of the debtor, he would not make an order now. He would let the petition stand over to be amended and re-presented, stating the true figures, and then to come on again.

Was that an exercise of discretion, which exercise is not appealable? In my opinion, plainly it was not. It is put only upon a ground which seems to me to be quite untenable. The registrar states the right figure and that if the case comes on on an amended petition, possibly the debtor may pay the money. But the petitioning creditor is not bound to receive that money. The act of bankruptcy is not disputed. He cannot be required to receive the money from the debtor after the service of the notice of the act of bankruptcy. Then it is said that the debtor's friends may come forward. If they come forward, not as mere aliases for the debtor but really as friends, I dare say the petitioning creditor will not be indisposed to accept the money. But that is not put before us. Can it be an exercise of a judicial discretion to say that the petition must be directed to stand over in order that it may be amended because, as counsel for the debtor said, and he has argued his case with great ability, there is a distinct hope that some of the debtor's friends may come forward? That is not a ground for refusing a receiving order in the circumstances. This is not a case of fraud. It is not a case under which no debt at all exists. It is, as it seems to me, within the principle of the decision in *Re Gentry* (3) and I think, therefore, that the appeal succeeds, and that the order of the learned registrar must be reversed.

WARRINGTON, L.J.—I am of the same opinion.

The petitioning creditor in the present case is a moneylender. He brought an action against the debtor for the amount due from the debtor to him in accordance with the bargain that they had made. He recovered judgment for the amount so due. No question was raised in that action as to the transaction being "harsh and unconscionable" within the meaning of the Moneylenders Act, 1900. The debtor paid certain sums in part discharge of the debt. The petitioning creditor then served a bankruptcy notice in respect of the balance due under the judgment. That notice was not complied with. No steps were taken with a view of disputing the validity of the notice or with a view of disputing the validity of the judgment, and it is not suggested that the judgment was obtained by fraud. Under those circumstances there was, on the bankruptcy notice not being complied

with, an available act of bankruptcy and it was competent for the present petitioning creditor, or for any creditor whose debt amounted to £50 to present a petition in bankruptcy. In the present case the petitioner was the judgment creditor, who had served the bankruptcy notice and he presented his petition. In it he alleged that the debtor was indebted to him in the balance then remaining due under the judgment. The petition came on for hearing.

It seems to me that things were then in this position: Either the registrar had power, on the hearing of the petition, to re-open the transaction and say whether it was "harsh and unconscionable," and, if he thought it was, then to reduce the amount claimed by the creditor, or he had no such power. If he had no such power, then the creditor has proved his debt by putting in his judgment, by showing the amounts paid in part discharge of it and thus establishing that he is a creditor for the balance. It would have been open to the registrar, of course, to accept evidence that further sums besides those alleged by the creditor had been paid in part discharge, and, in particular, he might have found, if he had so chosen, that the £250 said to have been paid as a bonus had really been paid in part discharge of the judgment debt. Even if he had taken that course, however, the creditor would have proved a liquidated debt for a sum exceeding £50. But, taking it the other way, assuming that the registrar had power to consider whether the transaction was "harsh and unconscionable," and, if he thought it was, then to re-open it and fix the amount which ought to be paid, even in that view the petitioning creditor has still to establish a debt of £50.

It seems to me that, under those circumstances, the petitioning creditor has done all that was necessary for him to do in order to require the court to make the receiving order, which is, after all, not an order made in favour of the petitioning creditor only, but for the protection of the assets for the benefit of all the creditors, in order that they may be duly administered in bankruptcy. Notwithstanding the position, which I think was the true position, the registrar adjourned the petition, and he adjourned it for a reason which he specified in his judgment, and it is said that that was such an exercise of his discretion that this court, cannot or ought not to interfere with it. With regard to the last point, I have nothing to add to what has been said by the Master of the Rolls. I agree with what he has said as to that. I think that there was no sufficient amount of exercise of discretion by the registrar, and there being, in this case, sufficient for a good act of bankruptcy, the debt exceeding £50, he ought to have made the receiving order.

SCRUTTON, L.J.—Probably owing to my lack of familiarity with the subject, I have felt very great doubt during the hearing of this case, and my doubt has not been lessened by the fact that I entirely sympathise with the order that the registrar made, and I think that there was a great deal of sound common sense behind it. I have come to the conclusion, however, that I am bound by two decisions of the Court of Appeal to concur in the judgments which have just been given. But, as the authorities, in my view, are not in a satisfactory position I propose to state the reasons why I come to the conclusion that I have done.

The debtor, a lady, borrowed money from a moneylender, who obtained judgment against her for a sum of £710. As far as I can see, having tried a good many money-lending cases, up to the time when he got judgment there was nothing in the figures which suggested harshness or unconscionableness. At any rate, compared with many figures that I have seen, they appear to be quite reasonable. After the judgment was obtained for £710 the lady brought £300 to the moneylender and then he did what does seem to me a thoroughly outrageous thing. He took £40 off the debt and £10 for costs and he purported to appropriate the other £250—he did not quite know what it was himself, because he sometimes calls it interest and he sometimes calls it a bonus—as a consideration for giving her three months' further time for paying the debt. That does work out at something like 200 per cent., and I think that is a thoroughly oppressive and "harsh and unconscionable"

transaction. She did not pay any more money. Thereupon, having given her a bankruptcy notice for the amount of the judgment, the moneylender applied for a receiving order by a bankruptcy petition. No objection was taken to the bankruptcy notice as such. But notice was given that, on the hearing of the petition, the debtor would raise the question of relief under the Moneylenders Act, 1900. Sub-section (3) of s. 1 of the Moneylenders Act, 1900, provides :

"On any application relating to the admission or amount of a proof by a moneylender in any bankruptcy proceedings, the court may exercise the like powers as may be exercised under this section when proceedings are taken for the recovery of money."

I confess that, left to myself, I should have had some difficulty in getting out of that section a power, on a bankruptcy petition, to consider the amount of the petitioning debt. But I find that the Court of Appeal have succeeded, by some benevolent construction which is rather beyond me, in arriving at the conclusion that it does apply to proceedings on a bankruptcy petition. For in *Re Debtor* (1) the court did send the case back to a registrar who had made a receiving order for him to consider the question whether there was a petitioning creditor's debt, having regard to the powers of the Moneylenders Act. Neither in the report in the LAW REPORTS nor in the other report which I have looked at is there any trace that the meaning of sub-s. (3) of s. 1 of the Moneylenders Act, 1900, was argued upon. That sub-section is not mentioned in either report. But the Court of Appeal could not have made the order it did unless it had considered that that section—and I think that I am bound by that decision—did give power to the registrar, on the hearing of a petition for a receiving order, to consider the question whether having regard to the relief which can be given under the Moneylenders Act, 1900, there is a petitioning creditor's debt.

The next question, on which I feel considerable difficulty, is, What are the powers exactly of the registrar? One thing seems quite clear, and that is that the judgment stands. The registrar cannot alter the judgment. There is still a judgment for £710, and if the petitioning creditor proceeded to put in execution for the judgment for £710, nothing that the Bankruptcy Court did would affect the matter in the slightest. The execution would still go if there is a good judgment, and the Bankruptcy Court has no power to interfere with it. Therefore, on the authorities, the decision of the registrar whether there is or is not a good judgment is not *res judicata*, because the matter may be raised again by any subsequent proceedings. One would have thought, under these circumstances, but for the decision of the Court of Appeal in *Re Debtor* (1) that the registrar had nothing to do with the amount of a debt. Apart from the authorities, if an unfair use is being made of a judgment, where you have a judgment which could be reduced under the Moneylenders Act, 1900, and you propose to enforce it by bankruptcy, I can understand the Court of Bankruptcy saying: "We will not give you this remedy; take all the other remedies you can get, but we will not give you this remedy."

But I find that, at any rate in two cases, the Court of Appeal has used language which shows that they think the registrar can, on these proceedings, find out what the amount of the debt is. Both of those authorities are judgments of LORD ESHER. In *Re Vitoria, Ex parte Vitoria* (4), LORD ESHER, M.R., pointed out very much what I have been saying about the position of a judgment in regard to the registrar's powers. His Lordship said ([1894] 2 Q.B. at p. 390):

"Suppose that the registrar should come to the conclusion that the judgment was obtained by fraud; he would then have power to say that he would not make a receiving order. But he would have no power to set aside the judgment or to stay execution upon it. The authority of a registrar in bankruptcy depends entirely upon the Bankruptcy Act, and he has no power to set aside or to review a judgment. But the Court of Bankruptcy can refuse to make a receiving order in respect of a judgment which it cannot set aside."

In the other case, *Re Fraser, Ex parte Central Bank of London* (5), LORD ESHER, M.R., said (9 Morr. at pp. 260, 261):

"The mere fact that there is a judgment in law does not prevent the registrar from considering whether there was a good petitioning creditor's debt. The Bankruptcy Court can go behind the judgment and enquire into the liability on which the debt was founded. The Bankruptcy Court does not set aside the judgment and is not called upon to do so. It goes round the judgment and enquires into the subject-matter on which the judgment is founded. It might perhaps be said that on s. 4 (1) (g) of the Bankruptcy Act, 1883, the judgment is to govern the matter, but when we come to s. 7 it shows that even if there is a judgment the court may not be satisfied that the case is one in which it ought to make a receiving order. That was clearly decided in *Re Lennox, Ex parte Lennox* (6), where it was held that the Court of Bankruptcy has power to go behind a judgment and enquire into the consideration for the judgment debt, not only at the instance of the trustee in the bankruptcy of the debtor upon the question of the proof of the debt, but also at the instance of the judgment debtor himself upon the hearing of a petition by the judgment creditor for a receiving order, even though the debtor has consented to the judgment; and if on the hearing of the petition facts are alleged by the debtor, of which evidence is rendered, and which, if proved, would show that, notwithstanding the judgment, there is, by reason of fraud or otherwise, no real debt, the court ought not to make a receiving order without first enquiring into the truth of the debtor's allegations. That rule of conduct is put on the highest ground, that you are not dealing simply between a man and his creditor, but you are interfering with the rights of other creditors. Therefore it was said that the court ought not to exercise its tremendous power unless it was perfectly satisfied there is a good petitioning creditor's debt irrespective of the judgment."

I take that to be a decision of the Court of Appeal, which binds me, that although there is one debt under the judgment with which the registrar cannot interfere, he may enquire whether there is another debt—a different debt from the judgment debt—which is a good petitioning creditor's debt, by which I suppose is meant a debt amounting to £50. The effect of such a finding apparently would be only very limited. It would not interfere with the extent of the other debt under the judgment or the remedies of the other debt under the judgment. But it would say that, for the purposes of the bankruptcy, apart from the judgment, there is a debt of £50 in respect of which a remedy in bankruptcy can be given, though it cannot be given in respect of the amount for which it is being claimed. I confess that that curious limited new debt brought into existence does seem to me rather an anomaly. But I am bound by the decision of the Court of Appeal in *Re Debtor* (1), which clearly recognises the possibility to say that the registrar can inquire into, not the judgment debt, but whether, behind the judgment debt, there is a good debt amounting to £50. In that case which was sent back to the registrar I see that he found that there was no such debt, because the petition was dismissed. In the present case the registrar, having considered the matter, has found that there is a debt of over £50. As far as I can see, the fact that it is £440 does not bind anybody, except for the purpose of saying that it is more than £50. But he has found that there is a debt of over £50. The next stage is this. Counsel for the debtor says the registrar has a discretion to adjourn the petition, and that he was quite justified in adjourning it in order that the debtor might have an opportunity of paying. The registrar said that an excessive sum having been previously claimed against the debtor, he would give her a chance of paying the sum which he really found due. I think that the decisions to which my brothers have referred—particularly *Re Gentry* (3)—show that if one has got a good petitioning creditor's debt, the creditor cannot be forced to take it, and an adjournment simply for the

purpose of allowing a tender to be made to him is not a matter which the registrar ought to allow. For those reasons, which I have endeavoured to state as fully as I could, because I do not think the matter is at all satisfactory at present, I concur in the judgment which has been given by my brothers, and I think that this appeal should be allowed.

Appeal allowed.

Solicitors : *A. H. Freeman; Fladgate & Co.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

WEDD v. PORTER AND OTHERS

[COURT OF APPEAL (Swinfen Eady, Pickford and Bankes, L.JJ.), March 7, 8, 9, April 11, 1916]

[Reported [1916] 2 K.B. 91; 85 L.J.K.B. 1298; 115 L.T. 243]

Landlord and Tenant—Yearly tenancy—Holding over—Agreement that no terms of expiring lease should apply to tenancy—Agreement as to yearly rent—Implication in tenancy of such terms as law implied in such a tenancy.

Sale of Land—Covenant running with reversion—Purchase of land subject to yearly tenancy—Tenancy subject to implied conditions—Right of purchaser to recover for breaches before date of conveyance.

It is a question of fact in every case whether a tenant who holds over as a yearly tenant does so upon the terms of the expired lease. If the facts do not exclude an implied agreement to hold upon the terms of the old lease, the law implies a new agreement between the parties under which the tenant holds subject to all the covenants in the lease which are applicable to a yearly tenancy.

On the termination of a lease for fourteen years of an agricultural property the tenant held over as a yearly tenant. The parties agreed that no term of the lease should apply to the yearly tenancy, but no terms of the tenancy were agreed save that the tenant should pay £850 a year rent. On the death of the landlord his executors conveyed the property to the plaintiff. On a claim by the plaintiff against the tenant for damages for breach of the covenants of the lease which, he alleged, were to be implied in the yearly tenancy,

Held: (i) the evidence showing that an implied agreement between the parties to hold over on the terms of the lease must be excluded, the additional terms to be implied in the tenancy were those which the law implied in such a tenancy, namely, that the tenant must keep the buildings wind and water tight and cultivate the land in a husbandlike manner according to the custom of the country: (ii) the plaintiff was entitled to enforce the covenants implied in the tenancy (per SWINFEN EADY, L.J.) as assignee of the reversion, and (per curiam) because the relationship of landlord and tenant had been established between him and the tenant as from the date of the conveyance of the property to him.

Per SWINFEN EADY, L.J.: The plaintiff was entitled to maintain a claim against the tenant for such breaches of the implied obligations as had occurred since the conveyance to him, but he could not recover for any breaches before that date as a cause of action which had accrued to the vendor did not pass to him under the conveyance.

Notes. Considered: *Blane v. Francis*, [1917] 1 K.B. 252; *Cole v. Kelly*, [1920] All E.R. Rep. 537; *Warren v. Keen*, [1953] 2 All E.R. 118. Referred to: *Barnes v. City of London Real Property Co.*, [1918] 2 Ch. 18; *Rye v. Purcell*, [1925] All

E.R. Rep. 448; *Snowdon v. Ecclesiastical Comrs.*, [1934] All E.R. Rep. 779; *Re United Railways of the Havana and Regla Warehouses, Ltd.*, [1959] 1 All E.R. 214; *Rhyl U.D.C. v. Rhyl Amusements, Ltd.*, [1959] 1 All E.R. 257; *Longmuir v. Kew*, [1960] 3 All E.R. 26.

As to holding over on a yearly tenancy and covenants running with the reversion, see 23 HALSBURY'S LAWS (3rd Edn.) 515, 516, 649, 650, and for cases see 31 DIGEST (Repl.) 53-56, 58-61, 149 et seq.

Cases referred to:

- (1) *Hyatt v. Griffiths* (1851), 17 Q.B. 505; 18 L.T.O.S. 74; 117 E.R. 1375; 31 Digest (Repl.) 53, 2158.
- (2) *Oakley v. Monck* (1866), L.R. 1 Exch. 159; 4 H. & C. 251; 35 L.J.Exch. 87; 14 L.T. 20; 30 J.P. 180; 12 Jur. N.S. 213; 14 W.R. 406, Ex.Ch.; 31 Digest (Repl.) 58, 2147.
- (3) *Digby v. Atkinson* (1815), 4 Camp. 275, N.P.; 31 Digest (Repl.) 58, 2152.
- (4) *Horsefall v. Mather* (1815), Holt, N.P. 7, N.P.; 31 Digest (Repl.) 349, 4798.
- (5) *Powley v. Walker* (1793), 5 Term. Rep. 373; 101 E.R. 208; 2 Digest (Repl.) 52, 271.
- (6) *Onslow v. —* (1809), 16 Ves. 173; 33 E.R. 949, L.C.; 31 Digest (Repl.) 398, 5266.
- (7) *Auworth v. Johnson* (1832), 5 C. & P. 239, N.P.; 31 Digest (Repl.) 395, 5227.
- (8) *Leach v. Thomas* (1835), 7 C. & P. 327, N.P.; 31 Digest (Repl.) 396, 5229.
- (9) *Standen v. Christmas* (1847), 10 Q.B. 135; 16 L.J.Q.B. 265; 9 L.T.O.S. 169; 11 Jur. 694; 116 E.R. 53; 31 Digest (Repl.) 150, 2880.
- (10) *Bickford v. Parson* (1848), 5 C.B. 920; 17 L.J.C.P. 192; 11 L.T.O.S. 126; 12 Jur. 377; 136 E.R. 1141; 31 Digest (Repl.) 446, 5731.
- (11) *Clayton v. Illingworth* (1853), 10 Hare, 451; 68 E.R. 1003; 30 Digest (Repl.) 421, 641.
- (12) *Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. 608; 70 L.J.Ch. 814; 82 L.T. 347; 16 T.L.R. 299; 30 Digest (Repl.) 421, 643.
- (13) *Lewes v. Ridge* (1601), Cro. Eliz. 863; 78 E.R. 1089; 31 Digest (Repl.) 472, 5983.
- (14) *Canham v. Rust* (1818), 2 Moore, C.P. 164; 8 Taunt. 227; 129 E.R. 370; 31 Digest (Repl.) 151, 2897.
- (15) *Johnson v. Churchwardens of St. Peter, Hereford* (1836), 4 Ad. & El. 520; 1 Har. & W. 720; 6 Nev. & M.K.B. 106; 5 L.J.K.B. 116; 111 E.R. 883; 31 Digest (Repl.) 59, 2162.
- (16) *Williams v. Hayward* (1859), 1 E. & E. 1040; 28 L.J.Q.B. 374; 33 L.T.O.S. 344; 5 Jur. N.S. 1417; 7 W.R. 563; 120 E.R. 1200; 31 Digest (Repl.) 292, 4286.

Also referred to in argument:

- Dougal v. McCarthy*, [1893] 1 Q.B. 736; 62 L.J.Q.B. 462; 68 L.T. 699; 57 J.P. 597; 41 W.R. 484; 9 T.L.R. 419; 4 R. 402, C.A.; 31 Digest (Repl.) 59, 2156.
- Smith v. Eggington* (1874), L.R. 9 C.P. 145; 43 L.J.C.P. 140; 30 L.T. 521; 31 Digest (Repl.) 150, 2882.
- Bridgland v. Shapter* (1839), 5 M. & W. 375; 8 L.J.Ex. 246; 151 E.R. 159; 31 Digest (Repl.) 29, 1871.
- Re Negus*, [1895] 1 Ch. 73; 64 L.J.Ch. 79; 71 L.T. 716; 43 W.R. 68; 39 Sol. Jo. 29; 13 R. 85; 30 Digest (Repl.) 473, 1153.
- Rickett v. Green*, [1910] 1 K.B. 253; 79 L.J.K.B. 193; 102 L.T. 16, D.C.; 31 Digest (Repl.) 258, 3940.
- Martin v. Smith* (1874), L.R. 9 Exch. 50; 43 L.J.Ex. 42; 30 L.T. 268; 22 W.R. 336; 30 Digest (Repl.) 492, 1358.

Torkington v. Magee, [1902] 2 K.B. 427; 71 L.J.K.B. 712; 87 L.T. 304; 18 T.L.R. 703, D.C.; on appeal [1903] 1 K.B. 644; 72 L.J.K.B. 336; 88 L.T. 443; 19 T.L.R. 331, C.A.; 8 Digest (Repl.) 556, 98.

Buckworth v. Simpson (1835), 1 Ct. M. & R. 834; 1 Gale, 38; 5 Tyr. 344; 4 L.J.Exch. 104; 149 E.R. 1317; 30 Digest (Repl.) 469, 1107.

Cornish v. Stubbs (1870), L.R. 5 C.P. 334; 39 L.J.C.P. 202; 22 L.T. 21; 18 W.R. 547; 31 Digest (Repl.) 481, 6067.

Martyn v. Williams (1857), 1 H. & N. 817; 26 L.J.Ex. 117; 28 L.T.O.S. 321; 5 W.R. 351; 156 E.R. 1430; 31 Digest (Repl.) 153, 2910.

Appeal by the plaintiff from a decision of the Divisional Court (RIDLEY and SHEARMAN, JJ.), reported 113 L.T. 819.

By a lease, dated Oct. 11, 1878, one William Butt demised certain farms known as the Corney Bury property in Hertfordshire to Isabella Porter, Frederick Charles Porter, and Albert Porter, for a term of fourteen years, at a rental of £1,301 7s. for the first seven years, and of £1,330 19s. 3d. for the remainder of the term. Under that lease the defendants covenanted :

"The said lessees . . . shall and will from time to time during the said term and so often as need shall require at their . . . own costs, well and substantially paint, paper, whitewash, repair, and maintain, scour, cleanse, amend, and keep the mansion-house, farmhouses, offices, and other messuages and buildings standing upon the said demised premises (except the Corney Bury mansion-house and offices and the Corney Bury farmhouse, homestead, and buildings) and the fixtures therein and all the walls, gates, stiles, hedges, mounts, banks, bridges, fences, culverts, drains, and ditches belonging to the said farms and premises in by and with all manner of needful and proper reparations and amendments whatsoever, being allowed rough timber, brick, tiles, and lime to be furnished on or within fifteen miles of the said demised premises . . . and the same so well and substantially painted, papered, whitewashed, repaired, maintained, and scoured, cleansed, amended, and kept shall at the expiration or other sooner determination of the term hereby granted duly surrender and yield up unto the said lessor, his heirs and assigns, damage by accidental fire or tempest excepted."

The lease further provided that the lessees would to the satisfaction of the lessor every fifth year paint all such parts of the wood, iron, and stone work of the exterior of the said messuages and buildings as had been heretofore painted, and would tar such parts as had been tarred, and also in the seventh year, and again in the last year of the said term, would paint, paper, &c., all such parts of the inside of the said messuages and buildings as were then painted, &c. The lessees were also to keep and maintain the lands and grounds . . . in good heart and condition, and well farmed and well weeded," to "cultivate and manage the same in a husband-like manner, and according to the most improved system of husbandry in that part of the country where the said demised premises are situate, used, and followed . . ." and "from time to time replant with quick plants all the vacant places in the hedges, and properly maintain and rear the same . . . open and scour out in the most effectual manner once at least in every year of the said term all the ditches on the said premises." Isabella Porter died during the term, and the two other lessees remained in occupation. On Sept. 29, 1892, the lease expired by effluxion of time, but the surviving lessees remained in possession, and negotiations for a new tenancy which took place between the parties never came to anything. F. C. Porter died on Nov. 21, 1911, and his executors were defendants to the present action with the surviving lessee. William Butt died on Dec. 3, 1911. On Sept. 17, 1912, his executors gave the defendant, Albert Porter, notice determining the tenancy on Sept. 18, 1913. By two indentures dated Dec. 3, 1912, and Sept. 18, 1913, they conveyed the property to the plaintiff. On Sept. 18, 1913, the defendants received a notice from the executors of Mr. Butt notifying them of the fact that the plaintiff

had bought the farms, &c., of which they were tenants, and requesting them to pay the rent as from Lady Day last to him "or as he may direct." The defendants paid the rent to the plaintiff, but without prejudice to any of their rights. On Sept. 19, 1913, the defendants served on the plaintiff a notice under the Agricultural Holdings Act, 1908, s. 1, claiming compensation for improvements. Subsequently the plaintiff brought this action against the defendants claiming damages for breach of the covenants, terms, and conditions of the lease of Oct. 11, 1878, contending that the defendants were holding over under the terms of the lease in so far as they were applicable to a tenancy from year to year. The action was sent for trial before an official referee, and at the hearing it was agreed that he should try the question of liability before going into any questions as to the amount of damages. He held that the defendants were holding over as tenants from year to year under the terms of the lease of Oct. 11, 1878, so far as they were applicable to such a tenancy, and that after the notice it was impossible for the defendants to say that they did not recognise the plaintiffs as their landlord. He, accordingly, made a declaration whereby it was ordered and declared :

"That after the expiration of the lease granted by the indenture of the 11th day of Oct., 1878, the defendants or their predecessors in title held over from the 29th day of Sept., 1892, until the 29th day of Sept., 1913, as tenants from year to year of the farms and premises referred to in the pleadings upon the covenants, terms, and conditions in so far as applicable to a tenancy from year to year, and that the plaintiff is entitled to recover from the defendants damages for breach of the covenants, terms, and conditions of the said lease on the basis of such tenancy from year to year, and in particular that the plaintiff is entitled to recover from the defendants damages in respect of breaches of covenants, terms, and conditions dependent upon periodic occasions and happenings, in so far as such periodic occasions or happenings have taken place during the continuance of the said tenancy from year to year."

The Divisional Court held that the assignment of the reversion did not pass to the assignee the right to recover damages for breach of covenant to repair when the tenancy was by parol, the Grantees of Reversions Act, 1540 [repealed by Law of Property Act, 1925, of which see s. 141], only applying to leases under seal. The fact that the tenant had made a claim against the assignee of the reversion under the Agricultural Holdings Act, 1908, did not amount to a recognition by the tenant of the assignee as his landlord so as to entitle the assignee to sue upon the covenant. Judgment was, accordingly, entered for the defendants, and the plaintiff appealed.

J. F. P. Rawlinson, K.C., and *W. Hanbury Aggs* for the plaintiff.

Disturnal, K.C., and *W. Allen* for the defendants.

Cur. adv. vult.

April 11, 1916. The following judgments were read.

SWINFEN EADY, L.J.—The plaintiff claimed damages for the breach of an agreement of tenancy of certain farms, buildings, lands, and premises. The action was tried before an official referee, who made an order on April 27, 1915. [The lord justice read the order set out hereinbefore.] Upon motion by the defendants to a Divisional Court the order of the official referee was discharged, and it was ordered that the judgment be entered for the defendants. The plaintiff now appeals from this order of the Divisional Court. The plaintiff recently purchased the farms and premises in question from the representatives of the late William Butt, of Corney Bury in the county of Hertford. Part of the premises was conveyed to the plaintiff by deed dated Dec. 3, 1912, and the remainder by deed dated Sept. 18, 1913, and the defendants' yearly tenancy, whatever the conditions of it were, expired on Sept. 29, 1913, pursuant to a notice to quit given twelve months previously.

The first question to be determined is: What were the terms and conditions of the tenancy from year to year upon which the defendants held the premises at the date of the plaintiff's purchase? The defendants and their predecessors had been in occupation of the farms and premises under Mr. Butt for many years. Mr. Butt had been an indulgent landlord, and extended liberal treatment to his old tenants. By a lease dated Oct. 11, 1878, William Butt demised to Isabella Porter, widow, Frederick Charles Porter, and the defendant Albert Porter, Corney Bury mansion-house and lands, Corney Bury Farm, Throcking Farm, Bridgefort Farm, and certain maltings at Buntingford from Sept. 29, 1878, for the term of fourteen years, at the rent of £1,301 7s. during the first seven years and £1,330 19s. 3d. during the rest of the term. This lease expired at Michaelmas, 1892. No further document has been signed by the parties putting into writing the terms of the tenancy subsequent to the expiration of this lease. Mrs. Isabella Porter died on Mar. 26, 1889. After her death Frederick Charles Porter and Albert Porter continued as tenants of the farms. Frederick Charles Porter died on Nov. 21, 1911, and the defendants Eliza Porter and George Joseph Bayspool Porter are his executrix and executor. Although the rent reserved by the lease during the last seven years of the term was £1,330 19s. 3d. per annum, I gather, although the evidence is not very clear, that no such amount had been paid during the latter years of the term. After the expiration of the term the correspondence makes it clear that the tenants did not intend holding over upon the terms of the expired lease, nor did the landlord intend that they should. They agreed that the tenancy should not be on the old terms of the expired lease. There were discussions as to the terms of a new tenancy. Mr. F. C. Porter even suggested to Mr. Butt's solicitor that perhaps it would be better for him to give up the whole of Corney Bury. He stated that he considered that the full annual value at that time did not exceed £650, and that he could not possibly find money enough to pay more than £800. There were also negotiations with regard to repairs, mode of cultivation, the shooting rights, and other matters. It is a question of fact in every case whether tenants holding over do so upon the terms of an expired lease: *Hyatt v. Griffiths* (1). If the true inference of fact to be drawn is that the tenants do hold over upon the terms of an expired lease, so far as applicable to an annual tenancy, in law there is constituted a new agreement to that effect between the parties: *Oakley v. Monk* (2). Where tenants hold over after the expiration of a term, and the facts do not exclude an implied agreement to hold upon the terms of the old lease, then the law determines that they impliedly hold subject to all the covenants in the lease which are applicable to the new situation: *Digby v. Atkinson* (3). The official referee stated in his judgment that it appeared fairly obvious that neither Mr. Butt nor the Porters were satisfied to go on upon the holding over under the lease of 1878, and, in my judgment, this was correct, and after the end of the lease neither party expressly or impliedly agreed to continue upon any of the terms contained in it. The negotiations for a new agreement proceeded a considerable way. Some of the new terms for the proposed new tenancy were provisionally arranged, and counsel received written instructions to settle a new tenancy agreement from year to year, with proper covenants and conditions as to the proper keeping up of the farm in accordance with the custom of the country. Accordingly, a draft agreement was prepared, and was under consideration in the summer of 1894. Mr. F. C. Porter saw Mr. Butt's solicitor upon the draft, and marginal notes in the draft indicate the points under discussion upon which they were not agreed. In August, 1894, Mr. Booty, the solicitor, again sent the draft to Mr. Porter in order that he might go through it again with his brother, and suggested a compromise with regard to two of the points in dispute—namely, that the landlord should give way on the question of taking two white crops in succession off 120 acres, and that the tenant should give way on the question of the restriction upon mowing the grass lands. It does not appear that this proposal was accepted by the tenants, or that the other outstanding questions were adjusted. No agreement was ever signed between the parties,

nor was any draft agreement assented to. The result is that the parties agreed that the terms of the old lease should not apply, and never agreed upon the terms of any new arrangement, except that there should be a yearly tenancy at £850 a year, and this rent continued to be paid less voluntary abatements from time to time made by Mr. Butt. In my opinion, the official referee arrived at the right conclusion in determining that no agreement upon the terms of counsel's draft was ever arrived at. He, however, appears to have thought that, unless it was shown that this new express agreement had been come to, he was bound to hold that the terms of the old lease remained in force. This view is erroneous; the parties were agreed that the old terms were inapplicable. What actually happened was that the parties agreed upon a yearly tenancy at £850 rent, and, in default of having made any other agreement, the additional implied terms are those which the law implies on such a tenancy.

Having now stated what, in my judgment, were the terms upon which the tenancy subsisted between the parties, it remains to consider whether the plaintiff can lawfully maintain this action against the defendants upon any of the grounds alleged in the pleadings and not yet disposed of. A tenant from year to year of a farm and buildings at a fixed rent, who has not entered into any other express agreement with the landlord than as to the amount of rent, is under an obligation implied by law to use and cultivate the lands in a husbandlike manner, according to the custom of the country: *Horsefall v. Mather* (4), *Powley v. Walker* (5), *Onslow v. —* (6), subject to the provisions of the Agricultural Holdings Act, 1908, and to keep the building wind and water tight: *Auworth v. Johnson* (7), *Leach v. Thomas* (8), but is not liable to "sustain and uphold the premises": *Auworth v. Johnson* (7). It is, however, objected that the plaintiff, as the assignee of the reversion, cannot enforce this liability against the defendants. It is said there is no lease by deed containing express covenants, and, therefore, the Act 32 Hen. 8, c. 34 [Grantees of Reversions Act, 1540: see now Law of Property Act, 1925, s. 141], does not assist the plaintiff: *Standen v. Christmas* (9), *Bickford v. Parson* (10). The plaintiff meets this objection by relying upon s. 10 of the Conveyancing Act, 1881 [see Act of 1925, s. 141] and urged that now a writing not under seal would be sufficient. But this question does not really arise, as there is no writing, and no case for specific performance, and nothing to show that any instrument at all was ever intended to be executed or signed by the parties: see *Clayton v. Illingworth* (11); *Manchester Brewery Co. v. Coombs* (12).

The law, however, has always drawn a distinction between express and implied covenants and conditions. By rules of common law none but parties or privies to express covenants was bound by or could take advantage of them, and grantees of reversions were regarded in the light of strangers. If the grantee of a reversion could have maintained an action of covenant against the lessee upon his express covenant, the provision of the Act of 1540 would have been in a great degree unnecessary. But the statute refers only to express covenants, and not to covenants in law or implied covenants. The statute provides that grantees of reversions

"shall and may have and enjoy all and every such like and the same advantage, benefit, and remedies by action only, for not performing of other conditions, covenants, or agreements contained and expressed in the indentures of their said leases."

The reason why the statute extended only to express covenants was that no such provision was necessary with regard to covenants in law or implied covenants. The law is thus stated in PLATT ON COVENANTS (1829), p. 532:

"Upon an implied covenant, however, an action at the suit of the assignee of the reversion was undoubtedly maintainable prior to the passing of that Act."

And so with conditions. In SHEPPARD'S TOUCHSTONES (8th Edn.), p. 140, note (y), it is thus stated:

"It is a rule of the common law that no one can take advantage of the breach of an express condition but parties and privies in right and representation; as heirs, executors, or administrators of natural persons, and the successors of bodies politic; so that neither privies nor assignees in law, as lords by escheat, nor privies in estate, as persons in remainder, can enter for a condition broken. In the case, however, of conditions implied, or in law, privies and assignees in law may enter for breach of them. Thus LORD COKE says, if a man makes a lease for life, there is a condition in law annexed to it, that if the lessee creates a greater estate than for his own life the lessor may enter. Of this, and the like conditions in law, not only the lessor and his heirs may take the benefit, but also his assignee, as the lord by escheat."

The reference to LORD COKE is to the first INSTITUTE (Co. Litt.), 215a, where that learned author treats of the "diversitie" or difference which existed at common law, and before the statute of Henry VIII, between conditions expressed in deeds and conditions in law or implied conditions.

The plaintiff is, therefore, entitled to maintain a claim against the defendants for such breaches (if any) of the implied obligations as have occurred since the conveyances to the plaintiff—that is to say, as to part of the property between Dec. 3, 1912, and Sept. 29, 1913, and as to the rest of the property between Sept. 18, 1913, and Sept. 29, 1913, when the tenancy expired. For any breaches which occurred before the conveyances the plaintiff cannot sue, as causes of action which had accrued to the vendor did not pass to the plaintiff by those deeds: *Lewes v. Ridge* (13); *Canham v. Rust* (14); *Johnson v. Churchwardens of St. Peter, Hereford* (15). The result to the parties is the same whether the benefit of the implied obligation passes to the plaintiff as assignee of the reversion, or whether he becomes entitled to it by virtue of the relationship of landlord and tenant constituted by the conveyances. Since the Administration of Justice Act, 1705, s. 9 [see now Law of Property Act, 1925, s. 151 (1)] attornment is no longer necessary, and upon conveyance the defendants became tenants to the plaintiff for the unexpired portion of the yearly tenancy, and were under the same implied obligations to the plaintiff as before conveyance they were under to his predecessor in title. These obligations spring, in the absence of any agreement to the contrary, from the mere relationship of landlord and tenant. By force of the statute of Anne (Administration of Justice Act, 1705) there was the same privity between the plaintiff and the defendants, after the date of the respective conveyances, as if the defendants had actually attorned tenants to the plaintiff: *Williams v. Hayward* (16). The plaintiff has in his statement of claim duly claimed relief against the defendants upon this footing, and this claim has not yet been dealt with or adjudicated upon by the official referee, and the matter must go back to him to be disposed of. The proper order will be to allow the appeal and discharge the order of the Divisional Court, except so far as it discharged the order of the official referee; declare that the defendants are liable in damages to the plaintiff for breaches (if any) after the dates of the respective conveyances to the plaintiff of the implied obligations to keep the buildings wind and water-tight, and to use and cultivate the lands in a husband-like manner according to the custom of the country, subject to the provisions of the Agricultural Holdings Act, 1908 [see now Agricultural Holdings Act, 1948]. Each party has partly succeeded and partly failed, and the proper order as to costs will be for each side to bear his own costs in the Divisional Court and of this appeal. The costs of the former hearing before the official referee and of any further hearing pursuant to this order to be dealt with by the official referee.

PICKFORD, L.J.—I have had the advantage of reading the judgments of SWINFEN EADY and BANKES, L.JJ., in this case, and agree with them; and, therefore, I do not think it necessary to say more than a few words. I agree that on the evidence there was no tenancy from year to year on the terms of the old lease established, and that what took place was that the parties agreed that the tenancy

should not be upon the old terms, but never arrived at a concluded agreement as to what the terms should be. The result is that the tenants continued to hold upon the terms of an ordinary tenancy from year to year—i.e., that they should cultivate the lands in a husbandlike manner according to the custom of the country, subject to the provisions of the Agricultural Holdings Act, 1908, and keep the buildings wind and water-tight. These are the terms upon which the plaintiff thought that the tenants were holding, as is seen by his claim as originally framed, and the idea of a tenancy upon the terms of the original lease only arose on the lease coming to his knowledge in the course of the proceedings. The question then to be determined is whether the plaintiff is entitled to sue the defendants for a breach of those covenants implied by law. I think he is, because the defendants became his tenants by reason of the conveyance to the plaintiff of the lands occupied by them, and the terms of such tenancy were those implied by law in an ordinary yearly tenancy, no attornment being necessary since the passing of s. 9 of the Administration of Justice Act, 1705. It is not, therefore, necessary to decide the points raised upon s. 10 of the Conveyancing Act, 1881, and the right of an assignee of the reversion to sue upon covenants implied by law, but I agree with what has been said on the latter point. I think the judgment of the Divisional Court was wrong in so far as it entered judgment for the defendants, and that the case should go back to the official referee to assess the damages on the basis stated in the judgment of SWINFEN EADY, L.J.

BANKES, L.J., stated the facts and continued: Upon what terms must the tenants be considered to have continued in possession after the year 1894? The official referee held that as the tenants held over after the expiration of the lease, and no agreement had been established to take the place of the lease on its termination in 1892, the inference of law was that they held over as tenants from year to year upon the terms of the lease so far as they were applicable. The Divisional Court did not agree with this view. In my opinion, the Divisional Court were right. It is, I think, impossible to regard the negotiations of 1894 as absolutely without result. It is true that they did not result in complete agreement on all points, but it is, in my opinion, quite clear that they did result in complete agreement on one point, namely, that, if the tenants continued in occupation, it was to be as from Michaelmas, 1893, on terms different from those in the lease, and that the terms of the lease were no longer to apply to the tenancy. Under these circumstances, as the parties failed to agree upon any terms except the rent and the fact that the tenancy was to be a yearly one commencing at Michaelmas, 1893, the true inference, in my opinion, is that in all other respects the tenancy was one upon the terms implied by law as applicable to an agricultural tenancy of land and buildings, namely, that the tenant must keep the buildings wind and water-tight and cultivate the land in a husbandlike manner according to the custom of that country. The official referee appears to have attached importance to the fact that the course of dealing between the landlord and the tenants with regard to repairs appeared to him to have been the same, or much the same, after the year 1894 as it had been during the currency of the lease. This ceases to be of any importance when once the conclusion is arrived at that the parties did definitely agree not to continue the old relations; but in any event I do not regard the dealings of the parties in relation to repairs of any real importance, having regard to the indefinite position in which the tenants stood and to the extremely indulgent way in which the landlord appears to have treated them and the allowances he made them, in consideration of which the tenants may well have done small repairs which they were under no legal obligation to do. The conclusion at which I have arrived coincides with the view of the position originally taken by the plaintiff's advisers when the action was commenced. At that time the plaintiff's case was based upon alleged breaches of covenants implied by law, and it was only after the expired lease was discovered in the possession of the vendor's representatives that the

plaintiff alleged the existence of a yearly tenancy upon the terms of the lease as regards repairs. The plaintiff's claim to recover damages was rested in the statement of claim upon the relationship of landlord and tenant which was established between the plaintiff and the defendants upon and after the conveyances by the executors of the late Mr. Butt to the plaintiff of Dec. 3, 1912, and Sept. 18, 1913. This is, in my opinion, a true ground upon which the claim can be based, but it entitles the plaintiff to relief only in respect of breaches of covenant committed after the relationship of landlord and tenant was established—that is to say, as to part of the premises between Dec. 3, 1912, and Sept. 29, 1913, and as to the remainder between Sept. 18 and 29, 1913. This, having regard to the nature of the covenants which are implied by law, must reduce the claim to very moderate proportions. As pointed out by SWINFEN EADY, L.J., the claim of the plaintiff may be rested on the ground that covenants implied by law run with the reversion at common law. A claim so framed would not, however, extend the plaintiff's remedy, but would only leave him in the same position as he would be in under the claim as formulated in the statement of claim. In my opinion, the Divisional Court were wrong in directing judgment to be entered for the defendants, and I think the case must go back to the official referee to assess the damages on the footing I have indicated. I agree with the order suggested by the lord justice.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, for *G. A. Wootten*, Cambridge; *Farrar, Porter & Co.*

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

R. v. BRIGHT

[COURT OF CRIMINAL APPEAL (Darling, Bray and Horridge, JJ.), June 23, 1916]

[*Reported* [1916] 2 K.B. 441; 85 L.J.K.B. 1638; 115 L.T. 488; 80 J.P. 407; 32 T.L.R. 600; 25 Cox, C.C. 540; 12 Cr. App. Rep. 69]

Criminal Law—Sentence—Plea of guilty—Evidence of motive—Aggravating circumstances—Accused liable to more severe sentence—Circumstances taken into account only if charged in indictment and proved or admitted.

Where an accused person has pleaded guilty, the trial judge, before passing sentence, may hear evidence as to motive in order to decide on the accused's degree of culpability, but where aggravating circumstances render the accused liable to a more severe sentence under the provisions of a statute, such circumstances may not be taken into account in passing sentence unless they have been charged in the indictment and either proved to the satisfaction of the jury or admitted by the plea of guilty.

Notes. Referred to: *R. v. Wheeler*, [1917] 1 K.B. 283.

As to delivery of judgment in a criminal case, see 10 HALSBURY'S LAWS (3rd Edn.) 434, 435; and for cases see 14 DIGEST (Repl.) 373, 374.

Cases referred to in argument:

R. v. Ellis (1826), 6 B. & C. 145; 9 Dow. & Ry. K.B. 174; 4 Dow. & Ry. M.C. 268; 5 L.J.O.S.M.C. 25; 108 E.R. 406; 14 Digest (Repl.) 417, 4062.

R. v. Hodgkinson and Manning (1900), 64 J.P. 808; 14 Digest (Repl.) 509, 4934.

Appeal against sentence.

The appellant pleaded guilty to an indictment charging him with contraventions of reg. 18 of the Defence of the Realm (Consolidation) Regulations, 1914. In the

first count, he was charged that, on certain dates in the county of York, without lawful authority, he collected, or attempted to elicit, information with respect to the manufacture of war material. In the second count, he was charged with having "in his possession, without lawful authority or excuse, certain documents containing information with respect to the description of war material." The evidence showed that the appellant had attempted to bribe a workman in the employ of Messrs. Vickers, Ltd., by offering him £100, and had obtained information and documents dealing with the description and manufacture of war material. No evidence was forthcoming to show that the appellant had parted with the information so obtained to anyone else. He pleaded guilty to the charges in the indictment, and two witnesses were called by the trial judge, AVORY, J., and examined by him. The two witnesses were soldiers who, when the appellant was arrested, were in the custody of the police, and their evidence was to the effect that, at the police station, the appellant had suggested mutiny to them and had made other statements indicating disloyalty to the Crown.

N. L. Macaskie for the appellant.

Tindal Atkinson, K.C., and *G. F. L. Mortimer* for the Crown.

DARLING, J., delivered the following judgment of the court.—In this case the appellant pleaded guilty to an indictment which charged him with attempting to collect information with regard to the manufacture of war materials, which is an offence under reg. 18 of the Defence of the Realm (Consolidation) Regulations, 1914. He was sentenced to penal servitude for life, and he now appeals against that sentence. At the trial, after the appellant had pleaded guilty, two witnesses were called and examined by the judge, in order to decide on the degree of culpability and the proper sentence to be passed. Objection has been taken to the course taken by the judge. The court is clearly of opinion that the judge had a right to hear the witnesses, even although the appellant had pleaded guilty. It is also objected that, before passing sentence, the judge took into account the motive of the appellant in committing the offence. A judge has a perfect right to consider whether a prisoner's motive is good or bad to enable him to consider whether he shall pass a severe or a light sentence. But if, under the circumstances of the case, the motive of the prisoner is a question which the jury have to decide, the judge must not attribute to the prisoner any motive which has been negatived by the verdict of the jury, if such motive has been submitted to them. Nor must the judge attribute to the prisoner that he is guilty of a crime with which he is not charged, nor of a statutory aggravation of a crime which might and should have been charged in the indictment if it was intended that he should be punished for such aggravation.

In the present case, we think that the judge might have passed sentence without giving any reasons, and in that case this court would not have interfered with his discretion. But AVORY, J., stated the reasons which influenced his decision, and in them he included an assumption that the appellant did the acts with which he was charged with an intention to assist the enemy. The court must, therefore, look at the whole case and see whether the sentence can be justified on other grounds than those which influenced the judge. Clearly, on the evidence, the appellant was collecting information as to the manufacture of war material which would be very valuable to the enemy, and also to other persons. That is a different matter from the use he might make of such information, and that is where the court thinks that the judge failed to act within the principles we have laid down. The offence to which the appellant pleaded guilty was a very grave offence, and one which might have had serious consequences for this country. A step further would have exposed the appellant to the sentence of death. Even in the absence of proof of an intention to assist the enemy, the offence, particularly in war time, was of a very serious

A nature, and, under all the circumstances, we think that the sentence, although it can be reduced, must be one of ten years' penal servitude.

Sentence reduced.

Solicitors: Registrar of the Court of Criminal Appeal; Director of Public Prosecutions.

[Reported by R. F. BLAKISTON, Esq., Barrister-at-Law.]

KIRKLINTON v. WOOD

[KING'S BENCH DIVISION (Lush, J.), December 6, 7, 1916]

[Reported [1917] 1 K.B. 332; 86 L.J.K.B. 319; 115 L.T. 920;
33 T.L.R. 108; 61 Sol. Jo. 147]

D *Landlord and Tenant—Repair—Liability of tenant—Covenant to paint in particular year—Tenancy determined by lessee's notice during that year.*

E A lessee covenanted, inter alia, that he would "in the year 1909 and also in the year 1916, if this lease should so long last, paint, varnish, and grain all the inside wood and iron work usually painted, varnished, or grained of the said demised premises . . ." The lessee died in 1915, and his executors, in accordance with a power contained in the lease, gave six months' notice to the lessor to determine the lease on March 1, 1916. At that date, the covenant to paint had not been performed, and the lessor claimed damages for its breach.

F **Held:** the obligation to perform the covenant arose as soon as the year 1916 began, and the fact that the lease was determined by the lessee's executors before the end of 1916 did not relieve them of that obligation.

Notes. As to the construction of covenants to repair, see 23 HALSBURY'S LAWS (3rd Edn.) 578 et seq.; and for cases see 31 DIGEST (Repl.) 349 et seq.

Award in the form of a Special Case stated for the opinion of the court.

G By a lease dated Mar. 24, 1904. between George Graham Kirklington and Joseph Edmund Carter Wood, certain premises were demised by Mr. Kirklington to Mr. Wood for a term of twenty-one years from Mar. 1, 1904. The lessee covenanted, inter alia:

H "And will in the year 1909 and also in the year 1916, if this lease shall so long last, paint, varnish, and grain all the inside wood and iron work usually painted, varnished, or grained of the said demised premises with three coats of good oil and white lead paint in a proper and workmanlike manner."

There was a proviso to the lease as follows:

I "Provided also and it is hereby also agreed that if the lessee shall during the continuance of the term hereby granted die and if the executors, administrators, or assigns of the lessee or the lessor respectively shall be desirous of determining the present lease, then, if the executors, administrators, or assigns of the lessee shall give to the lessor six calendar months' previous notice as aforesaid to determine this present lease on the first day of March in any year of the said term, or if the lessor shall give six calendar months' previous notice in writing to determine this present lease on the first day of March in any year of the said term to the lessee's executors, administrators, or assigns, then and in either of such cases immediately after the expiration of such six calendar months' notice this present demise and everything herein contained shall cease and be void."

The lessee died in 1915, and his executors gave six months' notice, in accordance with the power contained in the lease, to determine the lease on Mar. 1, 1916. The arbitrator found the following facts.—(a) That the lease lasted until the first day of March, 1916, on which date it was determined by six calendar months' prior notice in writing given by the lessee as executor of the original lessee pursuant to the provisions thereof. (b) That no painting, varnishing, or graining, pursuant to the covenant, was executed by the lessee during the period from the commencement of 1916 up to the date of the determination of the lease. The question for the opinion of the court was whether the lessee was liable for breach of the recited covenant to paint, varnish, and grain all the inside wood and iron work in the manner therein mentioned in 1916.

Eustace Hills for the lessor.

E. W. Lavington for the executors of the lessee.

LUSH, J.—A dispute has arisen between the lessor and the executors of the lessee as to the liability of the executors to perform a certain covenant in the lease, or to pay damages for breach of the covenant. The lease was dated Mar. 24, 1904. The parties to it were Mr. Kirklington of the one part and a Mr. Joseph Carter Wood, the lessee, of the other part. The lease provided that, if the lessee should during the continuance of the term die, and if his executors should give to the lessor six calendar months' notice to determine the lease on Mar. 1 in any year of the term, or if the lessor should give six calendar months' previous notice in writing to determine the lease on Mar. 1 in any year to the executors, then, and in either of such cases immediately after the expiration of the notice, the demise should cease. The lessee died in 1915, and his executors gave notice, pursuant to that power, to determine the lease on Mar. 1, 1916. The lease contained the usual covenants on the part of the lessee to pay the rent and keep the premises in repair, and there were other covenants with regard to the furniture; and then comes this covenant, on which this dispute has arisen :

"The lessee will in the year 1909 and also in the year 1916, if this lease shall so long last, paint, varnish, and grain all the inside work,"

and so on—a covenant to do certain painting and decorative work. The lease came to an end on Mar. 1, 1916; and the lessor contends that the executors of the lessee are bound by the covenant that I have just read, and, not having observed it, are liable to pay damages for its breach.

The ground of the contention on the part of the lessor is that, inasmuch as the lease has lasted into 1916, the executors came under an obligation to perform that covenant; and, inasmuch as they have not performed it, and they have gone out of possession and the lease has come to an end, they must pay damages for the breach of the covenant. The executors of the lessee, on the other hand, contend this: "True it is that the lease has lasted into 1916, but the meaning and effect of the covenant on the part of the lessee was that he should have the whole of 1916 in which to perform the covenant; that there was, therefore, no breach until 1916 came to an end; and that inasmuch as, pursuant to the power reserved to the lessee in the lease, the lease was determined before 1916 came to an end, there is no liability on the part of the executors." In my opinion the contention of the lessor is the correct one. It is quite true that, if the lease had not been determined, there would have been no breach on the part of the executors of the lessee on the date in question—namely, Mar. 1, 1916; but none the less there was an obligation on the executors of the lessee, as soon as 1916 commenced, to perform that covenant; and, inasmuch as the executors of the lessee, by giving that notice, put it out of their power to perform the covenant after Mar. 1, they cannot, having put it out of their power, contend that they were not under an obligation to perform it during the period that intervened between Jan. 1 and Mar. 1. It may be quite true to say that, although there was an obligation on them, there would be no breach; but

the executors, by giving the notice, shortened the period during which they had the opportunity of doing the painting and performing the covenant. It seems to me quite impossible for them, having taken that course, to say that they had the whole of 1916 in which to perform it, and that, therefore, there was no breach on Mar. 1. The case was put in argument as to what would have happened if the lessor had given the notice. I do not think it is necessary for me to consider what would have been the case if that had happened. It did not happen. The lessee's executors gave the notice, and, in my opinion, the obligation having attached to them as soon as 1916 commenced, they were bound to perform it, or to show some excuse for their non-performance. They have not performed it; they have given no excuse for their non-performance. Therefore, I think the executors were bound by the covenant. The arbitrator in his award, which is stated in the form of a Case, simply left it to the court to say whether the lessor is right or wrong in his contention. My answer, therefore, is that the lessor is right, and that the executors of the lessee are liable for breach of the covenant.

Judgment for the lessor.

Solicitors: *Harrison, Powell & Tuck*, for E. K. Hough, Carlisle; *Gray, Mounsey & Fuller*, for Mounsey, Bowman & Graham, Carlisle.

[Reported by W. V. BALL, Esq., Barrister-at-Law.]

R. v. WATSON

[COURT OF CRIMINAL APPEAL (Lord Reading, C.J., Scrutton and Shearman, JJ.), June 5, 1916]

[Reported [1916] 2 K.B. 385; 85 L.J.K.B. 1142; 115 L.T. 159; 80 J.P. 391; 32 T.L.R. 580; 25 Cox, C.C. 470; 12 Cr. App. Rep. 62]

Criminal Law—Receiving stolen property—Need to prove possession or control of stolen property.

Unless it is proved that a person who negotiates the sale of goods knowing them to be stolen has been in possession or control of the goods, he cannot be convicted of receiving the goods knowing them to have been stolen.

Notes. As to receiving stolen property, see 10 HALSBURY'S LAWS (3rd Edn.) 809 et seq.; and for cases see 15 DIGEST (Repl.) 1142 et seq.

Cases referred to:

- (1) *R. v. Fallon* (1862), Le. & Ca. 217; 32 L.J.M.C. 66; 7 L.T. 471; 27 J.P. 5; 8 Jur. N.S. 1217; 11 W.R. 74; 9 Cox, C.C. 242; 14 Digest (Repl.) 358, 3478.
- (2) *Richards v. R.* (1897), 61 J.P. 389; 13 T.L.R. 254, D.C.; 14 Digest (Repl.) 358, 3479.

Also referred to in argument:

R. v. Whiley (1850), 2 Den. 37; T. & M. 367; 4 New Sess. Cas. 363; 20 L.J.M.C. 4; 16 L.T.O.S. 514; 14 J.P. 770; 15 Jur. 134; 4 Cox, C.C. 412, C.C.R.; 15 Digest (Repl.) 1147, 11,546.

R. v. Smith (1855), Dears C.C. 494; 24 L.J.M.C. 135; 26 L.T.O.S. 6; 19 J.P. 358; 1 Jur. N.S. 575; 3 W.R. 484; 3 C.L.R. 1154; 6 Cox, C.C. 554, C.C.A.; 15 Digest (Repl.) 1147, 11,548.

Appeal against a conviction for receiving stolen property before the recorder at Manchester City Sessions.

The appellant was charged with two other men on an indictment containing two counts, the first for breaking and entering a shop and stealing jewellery therefrom.

and the second for receiving the stolen property. There was no evidence in support of the first count, and the jury were properly so directed. The evidence against the appellant on the second count was that he was in Liverpool in the company of the other two men, who told him that they had some rings and brooches to dispose of which had been "got on the cross." The appellant crossed a ferry in the company of the other two men and went by himself to a jeweller's shop. He asked the jeweller if he would buy some stuff which had been got near London "on the cross." The jeweller declined to buy, and, later in the same day, the appellant and two other men were seen together and arrested. A large proportion of the stolen property was found on one of the other two men. The jury were directed that the appellant, although not charged as an accessory after the fact, could be convicted of receiving property knowing it to be stolen. The jury returned a verdict that the appellant was "guilty of being a negotiator and in the full knowledge that the goods were stolen," and this was accepted as a verdict of guilty on the second count of the indictment.

E. T. Nelson for the appellant.

J. B. Sandbach for the Crown.

LORD READING, C.J., delivered the following judgment of the court.—The question for this court is whether the verdict of the jury that the appellant was guilty of "being a negotiator and in the full knowledge that the goods were stolen" could be accepted as a verdict that the appellant was guilty of receiving the goods knowing them to have been stolen. If an accused person is indicted as a principal and not as an accessory, he cannot be convicted on the indictment if the evidence only goes to show that he is an accessory after the fact. This is clear from *R. v. Fallon* (1), which was decided in the year after the passing of the Accessories and Abettors Act, 1861, and *Richards v. R.* (2), which is a decision to the same effect. In the present case, the appellant could not properly be convicted as an accessory after the fact, either to stealing or receiving, as the counts in the indictment charged him with being a principal in both those offences. If that were the only question involved in the case, the authorities show what must have been the result.

But the meaning of the direction given to the jury by the recorder is not quite clear. He seems to have treated the appellant as an accessory after the fact, and, therefore, to have been guilty of aiding and abetting the other men in the commission of the crime charged against them. If the direction to the jury had been that, if they considered that the appellant was in possession of the stolen property either by himself or jointly with the other two men in such a way that he had either exclusive or joint control of it, they could legally convict him, and if they had accepted that view having regard to the facts of the case, this court might have had material on which the conviction could be supported. But this question was never left to the jury, and the direction given to them does not show that they were told to direct their attention to this point. The direction given to the jury cannot, therefore, in our opinion be supported.

Beyond this it is not clear from the verdict of the jury whether they considered that the appellant was in exclusive or joint possession of the stolen property or whether he had control equivalent to possession. They returned a verdict that he was a negotiator for the sale of property with the full knowledge that the property was stolen, but we cannot say that. This verdict does not amount to a finding that the appellant was in possession or control of the goods. In order to constitute the offence charged against the appellant, it is essential that he should have been in possession or control of the goods stolen. The direction to the jury was not sound in law, and the verdict does not affirm the charge which might have been established against the appellant on the evidence under a proper direction to the jury. The conviction cannot, therefore, be supported, although it was clearly shown

A that the appellant knew that the other men had possession of stolen property, and that he was helping them to dispose of it. This court has no power to substitute a verdict instead of the one found where the indictment contains no count sufficient to support a substituted verdict. Nor can we say that, even on a proper direction, the jury would necessarily have found the appellant guilty of receiving the stolen property well knowing it to have been stolen. They might have done so, but that
 B would not be sufficient to warrant this court in upholding the conviction. Before we could do so we should have to be satisfied that the jury must have found such a verdict, and their present finding merely leaves us in doubt as to what verdict they would have returned on a proper direction. The conviction must be quashed, and the appeal is, therefore, allowed.

Appeal allowed.

C Solicitors: Registrar of the Court of Criminal Appeal; Director of Public Prosecutions.

[Reported by R. F. BLAKISTON, Esq., Barrister-at-Law.]

HOLGATE v. BLEAZARD

E [KING'S BENCH DIVISION (Ridley and Avory, JJ.), December 11, 1916]

[Reported [1917] 1 K.B. 443; 86 L.J.K.B. 270; 115 L.T. 788;
 33 T.L.R. 116]

*Animal—Trespass—Tenants of adjoining fields having common landlord—One tenant under covenant to keep intervening hedge in repair—Escape of other
 F tenant's horses through intervening hedge causing damage—Right of tenant under covenant to repair hedge to recover.*

The plaintiff and the defendant, who occupied adjoining farms, were tenants of the same landlord. The plaintiff was under covenant with the landlord to keep in repair a hedge between two fields occupied by the plaintiff and the defendant respectively. Horses belonging to the defendant got through a hole
 G in the hedge and injured a colt belonging to the plaintiff.

Held: the general principle that an owner of animals must keep them on his land at his peril applied; the mere fact that the plaintiff was in breach of the covenant to repair the hedge did not bring the case within the exception of damage caused by the plaintiff's default as laid down by BLACKBURN, J., in *Fletcher v. Rylands* (1) (1866), L.R. 1 Exch. 265 at p. 280; accordingly, the
 I defendant was liable for the damage caused.

Notes. Referred to: *Fowler v. Lanning*, [1959] 1 All E.R. 290.

As to trespass by animals, see 1 HALSBURY'S LAWS (3rd Edn.) 668 et seq.; and for cases see 2 DIGEST (Repl.) 309 et seq. As to the erection, maintenance and repair of fences, see 3 HALSBURY'S LAWS (3rd Edn.) 370 et seq.; and for cases see 7 Digest (Repl.) 286 et seq.

Cases referred to:

- (1) *Fletcher v. Rylands* (1866), L.R. 1 Exch. 265; 4 H. & C. 263; 35 L.J.Ex. 154; 14 L.T. 523; 30 J.P. 436; 12 Jur. N.S. 603; 14 W.R. 799, Ex.Ch.; affirmed sub nom. *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 2 Digest (Repl.) 313, 164.
- (2) *Singleton v. Williamson* (1861), 7 H. & N. 410; 31 L.J.Ex. 17; 5 L.T. 644; 26 J.P. 88; 8 Jur. N.S. 60; 10 W.R. 174; 158 E.R. 533; 18 Digest (Repl.) 438, 1822.

(3) *Tenant v. Goldwin (or Golding)* (1704), 1 Salk. 21, 360; Holt, K.B. 500; 2 Ld. Raym. 1089; 6 Mod. Rep. 311; 91 E.R. 20, 314; 36 Digest (Repl.) 287, 356.

(4) *Cox v. Burbidge* (1863), 13 C.B.N.S. 430; 1 New Rep. 238; 32 L.J.C.P. 89; 9 Jur. N.S. 970; 11 W.R. 435; 143 E.R. 171; 2 Digest (Repl.) 319, 187.

Also referred to in argument :

Boyle v. Tamlyn (1827), 6 B. & C. 329; 9 Dow. & Ry. K.B. 430; 5 L.J.O.S.K.B. 134; 108 E.R. 473; 7 Digest (Repl.) 297, 186.

Hilton v. Anckesson (1872), 27 L.T. 519; 7 Digest (Repl.) 297, 188.

Ellis v. Loftus Iron Co. (1874), L.R. 10 C.P. 10; 44 L.J.C.P. 24; 31 L.T. 483; 39 J.P. 88; 23 W.R. 246; 2 Digest (Repl.) 312, 158.

Ricketts v. East and West India Docks, etc., Rail. Co. (1852), 12 C.B. 160; 7 Ry. & Can. Cas. 295; 21 L.J.C.P. 201; 19 L.T.O.S. 109; 16 Jur. 1072; 138 E.R. 863; 38 Digest (Repl.) 330, 250.

Wiseman v. Booker (1878), 3 C.P.D. 184; 38 L.T. 292; 42 J.P. 295; 26 W.R. 634; 2 Digest (Repl.) 312, 156.

Rooth v. Wilson (1817), 1 B. & Ald. 59; 106 E.R. 22; 2 Digest (Repl.) 339, 290.

Coaker v. Willocks, [1911] 2 K.B. 124; 80 L.J.K.B. 1026; 104 L.T. 769; 27 T.L.R. 357, C.A.; 7 Digest (Repl.) 301, 217.

Appeal from Clitheroe County Court.

The plaintiff and the defendant were farmers holding adjoining farms as tenants of the same landlord. A field occupied by the plaintiff was separated from a field occupied by the defendant by a hedge, which the plaintiff was under covenant to repair and keep repaired. The terms of the covenant were :

"To keep all the premises and all hedges . . . fences . . . and leave the same at the end of the tenancy in good order and tenantable repair and to keep open the mouths of all covered drains."

As between the plaintiff and defendant, it was admitted that there was no prescriptive right or duty to fence. Certain horses of the defendant got through a hole in the hedge and attacked a colt of the plaintiff, inflicting such injuries that it had to be destroyed. The plaintiff claimed damages. The learned county court judge found as a fact that the horses escaped through a hole in the hedge which should have been repaired by the plaintiff. He, therefore, gave judgment for the defendant, and the plaintiff appealed.

Langdon, K.C., and *Hinde* for the plaintiff.

Glover for the defendant.

RIDLEY, J.—This case raises a question of some intricacy. The plaintiff brought an action of trespass. The learned county court judge referred to the terms of the covenant, and pointed out that the plaintiff could not complain inasmuch as the damage occurred through his default. The rule which governs the case was, in my opinion, correctly stated by the learned judge; but the question is: Has it been correctly applied in this case? The owner of land may be bound by prescription or otherwise to fence and maintain fences. The question is whether he can escape liability by showing that there was a duty cast on someone else. In my opinion, however, a distinction must be observed between the duty to fence imposed by mere covenant and the duty which may be imposed by Act of Parliament. The liability is absolute, although the damage was due to the act or default of the plaintiff (as in *Singleton v. Williamson* (2)). That exception was recognised by BLACKBURN, J., in *Fletcher v. Rylands* (1), but cannot be said to extend to relieve the defendant in a case like the present. The appeal must be allowed.

AVORY, J.—I have entertained some doubt whether the facts as found by the learned county court judge bring this case within the principle laid down by BLACKBURN, J., in *Fletcher v. Rylands* (1), where he says (L.R. 1 Exch. at p. 280) :

A "The person whose grass or corn is eaten down by the escaping cattle of his
neighbour, or whose mine is flooded by the water from his neighbour's reservoir,
or whose cellar is invaded by the filth of his neighbour's privy, or whose
habitation is made unhealthy by the fumes and noisome vapours of his neigh-
bour's alkali works, is damnified without any fault of his own; and it seems
B but reasonable and just that the neighbour who has brought something on
his own property which was not naturally there, harmless to others so long as
it is confined to his own property, but which he knows to be mischievous if
it gets on his neighbour's, should be obliged to make good the damage which
ensues if he does not succeed in confining it to his own property."

C But the learned judge had already referred to an exception: "He can excuse
himself by showing that the escape was owing to the plaintiff's default," and on
the findings of fact in this case there is something to be said for the contention
that the defendant's horses got on to the plaintiff's land by the plaintiff's default.
But it is necessary to consider the meaning of the words "fault or default" more
closely. The general principle with regard to cattle, as stated by BLACKBURN, J.,
is that a man must keep his cattle in at his peril. In support of that principle he
says (*ibid.* at pp. 280, 281):

D "As early as the Year Book, 20 Edw. 4, 11, placitum 10, BRIAN, C.J., lays
down the doctrine in terms very much resembling those used by LORD HOLT
in *Tenant v. Goldwin* (3) which will be referred to afterwards. It was trespass
with cattle. Plea, that the defendant's land adjoined a place where defendant
had common; that the cattle strayed from the common, and defendant drove
E them back as soon as he could. It was held a bad plea. BRIAN, C.J., says:
'It behoves him to use his common so that he shall do no hurt to another man,
and if the land in which he has common be not inclosed, it behoves him to
keep the beasts in the common and out of the land of any other.' . . . In the
recent case of *Cox v. Burbidge* (4), WILLIAMS, J., says (13 C.B.N.S. at p. 483):
'I apprehend the general rule of law to be perfectly plain. If I am the owner
F of an animal in which by law the right of property can exist, I am bound to
take care that it does not stray into the land of my neighbour, and I am liable
for any trespass it may commit, and for the ordinary consequences of the
trespass. Whether or not the escape of the animal is due to my negligence
is altogether immaterial'."

G The liability of the owner is the same whether the animals are on a common
or not. The mere fact the plaintiff was under covenant to repair does not, in my
opinion, bring this case within the exception contemplated by BLACKBURN, J. A
statutory obligation to fence is a different matter. I agree that the appeal should
be allowed.

Appeal allowed.

Solicitors: *R. J. Bentley, for J. J. Griggs; Ramsbottom, Clitheroe.*

[Reported by W. V. BALL, Esq., Barrister-at-Law.]

HUDSON AND ANOTHER v. BRAY

[KING'S BENCH DIVISION (Ridley and Avory, JJ.), December 12, 1916]

[Reported [1917] 1 K.B. 520; 86 L.J.K.B. 576; 116 L.T. 122; 81 J.P. 105;
33 T.L.R. 118; 61 Sol. Jo. 234; 15 L.G.R. 156, D.C.]*Highway—Obstruction—Tree blown down across highway—Liability of occupier of land to light and guard fallen tree—Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 65, s. 72.*

If a tree, which is blown down by a gale, falls across the highway and thereby causes an obstruction, the occupier of the land on which it was growing is under no obligation under either s. 65 or s. 72 of the Highway Act, 1835, to light or guard the tree.

Notes. The Highway Act, 1835, s. 65 and the relevant part of s. 72, have been replaced by the Highways Act, 1959, s. 120 (1) and (2), and s. 121 (1) respectively.

As to injury to, or obstruction of, highways, see 19 HALSBURY'S LAWS (3rd Edn.) 285 et seq.; and for cases see 26 DIGEST (Repl.) 468 et seq. For the Highways Act, 1959, ss. 120 and 121, see 39 HALSBURY'S STATUTES (2nd Edn.) 541, 542.

Case referred to :

(1) *Gully v. Smith* (1883), 12 Q.B.D. 121; 53 L.J.M.C. 35; 48 J.P. 309; 26 Digest (Repl.) 469, 1576.

Also referred to in argument :

Butterfield v. Forrester (1809), 11 East, 60; 1 Man. & G. 571, n.; 103 E.R. 926; 26 Digest (Repl.) 514, 1918.

Davies v. Mann (1842), 10 M. & W. 546; 12 L.J.Ex. 10; 7 J.P. 53; 6 Jur. 954; 152 E.R. 588; 26 Digest (Repl.) 514, 1921.

Nichols v. Marsland (1875), L.R. 10 Exch. 255; 44 L.J.Ex. 134; 33 L.T. 265; 23 W.R. 693; affirmed (1876), 2 Ex. D. 1; 46 L.J.Q.B. 174; 35 L.T. 725; 41 J.P. 500; 25 W.R. 173, C.A.; 36 Digest (Repl.) 297, 421.

Appeal by the defendant from Bishop's Stortford County Court.

The defendant was the occupier of land adjoining a highway. A tree standing on his land was blown down by a gale on the night of Dec. 27, 1915. On the following day the defendant, on the direction of the road foreman, sent two men to cut up and remove the tree, an operation which in fact took four days. At about 4.45 p.m. the defendant's two men went to his farm, which was distant about half a mile, to fetch a lamp to light the tree. The plaintiffs were driving along the road in a motor-car about 5 p.m., at which time it was dark, and there being no light on the tree, and no one to warn them of any danger, they ran into the tree and sustained personal injuries, and the car suffered damage.

The plaintiffs claimed damages in respect of the personal injuries and damage to a motor-car, which they alleged were caused by the negligence of the defendant. The county court judge held that the defendant had been guilty of negligence, as for a short period he had left no one in charge of the tree to warn travellers on the highway of the obstruction, although he himself was aware of it, and, therefore, he was liable.

The defendant appealed.

The Highway Act, 1835, provides :

"s. 65. . . . If the surveyor shall think fit that any carriageway or pathway is prejudiced by the shade of any hedges, or by any trees . . . growing in or near such hedges or other fences, and that the sun and wind are excluded from such highway to the damage thereof, or if any obstruction is caused in any carriageway or cartway by any hedge or tree, it shall be lawful for any one justice of the peace, on the application of the said surveyor, to summon the

A owner of the land on which such hedges or trees are growing next adjoining to such carriageway or cartway to appear before the justices at a special sessions for the highways to show cause why the said hedges are not cut, pruned, or plashed, or such trees not pruned or lopped in such manner that the carriageway or cartway shall not be prejudiced by the shade thereof, and that the sun and wind may not be excluded from such carriageway or cartway to the damage
B thereof, or why the obstruction caused in such carriageway or cartway should not be removed; . . . and if such justices shall order and direct that such hedges shall be cut, pruned, or plashed, or such trees pruned or lopped, in manner aforesaid, or such obstruction removed, the said owner shall comply therewith within ten days after a copy of such order shall have been left at the
C usual place of abode of the said owner or of his steward or agent, and in default thereof shall forfeit on conviction a sum not exceeding forty shillings; and the said surveyor, if the order of the said justices is not complied with, shall and he is hereby authorised and required to cut, prune, or plash such hedges, and to prune and lop such trees for the benefit and improvement of the highway and to remove such obstruction as aforesaid to the best of his skill and judgment, and according to the true intent and meaning of this Act . . .

D "s. 72. . . . If any person . . . shall in any way wilfully obstruct the free passage of any such highway; every person so offending . . . shall for each and every such offence forfeit and pay any sum not exceeding 40s. over and above the damage occasioned thereby."

R. W. Turner for the defendant.

E F. Phillips for the plaintiffs.

RIDLEY, J.—The point in this case, although small, is nevertheless of some difficulty. If the arguments of counsel for the plaintiffs are correct, the obligation of a tenant farmer would, in my opinion be increased to a point which would be intolerable. I do not think that the Highway Act, 1835, imposes on a tenant farmer the duty of removing a tree which has fallen across the highway
F before he has been called on to do so by the highway surveyor. That Act, by s. 72, makes the occupier of land liable for wilful obstruction of the highway if, after receiving notice calling on him to remove an obstruction on the highway coming from his land, he fails to do so. Counsel for the plaintiffs contended that s. 65 imposed an obligation on the defendant to remove the obstruction caused by the fallen tree from the highway. The marginal note to that section is
G "Mode of proceeding if highway is prejudiced by hedges, &c." I think that that section merely provides the procedure to be adopted if a road is prejudiced by the shade of hedges along the side of the road or of trees growing near the hedges so that the sun and wind are excluded from the highway, or by a branch of a tree overhanging the road, but that it has no application to a case where a tree has fallen across the highway. That is the only obligation imposed on the occupier of land by the Highway Act. It would be very hard if the statute were strained so that an occupier of land who has not the means of removing a fallen tree from the highway were to be held liable for an accident thereby caused to a person passing along the highway. There is nothing in the Act which imposes such an obligation on him. In *Gully v. Smith* (1), the occupier of the land had had the opportunity
I of removing the obstruction from the highway but had failed to do so, and the court, accordingly, held that he had thereby been guilty of wilful obstruction to the highway within the meaning of s. 72 of the Highway Act, 1835.

It is possible to argue that, where a tree has fallen across a highway and the occupier of the land on which the tree was growing has received a notice from the surveyor of highways calling on him to remove it, but has failed to remove it within a reasonable time and an accident happens in consequence, the occupier would be liable, notwithstanding that the tree fell through the act of God, the ground of

liability being that the occupier had not obeyed the order of the surveyor of highways and had failed to remove the tree within a reasonable time. But the county court judge did not decide this case on that ground. He appears to have decided it on the ground that, inasmuch as the defendant knew that the tree which was growing on his land had fallen across the highway, he was thereafter responsible for lighting it and warning persons travelling along the highway of the existence of the obstruction, and that he was guilty of negligence because he failed to do this. I think there was no evidence on which the county court judge could properly come to that conclusion. He said that there was some slight negligence on the part of the defendant, but I am unable to see any evidence of negligence. It may be that the defendant was under a duty to furnish a lamp to light the tree when requested to do so by the highway surveyor, but it seems to me that there was no duty on the defendant in the circumstances to light the tree. The county court judge said, in delivering judgment:

"During the day the foreman of the road came, and no doubt it came to the defendant's mind that at that particular time the public authority had taken charge of the road, but, in my opinion, they had done nothing of the kind. The public authority did not take possession of the road to warn the public against the consequences until afterwards. Towards dusk the defendant sent down a man to take charge of the tree. A good deal was made of the exact time, but, at all events, I find that for a short time, and only for a short time, there was no person in charge of the tree to warn the public travelling on the highway, and, in my judgment, there was some slight negligence in that. Defendant did his best, but his best was not sufficient, and for a short time that tree was undefended, and any person passing along the road might sustain injury."

I do not think that there was any duty on the defendant to keep perpetual watch over the tree so as to warn persons passing along the highway, and that there was no evidence of failure on his part of his duty with regard to the fetching of the light which the road foreman asked him to fetch. The lamp could not be fetched in a moment, and it was during the time that the lamp was being fetched that the accident happened. In the circumstances, I fail to see any evidence at all of negligence on the part of the defendant, and this appeal must, therefore, be allowed.

AYORY, J.—I am of the same opinion. I think it is clear from the county court judge's judgment that the defendant is not in any sense answerable for the original fall of this tree across the highway. The county court judge finds that it was blown down by a gale, which was in the eye of the law an act of God. That being so, the judgment of the county court judge in favour of the plaintiffs can only be supported if we are prepared to hold that, in the case of a fallen tree causing an obstruction to the highway, a duty was by the law cast on the defendant to light the tree as it lay across the highway, or to place someone there to warn persons travelling along the highway of the existence of the obstruction. I am not satisfied on reading the county court judge's judgment that, even taking the view of the law which the county court judge took, there was any evidence of negligence on the part of the defendant. The county court judge said this:

"Towards dusk the defendant sent down a man to take charge of the tree. A good deal was made of the exact time, but at all events I find that for a short time, and only for a short time, there was no person in charge of the tree to warn the public travelling on the highway."

The county court judge, therefore, does not base the defendant's liability upon the absence of a light, but on his not putting someone there to warn the public travelling on the highway of the existence of the obstruction. The county court judge continued:

"and, in my judgment, there was some slight negligence in that. Defendant did his best, but his best was not sufficient."

A I fail to see how a man can be said to have done his best and at the same time be guilty of negligence.

But even supposing that the finding of the county court judge that the defendant was guilty of negligence be a finding of fact which is binding on us, we must then see whether there was any duty cast by law on the defendant to light the tree or to warn passers-by of the existence of the obstruction. I doubt whether s. 65 applies at all to such a case as this. I think, however, that, if the defendant, after receiving a notice from the surveyor of highways calling on him to remove the tree, had failed to remove it within a reasonable time, he would have been guilty of wilful obstruction under s. 72 as interpreted in *Gully v. Smith* (1). It is clear that the decision in that case did not proceed on any act of the defendant in allowing the wall to fall on to the highway; the judgment proceeded entirely on the fact that, after the landslip had taken place, the defendant failed to remove the obstruction after receiving notice calling on him to do so, and LORD COLERIDGE, C.J., held that, in the circumstances, the defendant had been guilty of wilful obstruction to the highway within s. 72 of the Act of 1835. It may be, therefore, that the defendant in the present case would have been guilty of wilful obstruction to the highway under s. 72 if he had failed to remove the tree within a reasonable time after receiving notice to remove it. But it is not sought in the present case to make him liable by reason of his failure to remove the tree, but because he failed to light it or to place someone there to warn persons travelling along the highway of the existence of the obstruction. I do not, however, think that s. 72 can be construed as imposing any obligation on an occupier of land on which a tree was growing and which has fallen across the highway to light the tree or to place someone there to warn persons passing along the highway of the existence of the obstruction during the period before it is removed.

E

In my opinion, therefore, the appeal ought to be allowed.

Appeal allowed.

Solicitors: *Gedge, Fiske & Gedge*, for *A. E. Floyd*, Bishop's Stortford and Dunmow; *G. H. Walker & Tree*, for *Wm. Gee & Sons*, Bishop's Stortford.

[*Reported by W. V. BALL, Esq., Barrister-at-Law.*]

J. R. MUNDAY, LTD. v. LONDON COUNTY COUNCIL

[COURT OF APPEAL (Lord Reading, C.J., Warrington, L.J., and Scrutton, J.), May 24, June 2, 1916]

[Reported [1916] 2 K.B. 331; 85 L.J.K.B. 1509; 115 L.T. 99; 80 J.P. 403; 32 T.L.R. 559; 60 Sol. Jo. 587; 14 L.G.R. 1055]

County Court—Practice—Payment into court—Form of notice—Admission of negligence—Denial of damage—County Court Rules, 1903, Ord. 9, r. 12.

In an action in a county court by the plaintiffs claiming damages from the defendants for injury to a horse belonging to the plaintiffs which had been caused by the negligence of the defendants' servant, the defendants paid a sum into court under Ord. 9, r. 12, of the County Court Rules, 1903, with the following notice: "Take notice that the defendants admit that the accident was caused through their negligence, but that they deny the alleged damage, and, whilst in this manner denying liability, bring into court the sum of £40 damages and £2 9s. 10d. in respect of costs, and say that this sum is sufficient to satisfy the plaintiff's claim."

Held: the notice was not a sham, and was not wrong in form, since, although it admitted negligence, it put the plaintiffs to proof of damage.

Decision of Divisional Court, [1916] 1 K.B. 159, affirmed.

Notes. The County Court Rules, 1903, have been revoked by the County Court Rules, 1936. For Ord. 9, r. 12, of the Rules of 1903, see now Ord. 11, r. 2, of the Rules of 1936.

Followed: *Davies v. Scott-Lewis*, [1918] W.N. 166. Referred to: *East Suffolk Rivers Catchment Board v. Kent*, [1940] 4 All E.R. 527; *Davies v. Rustproof Metal Window Co.*, [1943] 1 All E.R. 248; *Hultquist v. Universal Pattern and Precision Engineering Co., Ltd.*, [1960] 2 All E.R. 266.

As to payments into a county court, see 9 HALSBURY'S LAWS (3rd Edn.) 230 et seq.; and for cases see 13 DIGEST (Repl.) 431.

Case referred to:

(1) *Critchell v. London and South Western Rail. Co.*, [1907] 1 K.B. 860; 76 L.J.K.B. 423; 96 L.T. 603, C.A.; Digest (Pleading) 87, 736.

Also referred to in argument:

Remington v. Scoles, [1897] 2 Ch. 1; 66 L.J.Ch. 526; 76 L.T. 667; 45 W.R. 580; 41 Sol. Jo. 489, C.A.; Digest (Pleading) 84, 700.

Howell v. Dering, [1915] 1 K.B. 54; 84 L.J.K.B. 199; 111 L.T. 790; 58 Sol. Jo. 669, C.A.; Digest (Practice) 919, 4629.

Appeal from a decision of the Divisional Court (AVORY and LUSH, JJ.), reversing a decision of Lambeth County Court.

The plaintiffs' particulars of claim alleged that, on Dec. 18, 1914, at about 6.15 p.m., a horse, the property of the plaintiffs, was being driven along Walworth Road, when, at a spot opposite Liverpool Street, a tramcar, the property of the defendants and driven by one of their servants, came up behind and collided with the plaintiffs' horse, and caused it to bolt, whereby it was injured, and that the tramcar collided with the horse owing to the negligence of the defendants' driver. The plaintiffs claimed £70 damages. The defendants, under Ord. 9, r. 12 (1), of the County Court Rules, paid the sum of £40 into court with a notice in the following form:

"Take notice that the defendants admit that the accident was caused through their negligence, but that they deny the alleged damage, and, whilst in this manner denying liability, bring into court the sum of £40 damages, and £2 9s. 10d. in respect of costs, and say that this sum is sufficient to satisfy the plaintiffs' claim."

A The county court judge decided that the damage amounted to £40 and no more. The defendants claimed to have the costs of the action. The plaintiffs contended that the payment into court was invalid on the ground that the notice which admitted negligence and denied liability was contradictory and inconsistent. The learned judge held that the defendants' notice was a nullity, as it raised contradictory and inconsistent defences, and that the payment was a sham within the meaning of *Critchell v. London and South Western Rail. Co.* (1), and he gave judgment for the plaintiffs for the £40 with all the costs. The defendants appealed. The Divisional Court held that, the action being an action on the case, and not an action in trespass, damages could not be recovered without proof of actual damage; the defendants' notice denying liability was, therefore, a valid notice, as it put in issue one of the questions which had to be decided. They were consequently entitled to the costs after the date of the payment into court. The plaintiffs appealed.

C Order 9, r. 12, of the County Court Rules, 1903, provides :

D “(1) A defendant who desires to pay money into court pursuant to s. 107 of the Act shall pay the same five clear days at least before the return day. Every such payment shall be taken to admit pro tanto the claim or cause of action or complaint in respect of which the payment is made, unless the defendant at the time of paying the money into court files with the registrar a notice according to the form in the appendix, stating his name and address, and further stating that notwithstanding such payment the defendant denies his liability . . . The defendant must also pay into court, in respect of the court fees and solicitor's costs (if any) entered on the summons, a sum proportionate to the amount paid in in respect of the claim, unless the payment into court is made under a defence of tender, in which case he may make such payment without costs.”

E *Doughty* for the plaintiffs.

Craig Henderson for the defendants.

F LORD READING, C.J.—This is an appeal from the decision of the Divisional Court, which reversed the judgment of His Honour JUDGE PARRY. The action was brought by the plaintiffs to recover damages for injuries to a horse belonging to them, occasioned by the negligence of the defendants or their servants. The defendants paid £40 into court under Ord. 9, r. 12, with the following notice: [His LORDSHIP read the notice, and continued:] It is said that that is an embarrassing notice, and that, in point of form, it is wrong, because it is really an admission and at the same time a denial. The plaintiffs say that it is, in effect, a sham. When the matter came before the learned county court judge, judgment was given for the £40, which was the total sum recovered by the plaintiffs. The defendants did not contest that the plaintiffs had in fact suffered some damage, and the amount of £40 which was paid in with the denial of liability was, according to their view, the total sum.

I The question that arose on this state of facts was what was to happen with regard to the costs. The plaintiffs' case was that the defendants had paid in this £40, not with a genuine denial of liability, but merely to prevent the plaintiffs taking the money out of court except in satisfaction of the claim, and that, in truth, the position was that the defendants knew that they were liable, both for the negligence of their servant and for some damage to the plaintiffs, which the defendants assessed at a maximum of £40, and that they ought to have paid that in with an admission of liability, in which case the plaintiffs could then have gone on to trial in order to get more damages if they insisted on it. The difference, and sometimes a very important difference, is that in the one case—that is, payment into court with an admission of liability—the plaintiff can take the money out; in the other case, where there is a denial of liability, he cannot get the money out until he has established the liability of the defendant, unless he takes it out in

satisfaction. It is said that defendants very often do this, because apparently it has the effect of preserving the money paid into court if the plaintiff will not accept it in satisfaction of the claim, so that, should he proceed to trial and not get more than the money paid into court, the defendant has the advantage of having that sum either as pro tanto security or it may be in complete satisfaction of the costs which, if the defendant is successful, he recovers from the plaintiff; and it is said that this is wrong in this particular case because of the form of notice. It is not in dispute, and counsel for the plaintiff is not contending that the defendants are not entitled to pay money into court with a denial of liability, but he says a denial of this kind, which admits negligence but denies damage, is really only a sham, and the court ought so to decide.

The first ground of counsel's contention is that the defendants admit that the accident was caused through their negligence, and in an interesting argument he contended that the use of the word "accident" implies, and necessarily implies, negligence which caused some damage; it must mean negligence which caused a collision, or some event, or something which resulted in damage, even though it may be only a farthing damage; and he says that, that being so, it is really admitting the cause of action; that it is not disputed and could not be disputed that the cause of accident is negligence of the defendants. In order to make out the cause of action, the negligence of the defendants' servant must be proved and that damage resulted from such negligence. Negligence alone does not give a cause of action, damage alone does not give a cause of action, the two must coincide. Counsel says that here the defendants by the notice admit that the two coincided, but only dispute the amount, and, if counsel had made out that contention, I think that he would go a very long way to establish the point which he is arguing. But I cannot read the notice as meaning that. When the defendants in the plainest terms make clear that they are drawing a distinction between admission of the negligence and admission of the damage, I cannot come to the conclusion that they have admitted in any way that this negligence did cause damage to the plaintiffs. That being so, it really disposes of this appeal, because, unless counsel can establish that the notice in form is wrong, in the sense that it is embarrassing because it admits the cause of action and at the same time denies it, he would be out of court on this appeal.

It is unnecessary to go through either the County Courts Act, 1888, or the rules or the forms, because there is no dispute or any doubt but that a defendant is entitled to pay into court with a denial of liability in the county court. There is a form specially providing for it; there is a special order providing for it, and the only question is whether that order and form have been complied with. It is as well to observe that there is also Ord. 54, r. 22, of the County Court Rules, which shows that the forms are to be similar to the forms used in the appendix where the same are applicable; but no one would suggest, because the language is not precisely the same, that consequently the form is invalid. One must look at the substance of the matter, and, indeed, counsel for the plaintiffs, quite properly, has not contended otherwise. He agrees that one must look at the substance. I have no doubt that what the defendants did by this notice was to deny the cause of action. That being so, I can see no ground for saying the defence was a sham. There are no facts in this case which, in my opinion, would in law amount to evidence that the defence was a sham; at most, what can be said is that the defendants intended to deny the liability in order to put the plaintiffs to proof; and that they are entitled to do. The consequence is that, in my judgment, the appeal fails, and I think that the judgment of the Divisional Court was right.

WARRINGTON, L.J.—I agree.

SCRUTTON, J.—I agree.

Appeal dismissed.

Solicitors : *Clifford, Turner & Hopton; Edward Tanner.*

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

A
CARNELL v. HARRISON AND ANOTHER[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Phillimore and Warrington, L.JJ.),
February 10, 1916]B
[Reported [1916] 1 Ch. 328; 85 L.J.Ch. 321; 114 L.T. 478;
60 Sol. Jo. 290, C.A.]C
Infant—Settlement—Repudiation—Reasonable time after majority—Date of commencement—Reversionary property—Right to wait until property falls into possession.D
By a marriage settlement dated Dec. 20, 1895, the wife, then an infant, transferred property to which she was entitled in reversion to trustees to hold the same on trust for her use and after her decease for the children of the intended marriage, which duly took place immediately afterwards. The wife became twenty-one on Mar. 18, 1896. There were three children of the marriage, but differences arose between the wife and the husband, and in 1906 she left him and they had since lived apart. In September, 1914, nearly nineteen years after the execution of the settlement, the wife, who had never confirmed the settlement, brought an action asking for the settlement to be set aside, on the ground that it was voidable as having been made by her during infancy and never confirmed by her after attaining her majority.E
Held: repudiation by a person of a contract entered into in his infancy must take place within a reasonable time of his coming of age; in the case of a settlement by an infant of reversionary property the infant was not entitled to wait until the falling into possession of that property before exercising the right to repudiate; in the present case the wife had allowed 18½ years to elapse before purporting to repudiate; that could not be said to be a reasonable time; and, therefore, her claim must fail.F
Edwards v. Carter (1), [1893] A.C. 360, applied.*Re Jones, Farrington v. Forrester* (2), [1893] 2 Ch. 461, disapproved.

Notes. As to contracts generally and settlements by infants, see 21 HALSBURY'S LAWS (3rd Edn.) 138–148, 180–184, and for cases see 28 DIGEST (Repl.) 496 et seq., 552 et seq.

Cases referred to :

- G
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- (1)
- Carter v. Silber*
- , [1892] 2 Ch. 278; 66 L.T.N.S. 473; affirmed sub nom.
- Edwards v. Carter*
- , [1893] A.C. 360; 63 L.J.Ch. 100; 69 L.T. 153; 58 J.P. 4; 1 R. 218, H.L.; 28 Digest (Repl.) 502, 188.
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- (2)
- Re Jones, Farrington v. Forrester*
- , [1893] 2 Ch. 461; 62 L.J.Ch. 996; 69 L.T. 45; 3 R. 498; 28 Digest (Repl.) 557, 730.

Also referred to in argument :

- H
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- Viditz v. O'Hagan*
- , [1899] 2 Ch. 569; 68 L.J.Ch. 553; 80 L.T. 794; 47 W.R. 571; 15 T.L.R. 416; reversed [1900] 2 Ch. 87; 69 L.J.Ch. 507; 82 L.T. 480; 48 W.R. 516; 16 T.L.R. 357; 44 Sol. Jo. 427; 28 Digest (Repl.) 557, 728.

I
Appeal by the plaintiff against a decision of NEVILLE, J., in an action in which the plaintiff sought a declaration that a marriage settlement, dated Dec. 20, 1895, should be set aside.

By the settlement, which was made on the marriage then intended and shortly afterwards solemnised between Francis Drake Carnell and the plaintiff, after reciting that upon her marriage the plaintiff was entitled (i) under a will therein mentioned to one fifth share or some other part of certain freehold hereditaments in reversion expectant on the decease of her mother, and (ii) under another will therein mentioned to one undivided seventh part of the real and residuary personal estate arising under such will in reversion expectant upon the decease or future marriage of her mother, it was witnessed that such property should be transferred to the

trustees of the settlement when the same fell into possession, and the trustees were to hold the same upon trust to invest the same and pay the income thereof to the plaintiff during her life for her separate use and after her decease for such children or remoter issue upon obtaining the age of twenty-one as she should by will or deed appoint and in default of appointment in trust for the child or children of the marriage who should attain twenty-one and in default of a child or children in trust for the plaintiff absolutely should she survive the intended coverture, but if she should die during the intended coverture as she should by will appoint, and in default of appointment for her statutory next of kin. The marriage settlement contained power to raise half the share of any child and apply the same to his or her advancement, and a power to the plaintiff to appoint a portion of the trust funds to any future husband and issue by a future marriage. At the date of the settlement and the marriage the plaintiff was under twenty-one years of age, and she did not attain her majority until Mar. 18, 1896. There were three children only of the marriage, all of whom were infants and unmarried. One, a female, was about nineteen years old. The mother of the plaintiff was still alive and had not remarried, and the whole of the property in the settlement was still in reversion. The plaintiff's husband was still alive, but she was living apart from him. The plaintiff had never confirmed the settlement since she had attained the age of twenty-one, and claimed that she was ignorant until just before the present action was begun—namely, on Sept. 10, 1914—of her right to repudiate the settlement if she so desired upon attaining twenty-one. The plaintiff claimed a declaration that the settlement had been avoided by the issue of the writ in the present action and ought to be set aside. NEVILLE, J., said that he was not free to come to any conclusion on his own judgment, but was bound by *Carter v. Silber* (1), and under the circumstances of the case, the plaintiff not being entitled to rely upon the ignorance of her right, which he thought she had proved, he must come to the conclusion that she had come at the expiration of that long period of years too late, and that her action must fail. From that decision the plaintiff appealed.

Gilbart-Smith for the plaintiff.

W. J. Whittaker for the defendants, trustees of the settlement, was not called on to argue.

LORD COZENS-HARDY, M.R.—This is an appeal from a decision of NEVILLE, J. I have no doubt whatever that his decision was right.

There was a marriage settlement executed in 1895, the parties to it being the intended husband, Mr. Carnell, the plaintiff who was then a lady nearly twenty years old, and two trustees. It was a settlement arranged in the customary manner by the mother of the lady. It was drawn by the family solicitors, and it is a settlement in form obviously for the benefit of the infant wife. The husband did not take a penny of interest under it. The whole property is given to the plaintiff for life and then to the children of the marriage, with a power of appointment to the plaintiff. There have been three children of the marriage, one of whom has almost, but not quite, attained twenty-one years. One fact on which great reliance is placed is that the property comprised in the settlement is reversionary, a reversion expectant on the life interest of the mother of the plaintiff, and the reversion has not yet fallen in. There were matrimonial disputes of which we do not know the rights or the wrongs. The husband is living apart from his wife. The wife is living apart from her children, who have been taken charge of by their grandmother and maintained by her. The wife has not communicated with the children or with any members of the family. She has been living out of England during the greater part of this time, and entirely refrained from communicating with them. In September, 1914—that is to say, nineteen years after the date of the settlement—this action was commenced, seeking a declaration that the settlement is not binding on the plaintiff and is void and ought to be set aside, and for a declaration that the plaintiff is entitled to repudiate it. I have said already she was nearly twenty

A years of age when she executed the settlement. Therefore, it is eighteen years since she attained twenty-one.

We have been told this. Granted that it is settled that an infant's contract may be repudiated, but that it must be so within a reasonable time, that doctrine is qualified by these circumstances. First of all, it is said that the husband did not bring any property into settlement. It was all the wife's property which was dealt with, and, that being so, there is nobody with whom a bargain of this kind could be made, and nobody could be disappointed if the plaintiff did not perform her contract. That is, if I may say so with all respect to counsel, an extraordinary proposition. Marriage settlements constantly contain provisions with regard to property brought in by one of the spouses only. I never heard that in construing a contract or considering a question of repudiation of this kind it would be in any sense necessary to consider whether the husband brought in property as well as the wife. Then it is said that there is nobody disappointed. The three children of the marriage are all minors. They have not been entitled to a penny of the property hitherto, and they could not have dealt with their interests. That again is not the test. The three children are within the marriage consideration. They could sue the trustees for any breach of trust, and undoubtedly each has a contingent life interest in the settlement funds, and for all the purposes of today it seems to me that their interests must be considered in exactly the same position as the plaintiff's. The lady's daughter, who is now approaching twenty years of age, is of marriageable age, and she could, with leave of the court, settle her interest in this property. But that is of no importance whatever.

I regard this as a case which is absolutely covered by authority which we ought not in any way to depart from. *Carter v. Silber* (1) is a case of the highest possible authority which came before the Court of Appeal, consisting of LINDLEY, BOWEN, and KAY, L.JJ., who gave judgments which plainly cover the present case. But I do not refer to them in detail, though there are some very strong passages, because the case went to the House of Lords (sub nom. *Edwards v. Carter* (1)), consisting of, if I may respectfully say so, a very strong tribunal. In that case there were four years of minority before repudiation. LORD HERSCHELL, L.C., said this ([1893] A.C. at p. 364):

"It is not disputed that this contract executed and entered into by Martin Albert Silber was not absolutely void, but was voidable only [in the present case the lady's contract was voidable only], that is to say, that after he came of age it was as binding as if he had been of age at the time when he executed it, subject only to this, that the law enabled him to avoid his obligations provided he did so within a reasonable time."

That is a general proposition of law. Then he said (*ibid.* at p. 365):

"The first question is whether the infant was entitled to wait until an actual sum of money came to him to which this covenant could apply before he made the repudiation. I think that is a proposition which it is absolutely impossible to regard with seriousness—that this covenant being binding unless he repudiates it within a reasonable time, he is entitled to wait to see how in respect of any particular sum of money the covenant will operate, and when he has made up his mind whether with regard to that sum of money it will be beneficial to him or not, he can then, and not till then, be said to have his proper opportunity of making the determination."

LORD WATSON said in a very short judgment (*ibid.* at p. 366):

"If he chooses to be inactive, his opportunity passes away; if he chooses to be active, the law comes to his assistance."

LORD HALSBURY adopted (*ibid.* at p. 366) the language of LINDLEY, L.J., who said ([1892] 2 Ch. at p. 285):

"Whether the defendant could have repudiated the deed in five or six or nine months after he came of age I do not care to discuss; but to ask us to hold that he repudiated within a reasonable time is to ask us to hold that which no reasonable man could think of holding."

LORD MACNAGHTEN, again, said ([1893] A.C. at p. 367):

"It seems to me that everyone who is of sufficient age and intelligence to execute a deed, whether he be an infant or a man of full age, and who does execute a deed, must be treated as knowing the contents of the instrument which he executes; and therefore I think it is immaterial to inquire whether Mr. Martin Silber knew or did not know the particular covenant in question. I do not think he is entitled to any indulgence on the ground that he was not in fact aware of the obligation which he undertook."

Counsel said that there was one observation which he was entitled to make on that case, and that is that the husband's father might have altered his testamentary disposition in favour of his son if he had known that he would repudiate the settlement. The father there had brought in property. That again is not any qualification of the general principles which are laid down by the noble and learned Lords. I say deliberately that the general principles laid down by the noble and learned Lords seem to me absolutely to cover the present case.

Then counsel referred us to a decision of NORTH, J., in *Re Jones, Farrington v. Forrester* (2), decided in the same year as *Edwards v. Carter* (1), but rather before it, and not cited in the House of Lords by either counsel. He said that there the learned judge, NORTH, J., held that, in considering "reasonable time," it might be competent to say that reasonable time did not begin to run till the reversion fell into possession, or, at least, the fact that it was a reversionary interest with which you are dealing is sufficient to excuse a delay of, I think, forty years. With great respect to the learned judge I am unable to follow his judgment. He there said ([1893] 2 Ch. at p. 469):

"I think it is not an unreasonable time if she elects to repudiate the settlement when for the first time the question arises whether anything is or is not to be received by her or her trustees under it, and that question never arose, so far as I can see, until after the death of the tenant for life."

If that is to be taken to be the view of the learned judge on this point, I think that it is plainly overruled by the decision of the House of Lords in the same year in *Edwards v. Carter* (1), and it certainly is a principle which, so far as I am aware, has no support from any prior decision of this or any other court. For these reasons I think that the decision of the learned judge in the court below was perfectly right, and that this appeal must be dismissed with costs.

PHILLIMORE, L.J.—I am of the same opinion. I do not think that the differences between the present case and that of *Edwards v. Carter* (1) are sufficient to distinguish it in any material respect. I take the law as laid down in *Edwards v. Carter* (1) and apply it to this present case without difficulty.

There really are only three matters to be considered. The first is that in *Edwards v. Carter* (1), the infant, who was in that case the husband, had covenanted to settle after-acquired property, and there was a good deal of reason, in the opinion of the lords justices of the Court of Appeal in that case (sub nom. *Carter v. Silber* (1)), and the noble and learned Lords, for thinking that, if the father of the infant had known he was going to repudiate that covenant, he never would have devised benefits to him in the way that he did by his will. That is a topic to consider which is no doubt absent in the present case, because the lady here did not covenant to settle after-acquired property, and she cannot, therefore, in any way be supposed to be diverting to herself benefits which she otherwise would not have got, because she was dealing with property already coming to her.

The next point is that the property comprised in the settlement in the present case is a reversionary interest and that it has not yet fallen into possession, and that one must be guided by the decision of NORTH, J., in *Re Jones, Farrington v. Forrester* (2). The language of NORTH, J., in that case comes perilously near to an actual contradiction of the language of LORD HERSCHELL, L.C., in *Edwards v. Carter* (1). If it amounts to saying that a spouse who was an infant when he or she married is not bound to take action to repudiate a marriage settlement which includes reversionary property till actual sums of money are going to be handled by him or her one way or the other according as the settlement stands or not, it is in exact contradiction of the passage that I am now going to read from the opinion of LORD HERSCHELL, L.C. ([1893] A.C. at p. 365):

"The first question is whether the infant was entitled to wait until an actual sum of money came to him to which this covenant could apply before he made the repudiation. I think that is a proposition which it is absolutely impossible to regard with seriousness."

If it is meant to say that the exigency is not quite so pressing when there is a reversionary interest to deal with and that it may be a point to consider when deliberating upon what is a reasonable time, you might prolong what would otherwise be a reasonable time by some fraction. I do not know that I am inclined to comment specially on what NORTH, J., said. But if it comes to anything more than that, I respectfully disagree with his judgment. It is quite possible, as has been pointed out in the course of the argument, that the decision was quite right in the particular circumstances of that case. But the reasons given for it, in my opinion, go too far.

The last point is whether or not the fact that the lady here did not know her right of repudiation until quite late in point of fact justifies her waiting all this time. That was expressly dealt with by the lords justices in *Edwards v. Carter* (1) in the Court of Appeal, and it seems to me to be more than dealt with in the House of Lords, because the noble and learned Lords go a step further. In *Edwards v. Carter* (1) it was either assumed or proved for the benefit of the plaintiff that the plaintiff did not know what he had bound himself to do. The House of Lords said that that will not do, but that you must inquire. Of course if he did not know what he had bound himself to do, he was not considering whether he could repudiate and escape from doing it. The House of Lords said that the infant cannot even escape on the ground that he did not know what he had bound himself to do. It is his duty to inquire. He knows he has executed this solemn deed and speedily after he comes of age it is his duty to inquire what he has bound himself to do, and, if necessary, to inform himself whether he can take proceedings to repudiate. Therefore, I think that *Edwards v. Carter* (1) is really a stronger case than the present. The plaintiff here knew from the beginning that she had executed a settlement. She does not deny that she knew that she settled these reversionary interests coming under the wills of her relations, and the letter that she wrote a year and a half before she brought her action shows that she not only then knew, but must have known for some time, what the contents of the settlement were. Therefore, she is in a worse position than the plaintiff in *Edwards v. Carter* (1). Neither of the parties in that case knew the law. The plaintiff in *Edwards v. Carter* (1) did not know the facts, and yet he was not held entitled to relief. In the present case the plaintiff knew the facts and she ought not to be held entitled to relief. After this grave lapse of time, with the children growing up, naturally being educated, and very likely told that there is some little fortune awaiting them because of the mother's settlement, to allow the mother, in order to free herself from her duty to her children, to repudiate the settlement now, with no question of the husband and no question of more distant people, would, in my opinion, be

very unjust and wrong. I quite agree, therefore, that this appeal should be dismissed with costs.

WARRINGTON, L.J.—I am of the same opinion. The only question that we have to determine is whether the plaintiff repudiated this settlement within a reasonable time after Mar. 18, 1896, when she came of age. She in fact attempted to repudiate it by the issue of the writ in this action on Sept. 10, 1914—that is to say, eighteen and a half years after that date. No doubt, what is a reasonable time depends upon the circumstances of each particular case. In this case the plaintiff knew that she had made a settlement. Of that there is no doubt, because she said so in her evidence in terms. She must, according to the authority of all the noble and learned Lords who decided *Edwards v. Carter* (1), be taken to have known and been acquainted with its provisions. Those provisions were entirely in favour of herself and her children. No other person takes any interest whatever. The plaintiff has three children, one of whom is now nearly twenty years of age, the other two being younger. In 1906 she left her husband and children. What were the circumstances we do not know, and it is immaterial, but she then left the children in the care of her mother, who has educated them ever since, and the plaintiff has had no communication with them since that date. She knew and knows now that they have nothing at all except their respective interests under this settlement. Those seem to me to be the only circumstances of any materiality except, perhaps, one—namely, that the property was in reversion at the time the settlement was executed, and has remained in reversion until the present time. But, in my judgment—in this case at all events—that fact does not affect the question, and, if the judgment of NORTH, J., in *Re Jones, Farrington v. Forrester* (2) is to be taken as meaning that the reasonable time is to be calculated from the time when the interest falls into possession, then I respectfully disagree with it. In that case we do not know what the affidavits were. We do not know what the facts were, and it may have been on the facts of that particular case that NORTH, J., was justified in holding that forty years was a reasonable time. It seems difficult to see how that could be so, but it may be that he was justified in so holding. But I must respectfully say that the reasons on which he founds his judgment by no means commend themselves to me.

The plaintiff in the present case not only knew that she had executed a settlement and must be taken to have known what its provisions were, but, in my judgment, she must be taken to have known when she attained twenty-one years of age that that settlement, being a contract made by her when an infant, was one which could be repudiated by her, if she chose, on attaining her majority. That proposition is affirmed in terms by two of the learned lords justices who concurred in the decision of *Carter v. Silber* (1) and, although not affirmed in terms by the speeches of the noble and learned Lords in the House of Lords on appeal from the decision in that case, yet I think that the affirmation of it is involved in their decision. The observations of those two learned lords justices will not receive any greater authority from anything that I may say, and I should have said nothing about it except that NEVILLE, J., in his judgment, while following and regarding himself bound by their decision, has expressed his personal disagreement with that particular reason on which it was founded. With the greatest respect I cannot agree with the observations of NEVILLE, J. on that part of the case. It seems to me that so common and so well known a rule of law that a contract made by an infant is in a different position from a contract made by an adult, and that in a case in which it is not void it may yet be avoided by the infant, if he pleases, when he comes of age, is a rule of law the knowledge of which may well be attributed to the person in question. I think, therefore, the fact that the plaintiff in the present case was not actually advised of her rights until, as she said, about a year and a half before the trial of the present action is not a feature to which we ought to attach any weight. Excluding that, it seems to me wholly impossible to say, under the circumstances

which I have stated with regard to her family, that to repudiate the settlement at the expiration of eighteen and a half years from her minority was to do so within a reasonable time of her minority. For these reasons I think that the decision of the learned judge in the court below is perfectly right.

Appeal dismissed.

Solicitors: *A. F. Wild; Hardisty, Rhodes & Hardisty.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

Re WILLIAMS. JONES v. WILLIAMS

[CHANCERY DIVISION (Neville, J.), April 6, 1916]

[Reported [1916] 2 Ch. 38; 85 L.J.Ch. 498; 114 L.T. 992; 60 Sol. Jo. 495]

Trustee—Administration of estates—Accounts—Limitations—Trustee Act, 1888 (51 & 52 Vict., c. 59), s. 8.

In proceedings for accounts against trustees or executors, a claim by the trustees or executors that they are entitled, under the Trustee Act, 1888, s. 8, to limit their liability to six years before action brought must be raised when the order directing accounts and enquiries is made.

Notes. The Trustee Act, 1888, s. 8, has been replaced by the Limitation Act, 1939, s. 19.

As to an order for the administration of an estate, see 16 HALSBURY'S LAWS (3rd Edn.) 440 et seq.; and for cases see 24 DIGEST (Repl.) 720–722. For the Limitation Act, 1939, s. 19, see 13 HALSBURY'S STATUTES (2nd Edn.) 1179.

Case referred to:

- (1) *Re Blow, Governors of St. Bartholomew's Hospital v. Camden*, [1914] 1 Ch. 233; 83 L.J.Ch. 185; 109 L.T. 913; 30 T.L.R. 117; 58 Sol. Jo. 136, C.A.; 24 Digest (Repl.) 721, 7077.

Also referred to in argument:

How v. Earl Winterton, [1896] 2 Ch. 626; 65 L.J.Ch. 832; 75 L.T. 40; 45 W.R. 103; 12 T.L.R. 541; 40 Sol. Jo. 684, C.A.; 32 Digest 491, 1526.

How v. Earl Winterton (1897), 79 L.T. 344, n., C.A.

Re Davies, Ellis v. Roberts, [1898] 2 Ch. 142; 67 L.J.Ch. 507; 79 L.T. 344; 32 Digest 492, 1528.

Lacons v. Warmoll, [1907] 2 K.B. 350; 76 L.J.K.B. 914; 97 L.T. 379; 23 T.L.R. 495, C.A.; 24 Digest (Repl.) 721, 7074.

Further Consideration of an action for account brought by Ethel Winifred Jones and Florence Gwendoline Taylor, beneficiaries under the will of their father, Henry Williams, against the trustees and executors of the will.

By his will, dated May 18, 1895, Henry Williams, the testator, after appointing the defendants his trustees and executors, devised and bequeathed all his real and personal estate to them, including the goodwill and stock-in-trade of his business as provision merchant carried on at Albion House, Llanelly, on trust to carry on the business so long as they should think fit, and for that purpose to use such part of the residuary estate as they thought proper, keeping proper books of account so that they might be in a position to sell the business on the death of his widow if she survived him. The testator directed his trustees to convert and invest his residuary estate, and, after providing for the payment of the capital and income of certain sums to certain of his children therein specified, to pay the income from the trust investments to his widow for life, and after death in trust for his eight

children (including the plaintiffs) in equal shares absolutely. The testator died on Aug. 30, 1895, and his will was duly proved by the defendants as executors. His widow was then appointed by the trustees to manage the grocery business, and she received the income of the trust estate until her death on Jan. 1, 1906. The testator's children all survived their mother, the youngest attaining twenty-one in 1907. From time to time since the death of the testator, the defendants, at the request of various beneficiaries, made unauthorised payments out of the trust estate; these payments were made honestly and without fraud. In 1910 the plaintiffs wrote to the defendants asking for accounts of their dealings with the trust estate, and eventually accounts were received from them showing various receipts and payments made since 1895. The plaintiffs alleged that these accounts were insufficient, and, on Oct. 16, 1912, they issued an originating summons claiming from the defendants the usual trust accounts and inquiries. The defendants submitted to an account, and on Feb. 13, 1913, NEVILLE, J., ordered (i) an account of the personal estate of the testator (including the business) come to the hands of the defendants; (ii) an inquiry what parts of the personal estate were outstanding or undisposed of; (iii) an account of rents or profits of the testator's real and leasehold estates and the moneys arising from the sales thereof possessed or received by the defendants; (iv) an inquiry what parts, if any, of the testator's real and leasehold estates remained unsold; and (v) an inquiry whether any and, if so, what debts of the testator remained unpaid. It was further ordered that the testator's business and leasehold estates be sold with the approbation of the court, and that the moneys to arise from the sale be lodged in court to the credit of the action, subject to further order. The defendants, in accordance with this order, proceeded to carry in their accounts. These accounts covered a period of seventeen years, commencing with the testator's death in 1895. The testator's business was eventually sold for £840, and the leasehold estates for £1,765. By his certificate, the master found that a balance of £1,080 remained due from the defendants, £815 being in respect of personal estate and £265 in respect of the business. The certificate further stated that the defendants claimed that, in respect of all payments made by them on account of the testator's estate more than six years before the issue of the summons in the action, they were entitled to relief under s. 8 of the Trustee Act, 1888, and that none of such payments ought to be disallowed. On this, the master found in the alternative that, if the accounts were taken on this basis, a sum of £3,812 was due to the defendants on balance. The action now came on for hearing on further consideration.

The Trustee Act, 1888, s. 8 (1), provides :

"In any action or other proceeding against a trustee or any person claiming through him, except when the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:—(a) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him: (b) If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received . . ."

Ward Coldridge, K.C., and H. J. Mackay for the plaintiffs.

Jenkins, K.C., and R. M. Pattisson for the defendants.

Rowland Rowlands and Tyldesley Jones for other parties attending.

NEVILLE, J.—As at present advised, I am of opinion that this is a case in which s. 8 (b) of the Trustee Act, 1888, if properly raised, would have been applicable for the benefit of the defendants. But the question is whether it has been adequately raised, or at the proper time. The proceedings were originally commenced by originating summons, and the usual accounts and inquiries were directed. The master has made his certificate, and the matter is now before the court on further consideration. The accounts directed by the order and carried in by the trustees went back to the year 1895. Having regard to the form of the order, every one of the accounts directed is inconsistent with the liability of the trustees being limited to six years before the issue of the summons. The accounts were before the master for three years, and, at some time during that period, the point was raised for the first time on behalf of the trustees that they should be allowed the benefit of the statute, and what I have to consider is a very serious question indeed, namely, whether the statute can be relied on and set up by trustees after an order for accounts, inconsistent with it, has been made. Here the trustees never suggested that they were not liable to account from the testator's death until the point was raised. It seems to me that if I were now to allow this defence, an immense amount of time and money would have been thrown away. In every case that has been cited the point has been taken at the trial, or when the order was made. It appears to me that the account must depend on the form of the order at the time it is made. The order can be qualified by a reference to the statute or, as pointed out by the Master of the Rolls (COZENS-HARDY, M.R.) in *Re Blow* (1), a full account can be directed to be taken, the question as to s. 8 being reserved until further consideration. But in such a case I cannot see any advantage in postponing the question of the liability of the trustees to further consideration. In the present case, the accounts are complete, and, the question of the statute not having been raised until the accounts had been for some time before the master, the defendants, in my opinion, cannot now set up the defence of the statute.

Solicitors: *Fullilove Arnott & Co.*; *J. B. Somerville*, for *Brodie & Walton*, Llanelly.

[Reported by W. J. L. AMBROSE, Esq., Barrister-at-Law.]

COLCHESTER BREWING CO., LTD. v. TENDRING (ESSEX) LICENSING JUSTICES

[COURT OF APPEAL (Swinfen Eady, Pickford and Bankes, L.J.J.), March 24, 28, 29, 1916]

[Reported [1916] 2 K.B. 126; 85 L.J.K.B. 1001; 114 L.T. 1017; 80 J.P. 313; 32 T.L.R. 401.]

Licensing—Compensation authority—County committee—Need to act judicially on legal evidence—Power to state Case.

A compensation authority for a county licensing district (the county confirming and compensation committee) is acting judicially when determining whether the renewal of a licence should be refused, and, therefore, can only act on legal evidence. The authority has power to state a Case for the consideration of the High Court.

Per SWINFEN EADY, L.J.: There is no obligation on the licensing authority to arrange the licensed houses in order of merit and close first the lowest house on the list, even though the house to be closed compares favourably with another house which has not been dealt with.

Court—Established procedure—New jurisdiction—Exercise in accordance with existing procedure.

If a new jurisdiction is given to a court with established and well-known rules of procedure, unless the contrary be expressed or clearly implied the new jurisdiction is to be exercised in accordance with that procedure.

Evidence—Ordnance map—Admissibility.

An ordnance map and its contents, if properly proved or admitted, is admissible in evidence.

Raven v. Southampton Justices (1), [1904] 1 K.B. 430, explained.

Notes. Referred to: *R. v. Bath Compensation Authority*, [1925] 1 K.B. 685.

As to compensation authorities and admissibility in evidence of maps and plans, see 22 HALSBURY'S LAWS (3rd Edn.) 577-580, and *ibid.*, vol. 15, pp. 411-413. For cases see 30 DIGEST (Repl.) 54 et seq., and 22 DIGEST (Repl.) 373-376. For Licensing Act, 1953, see 33 HALSBURY'S STATUTES (2nd Edn.) 142.

Cases referred to:

- (1) *Raven v. Southampton Justices*, [1904] 1 K.B. 430; 73 L.J.K.B. 282; 90 L.T. 94; 68 J.P. 68; 52 W.R. 574; 20 T.L.R. 146; 48 Sol. Jo. 143, D.C.; 30 Digest (Repl.) 69, 517.
- (2) *R. v. Southampton Licensing Justices, Ex parte Cardy*, [1906] 1 K.B. 446; 75 L.J.K.B. 295; 94 L.T. 437; 70 J.P. 175; 54 W.R. 484; 22 T.L.R. 236; 50 Sol. Jo. 206, D.C.; 30 Digest (Repl.) 76, 533.
- (3) *Dale's Case, Enraght's Case* (1881), 6 Q.B.D. 376; 50 L.J.Q.B. 234; 45 J.P. 284, 300; sub nom. *Re Serjeant v. Dale, Ex parte Dale, Re Perkins v. Enraght, Ex parte Enraght*, 43 L.T. 763, L.J.J.; affirmed sub nom. *Enraght v. Lord Penzance* (1882), 51 L.J.Q.B. 506; 7 App. Cas. 240; 46 L.T. 779; 30 W.R. 753; 46 J.P. 644, H.L.; 16 Digest 271, 809.
- (4) *Dartford Brewery Co., Ltd. v. London County Quarter Sessions*, [1906] 1 K.B. 695; 75 L.J.K.B. 597; 94 L.T. 782; 70 J.P. 197; 22 T.L.R. 491; 50 Sol. Jo. 441, D.C.; 30 Digest (Repl.) 57, 428.
- (5) *Howe v. Newington Licensing Justices*, [1907] 2 K.B. 340; 76 L.J.K.B. 718; 71 J.P. 242; 96 L.T. 701; 23 T.L.R. 474; affirmed [1908] 1 K.B. 260; 77 L.J.K.B. 263; 98 L.T. 79; 72 J.P. 12; 24 T.L.R. 174; 52 Sol. Jo. 113, C.A.; 30 Digest (Repl.) 56, 422.
- (6) *Re Cathcart, Ex parte Campbell* (1870), 5 Ch. App. 703; 23 L.T. 289; 18 W.R. 1056, L.J.; 42 Digest 669, 795.

Also referred to in argument :

Morgan v. Aylesford Licensing Justices, [1906] 1 K.B. 437; 75 L.J.K.B. 266; 94 L.T. 485; 70 J.P. 155; 22 T.L.R. 229, D.C.; 30 Digest (Repl.) 56, 424.

R. v. Shann, [1910] 2 K.B. 418; 79 L.J.K.B. 736; 102 L.T. 700; 74 J.P. 273; 26 T.L.R. 435; 54 Sol. Jo. 474, C.A.; 30 Digest (Repl.) 56, 423.

Mitchell v. Croydon Justices (1914), 111 L.T. 632; 78 J.P. 385; 30 T.L.R. 526, D.C.; 30 Digest (Repl.) 56, 420.

R. v. Drinkwater, etc., Coventry Justices, Ex parte Conway (1905), 70 J.P. 1; 22 T.L.R. 12, C.A.; 30 Digest (Repl.) 56, 421.

R. v. Tolhurst, Ex parte Farrell, R. v. Cox, Ex parte West, [1905] 2 K.B. 478; 74 L.J.K.B. 652; 93 L.T. 76; 69 J.P. 308; 53 W.R. 619; 21 T.L.R. 533; 49 Sol. Jo. 515, D.C.; 30 Digest (Repl.) 16, 88.

Appeal by a brewery company from a decision of the Divisional Court (LORD READING, C.J., COLERIDGE and AVORY, JJ.), reported [1915] 3 K.B. 48, on a Case Stated by the licensing committee of Essex Quarter Sessions sitting as the compensation authority under the provisions of the Licensing (Consolidation) Act, 1910.

The Divisional Court held that when the question of the renewal of an old on-licence was referred by the licensing justices to the quarter sessions on the ground of redundancy, there was no principle of law which prohibited the licensing committee from refusing to renew the licence unless it was shown by the evidence that the house compared unfavourably with other licensed houses in the neighbourhood the licences of which were renewed, but as soon as there was evidence before the committee that the house was redundant they had a discretion to refuse the renewal, and it was no answer to say that there were other licensed houses in the neighbourhood which were equally redundant or that the particular house selected was of a higher order of merit than a neighbouring house the licence of which had been renewed. The decision of the licensing committee of quarter sessions refusing a renewal of a licence in respect of premises owned by the brewery company was, therefore, upheld. The brewing company appealed.

Wootten and Claughton Scott for the brewers.

Hohler, K.C., and *C. E. Jones* for the licensing justices.

SWINFEN EADY, L.J., read the following judgment.—This is an appeal from a decision of a Divisional Court upon a Case Stated by the licensing committee of the court of quarter sessions for the county of Essex sitting as the compensation authority under the provisions of the Licensing (Consolidation) Act, 1910.

The appellants are the registered owners of an ante-1869 beerhouse known as the Princess Alexandra at Manningtree. They contend that the order of the Divisional Court was erroneous upon the ground that the licensing committee of the court of quarter sessions were exercising the powers committed to quarter sessions by the Licensing Act and in so doing were acting judicially, and in that capacity could only act upon evidence on oath, and that there was no such evidence before the committee upon which they could arrive at the conclusion that the licensed house in question—the Princess Alexandra—was unnecessary for the wants of the neighbourhood and superfluous, and could on that ground refuse to renew the licence. It was contended by the licences justices, on the other hand, that the licensing committee were acting, not judicially, but in an administrative capacity, and that they were at liberty to act without evidence on oath merely upon statements made to them, or upon facts within the knowledge of individual justices who were members of the committee. It was also further contended by the justices that, if the true position be that they were acting judicially and could only arrive at a conclusion on legal evidence that the Princess Alexandra was unnecessary for the requirements of the neighbourhood, there was such evidence in the present case.

For the purposes of the Licensing (Consolidation) Act, 1910, "the compensation authority are quarter sessions": s. 2 (2) (c). By s. 6 (1), when the compensation

authority are the quarter sessions of a county, they shall delegate their power of determining any question as to the refusal of the renewal of a justices' licence under the Act and matters consequential thereon to a committee [see now Licensing Act, 1953, s. 18 (1)]. The Act of 1910 repealed but incorporated and re-enacted the provisions of the Licensing Act, 1904. Shortly after the Act of 1904 came into operation it was decided by the King's Bench Division in *R. v. Southampton Licensing Justices, Ex parte Cardy* (2) that the jurisdiction committed to the compensation authority of a county by that Act was not given to a new statutory body created by that Act and exercising administrative functions, but that the body spoken of as quarter sessions was meant to be the court of quarter sessions of the county, and that the committee to whom the duty of exercising the powers is delegated exercise the powers of quarter sessions, and in so doing are acting judicially and have power to state a Case for the opinion of the King's Bench Division. LORD ALVERSTONE, C.J., said ([1906] 1 K.B. at p. 450, 451):

"Further, the provision in the fifth section of the Act of 1904 that quarter sessions shall delegate their powers of dealing with the renewal of licences under the Act to a committee seems to me to show that the lesser body, the committee to whom the duty is delegated, are exercising the powers of quarter sessions. That being so, I come to the conclusion that, upon such an inquiry so conducted and such a decision, it is an instance of a new jurisdiction being given to a court to act through a committee of its members, and that the principle applies that where a new jurisdiction is given to a court, *prima facie* that court is to exercise that jurisdiction in accordance with all its ordinary powers. It seems to me that, subject to the committee of quarter sessions exercising their discretion on the application on the merits, they had the power either to state a Special Case or to frame an order stating such facts as would make it a speaking order, and would enable this court to exercise a judgment on the question whether or not the order was good or bad."

In so deciding, the court followed what was said by JAMES, L.J., in *Dale's Case, Enraght's Case* (3) (6 Q.B.D. at pp. 450, 451):

"If a new jurisdiction is given to an existing court—that is to say, a jurisdiction to deal with some new matters in a different mode and with a different procedure—if that jurisdiction be so given to a well-known court with well-known modes of procedure, with well-known modes of enforcing its orders, it must, unless the contrary be expressed or plainly implied, be given to that court to be exercised according to its general inherent powers of dealing with the matters which are within its cognisance."

Then followed the decision in *Dartford Brewery Co., Ltd. v. London Quarter Sessions* (4), that the quarter sessions, when considering the refusal of a licence, can only act upon evidence given upon oath before them. In 1907, in *Howe v. Newington Licensing Justices* (5), the same opinion was expressed by a Divisional Court differently constituted—namely, that the committee of quarter sessions acting as compensation authority can only act on legal evidence. The judgment in this case was affirmed on appeal. It was after this judicial exposition of the true intent and meaning of the Act of 1904 that the Act of 1910 was passed, which re-enacts the same provisions, and the language of JAMES, L.J., in *Re Cathcart, Ex parte Campbell* (6) is applicable (5 Ch. App. at p. 706):

"Where once certain words in an Act of Parliament have received a judicial construction in one of the superior courts, and the legislature has repeated them without any alteration in a subsequent statute, I conceive that the legislature must be taken to have used them according to the meaning which a court of competent jurisdiction had given to them. I consider, therefore, that the legislature, in repeating these words in the Act of 1861, must be taken to have adopted the meaning put upon them by the Court of Queen's Bench."

It must now, in my judgment, be considered as settled that a county compensation authority is acting judicially when determining whether the renewal of a licence should be refused, and, accordingly, can only act upon legal evidence and may state a Case, and that the present Case has been properly stated. I may add that, even before licensing justices, where the holder of a justices' licence applies for the renewal of his licence, the justices cannot receive any evidence with respect to the renewal of the licence which is not given on oath: Act of 1910, s. 16 (6).

There remains the question whether there was any evidence upon which the compensation authority could refuse the renewal. The licensing justices had reported this house with three others as being in their opinion unnecessary. At the principal meeting of the compensation authority there was evidence on oath given by an inspector of police verifying the statements in the report as to the number of licensed houses in the district, the character and population of the locality, and the respective distances of the several licensed premises from the house in question and their respective accommodation, except the Swan, and an ordnance plan was put in without objection. Evidence was also given with regard to the situation of this particular house and, on behalf of the licensee, with regard to the trade of the house. It appeared that there was a fully licensed house, the Red Lion, within 166 yds. and a house licensed for the consumption of beer on the premises (the Swan) within 120 yds. Under these circumstances it cannot be maintained that there was no evidence before quarter sessions upon which they could refuse the renewal of the licence of the beerhouse in question on the ground that that particular house was unnecessary. It was pointed out that according to the evidence the present house was a better house than the Swan beerhouse, which had not been presented, but there is no obligation upon the licensing authority to arrange the houses in order of merit and close first the lowest house on the list. If there was evidence upon which the authority could decide that the licence of the Princess Alexandra was unnecessary, their decision is valid, even although the house to be closed compares favourably with another licensed house which has not been dealt with. It is not open to us to review the decision of the compensation authority if it was one which they could lawfully come to on the materials before them, but I share the view expressed by AVORY, J., in the Divisional Court, and I should have been more satisfied if the justices had given some reason for deciding that this particular house was not required.

PICKFORD, L.J.—I agree that this appeal fails, and I also agree that it would have been very much more satisfactory if we had known upon what grounds the compensation authority acted, because upon the materials before us it does seem to me somewhat difficult to understand the position. That, however, very likely arises from the fact that we have not got all the materials before us, and, at any rate, we have not to consider whether the decision, in our opinion, was right or wrong; we have only got to consider whether there was any evidence upon which the compensation authority could act as they have acted. I think there was evidence on which they could act.

I also think that, assuming what appears upon the ordnance sheet to have been proved or admitted before the justices, the relative positions of different houses with regard to the distribution of population is a matter which they are entitled to look at. Two objections were taken to that proposition—one that it was decided by *Raven v. Southampton Justices* (1) that the ordnance sheet could not be looked at at all; and, secondly, that there was nothing on the face of this case to show that anything more was done than to put in the ordnance sheet, which, of course, is not a document which proves itself, but has to be either proved or admitted. To deal with the second point first, I do not think that that is a fair way of reading the Case as stated. I think, although it is not stated in express words, that there was oral evidence as to the contents, if I may call it so, of the ordnance sheet; and that it must be taken that it either was proved, or else was put in the way

in which these ordnance sheets are constantly put in in licensing matters, and in other matters too, with the consent of both sides. If there had been any point that it was not proved or admitted, and, therefore, was not evidence, I think it should have been very much more clearly stated, and I do not think that to assume that would be, as I have said, fairly to read the case. I do not think that *Raven v. Southampton Justices* (1) does establish the point for which it is so often cited—that an ordnance sheet and its contents, if properly proved, cannot be looked at at all. It may very well be, and I should think it very likely was the case, that in that case it might show nothing at all. It was an ordnance sheet representing a densely populated part of a densely populated town—Southampton—and it may very well be that the ordnance sheet in that case showed nothing except a number of houses included in one district or in two or three districts exactly like one another. In that case no inference very likely could be drawn, and I do not think that *Raven v. Southampton Justices* (1) decided anything more. If it decided that the compensation authority is not entitled to look at an ordnance sheet the contents of which are properly proved or admitted to see the relative positions of houses and population, with great respect, I dissent from that decision. But I do not think it does decide that; and I think, assuming the ordnance sheet to be fairly and properly proved, the justices are entitled to look at it exactly as if the evidence which it affords had been given verbatim—which would have taken a great deal longer and would have to have been written down word for word as it came from the mouth of the witness who was giving it. It is only a shorter way of doing the same thing. The witness, instead of saying everything that appeared upon the ordnance sheet in words says: "That ordnance sheet correctly represents the state of things." In that case in my opinion it is open to the justices to look at it. It may be, as in this case, that important qualifications ought to be made, because the ordnance sheet was not of recent date, and there may be a number of other things that ought to be considered; but I cannot agree that in no case are they entitled to look at what it shows, assuming that it is properly proved.

For these reasons I think there was evidence upon which the compensation authority could act. It is not for me or for this court to say whether, upon the materials before us, we should have come to the same conclusion. I agree that this appeal must be dismissed.

BANKES, L.J.—I agree. The Licensing Act, 1904, for the first time provided that compensation should be paid in respect of an old on-licence, the renewal of which was refused on any other ground than on those set out in the schedule to the statute. The statute also set up a tribunal, the compensation authority, who should deal with the question of compensation, and it defined the principles upon which compensation should be assessed and set up the machinery by which the compensation should be arrived at and divided. After the passing of the Act the question constantly came before the courts, raising questions as to what was the exact position and authority of the compensation authority; and, in a number of decision in which LORD ALVERSTONE, C.J., took part and in some other decisions, it has been over and over again laid down that the compensation authority was a judicial authority and must act judicially. Some of the cases have already been referred to by SWINFEN EADY, L.J., and I need not mention them again. There is only one that I will mention, and that is *Howe v. Newington Licensing Justices* (5). In that case the question was whether the compensation authority were entitled to consider evidence outside the report of the justices which had been made to them referring the licence for compensation, and, in giving the decision in that case, LORD ALVERSTONE, C.J., repeated emphatically what he had said before. He says ([1907] 2 K.B. at p. 343):

"The cases show that the committee of quarter sessions can only act on legal evidence, but they nevertheless have a very wide discretion as to the matters which they may take into consideration."

That decision was appealed against and it came before the Court of Appeal. The point was not directly in issue in that case, but the Court of Appeal, consisting of LORD HALSBURY, SIR GORRELL BARNES, and BIGHAM, J., dismissed the appeal without any reference to any question whether or not LORD ALVERSTONE's view was the correct one. Therefore, I think we may take it that both in the Divisional Court, and to that extent in the Court of Appeal, the view has been adopted, since the passing of the Act of 1904, that the compensation authority is a judicial authority and must act judicially. Before us counsel for the justices argued strenuously that those decisions were wrong, and that they had been arrived at by ignoring the language of the statute (s. 19) and by paying no attention to the language of r. 37 of the Licensing Rules, 1910, which expressly provides that

"the compensation authority may, if and to such extent as they think fit, require any evidence given before them at any meeting held under these rules to be given on oath."

He also pointed out the extraordinary result which these decisions have landed people in—viz., that the compensation authority for a county can state a Special Case, whereas the compensation authority for a borough cannot. I must say for myself that if the question were open for decision, I think that there is a great deal in what counsel contended, but some considerable time after all those decisions had been given the Licensing (Consolidation) Act, 1910, was passed, and the material provisions of the Act of 1904 with reference to the compensation authority were expressly re-enacted in the same language as had been used in the Act of 1904. Under those circumstances, in my opinion, the case is one in which we must apply the principles laid down by JAMES, L.J., in *Re Cathcart, Ex parte Campbell* (6), where he said (5 Ch.D. at p. 706):

"Where once certain words in an Act of Parliament have received a judicial construction in one of the superior courts, and the legislature has repeated them without any alteration in a subsequent statute, I conceive that the legislature must be taken to have used them according to the meaning which a court of competent jurisdiction has given them. I consider, therefore, that the legislature, in repeating these words in the Act of 1861, must be taken to have adopted the meaning put upon them by the Court of Queen's Bench."

Applying that doctrine, it seems to me that it is not open to this court to consider whether, if the matter were open to us, one would accept counsel's contention or not. The result, therefore, is that the compensation authority must be treated as a judicial authority, and it must act judicially, and have the right to state the Special Case, which is before us, and upon which our opinion is asked.

That being so, the only question is whether or not this compensation authority had evidence before them. The words of the Case are:

"The question upon which the opinion of this court is desired is whether there was any evidence before the court of quarter sessions upon which they were entitled to and legally could refuse the renewal of the licence of the said beer-house, and, if not, what should be done in the premises."

It seems to me, upon a consideration of the cases, that a great deal of confusion has arisen from not keeping distinct the position as it is presented to the licensing justices and the position as it is presented to the compensation authority. When the matter is before the licensing justices they have two things to consider and determine—first of all, whether the number of licences in the particular district with regard to which they are acting is in excess of the number required by the public; and, secondly, if they come to the conclusion that it is, which of the licences shall be referred to the compensation authority. But when the matter is before the compensation authority, the position, so far as they are concerned, is this. They have also to consider whether, upon the evidence before them, the number of licences is proved to be in excess of the number required for the district. But

then the second question they have to consider is one quite different from the one before the licensing justices, because they have to consider whether there is evidence before them which in their opinion is sufficient to justify them in refusing to renew the licence of the particular house or houses which have been referred to them by the licensing justices. That being the question which they have to decide, and which this particular compensation authority had to decide, if one looks at the Case one finds that there was evidence laid before them which it is admitted was ample evidence to justify them in coming to the conclusion that the number of licensed houses in this district was in excess of the wants of the locality. They had four houses referred to them, with regard to one of which only any question arises; and with regard to that house the evidence was that there were within 200 yds. of it six other licensed houses—two full, two beer on, two beer off, one of them within 166 yds., a full licence, and a beer on within 120 yds. It is quite true that the fact that there were those six houses within 200 yds. of that house is equally evidence against any of the other five, but, the question for the compensation authority being whether there was evidence with regard to this particular house, it seems to me that the fact that there was this number of houses within that short distance of this particular house was evidence upon which they were entitled to act as they thought proper, and that this, at any rate, was a house which was in excess of the wants of the neighbourhood. In addition the justices had before them a copy of the ordnance sheet, and I quite agree with what PICKFORD, L.J., has said about it. Assuming that proper evidence is given to show that the ordnance sheet fairly represents the locality at the time when the justices or the compensation authority are asked to look to it, in my opinion, it may be very valuable evidence to assist them in coming to the conclusion whether any particular licence is or is not required for the wants of the neighbourhood. I think that the decision in *Raven v. Southampton Justices* (1) has been very much misunderstood. I do not think that either of the learned judges who were the majority there did decide or intend to decide that under no circumstances could an ordnance sheet be made use of, or that under no circumstances could it be of any assistance. I think the decision in that case was confined to the particular facts of the case, and that particularly LORD ALVERSTONE was pointing out that in his opinion in that particular case that particular ordnance sheet afforded the justices no assistance. If that case is to be interpreted or considered as an authority that under no circumstances can an ordnance sheet be made use of, in my opinion it is wrong; but I do not think that that is the proper construction to be put on the case, and I agree with what PICKFORD, L.J., has said about it. In my opinion, there was evidence here before the compensation authority on which they were entitled to act, and on these grounds I think the appeal fails.

Appeal dismissed.

Solicitors: *Boxall & Boxall*, for Thompson, Smith & Son, Colchester; *Doyle, Devonshire & Co.*, for Jones & Son, Colchester.

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

WEINBERGER v. INGLIS

[CHANCERY DIVISION (Astbury, J.), November 13, 14, 21, 1917]

[Reported [1918] 1 Ch. 133; 87 L.J.Ch. 148; 118 L.T. 208; 34 T.L.R. 104; 62 Sol. Jo. 160]

Practice—Particulars—Further and better particulars of matter stated in pleading—"Matter stated"—Traverse in defence of negative allegation in statement of claim—Onus of proving allegation on plaintiff—R.S.C. Ord. 19, r. 7.

A mere traverse of a negative allegation pleaded by a plaintiff which he must establish to succeed is not a "matter stated" within R.S.C. Ord. 19, r. 7, and, accordingly, the court will not order the defendant to give particulars of such traverse.

Dictum of COLLINS, L.J., in *Alman v. Oppert* (1), [1901] 2 K.B. at p. 578, not applied.

Notes. Referred to: *La Radiotechnique v. Weinbaum*, [1928] Ch. 1; *Liversidge v. Anderson and Morrison*, [1941] 2 All E.R. 612; *Pinson v. Lloyds and National Provincial Foreign Bank, Ltd.*, [1941] 2 All E.R. 636.

As to further particulars, see 30 HALSBURY'S LAWS (3rd Edn.) 30, 31. For R.S.C. Ord. 19, r. 7, see THE ANNUAL PRACTICE, 1960, p. 459.

Cases referred to:

- (1) *Alman v. Oppert*, [1901] 2 K.B. 576; 70 L.J.K.B. 745; 84 L.T. 828; 17 T.L.R. 620; 45 Sol. Jo. 615; 8 Mans. 316, C.A.; 33 Digest 514, 585.
- (2) *Cassel v. Inglis*, [1916] 2 Ch. 211; 85 L.J.Ch. 569; 114 L.T. 935; 32 T.L.R. 555; 42 Digest 790, 10.
- (3) *Spedding v. Fitzpatrick* (1888), 38 Ch.D. 410; 58 L.J.Ch. 139; 59 L.T. 492; 37 W.R. 20; 4 T.L.R. 505, C.A.; Digest (Pleading) 186, 1579.
- (4) *Re Gresham Life Assurance Society, Ex parte Penney* (1872), 8 Ch. App. 446; 42 L.J.Ch. 183; 28 L.T. 150; 21 W.R. 186, L.J.J.; 9 Digest (Repl.) 218, 1384.
- (5) *Roberts v. Owen* (1890), 54 J.P. 295; 6 T.L.R. 172, D.C.; 33 Digest 514, 584.

Also referred to in argument:

- Wood v. Woad* (1874), L.R. 9 Exch. 190; 43 L.J.Ex. 153; 30 L.T. 815; 22 W.R. 709; 2 Asp. M.L.C. 289; 8 Digest (Repl.) 656, 35.
- Re Beloved Wilke's Charity* (1851), 3 Mac. & G. 440; 20 L.J.Ch. 588; 17 L.T.O.S. 101; 42 E.R. 330, L.C.; 8 Digest (Repl.) 535, 2814.
- Thorp v. Holdsworth* (1876), 3 Ch.D. 637; 45 L.J.Ch. 406; 3 Ch. Pr. Cas. 87; Digest (Pleading) 40, 322.
- Re Coalport China Co.*, [1895] 2 Ch. 404; 64 L.J.Ch. 710; 73 L.T. 46; 2 Mans. 532; 12 R. 462; sub nom. *Re Coalport China Co., Ltd., Ex parte Middleton and Bell*, 44 W.R. 38, C.A.; 9 Digest (Repl.) 394, 2529.
- Green v. Garbutt* (1912), 28 T.L.R. 575, C.A.; Digest (Pleading) 200, 1680.
- James v. Radnor County Council* (1890), 6 T.L.R. 240; 54 J.P. 614; Digest (Pleading) 199, 1674.

Adjourned Summons.

The plaintiff, a British subject, but of enemy birth, in 1895 became a member of the Stock Exchange in London, the rules and regulations of which are fully set out in *Cassel v. Inglis* (2). The rules of the Stock Exchange material to this case are r. 21, which provided that the committee should on the first Monday in March proceed to re-elect such members as they should deem eligible to be members of the Stock Exchange for one year commencing Mar. 25; and r. 35, that any member might by notice in writing object to the re-election of any other member, and that any such objection should be considered by the committee. The

plaintiff in 1917 applied for re-election, and on Feb. 15 received a letter from the committee stating that a notice of objection to his re-election had been lodged with them under r. 35, "on the ground of your enemy birth," and asking him to make a statement of facts in reply. On Feb. 19 the plaintiff replied by letter that he came to England in 1887 at the age of twenty, and five years later was naturalised as a British subject and denationalised in Germany; that he had been in business in London since 1887, had married an English wife, had always been a loyal British subject, and that there could not possibly be any good ground for the objection. On Mar. 18, the plaintiff received notice that he had not been re-elected. Under these circumstances he commenced this action on April 5 against the committee for general purposes of the London Stock Exchange for a declaration that their decision whereby his application for re-election was rejected was invalid, and for an order that his name should be restored to the list of members of the London Stock Exchange, and a mandatory injunction requiring the defendants to proceed to re-elect the plaintiff. The plaintiff in 1895 paid an entrance fee on his election to the Stock Exchange of £525, and became the proprietor of twenty shares of £12 each, for which he paid £4,139 10s. He was re-elected each year until 1917, and paid the annual subscription of £31 10s.

This summons was taken out in the action by the plaintiff for particulars of the defence. The material pleadings in the statement of claim were as follows. In para. 5 the plaintiff alleged (inter alia) that nothing had occurred since his election in 1895 to render him ineligible for re-election. In para. 6 he set out the committee's letter, and his reply on Feb. 19, 1917, and alleged that the statements in his own letter were true. In para. 9 he alleged that in declining to re-elect him the committee did not exercise any discretion *bonâ fide*, fairly, reasonably, or judicially, but had acted arbitrarily, that there were no facts or grounds on which they could exercise any discretion against his re-election, and that no reasons or facts were adduced or existed which could or did operate to induce the committee properly to decide that he was not eligible. In para. 10 he alleged that the committee's decision was against natural justice and not a proper exercise of their judicial discretion. By para. 5 of their defence the committee traversed para. 5 of the statement of claim. In para. 6 they admitted the writing and receipt of the two letters of Feb. 15 and 19, 1917, but made no admission as to any matters alleged in para. 6 of the claim. By para. 9 they alleged that in their *bonâ fide* discretion under r. 21 they did not re-elect the plaintiff because they did not deem him eligible, and for no other reason. In para. 10 they traversed every allegation of fact in paras. 9 and 10 of the claim. The particulars the plaintiff applied for were (inter alia) under para. 5 of the defence, any facts or circumstances that had occurred since 1895 to render him ineligible, and of any grounds on which he was now ineligible; under para. 6, as to which of the statements in his letter were untrue or incorrect, and in what respect; under para. 9, of any facts or grounds on which the committee founded their decision; and under para. 10, of any facts or grounds on which they could properly exercise any discretion against his re-election, or any reasons or facts that could induce them to decide that he was not eligible.

Order 19, r. 7, of the Rules of the Supreme Court is as follows :

"A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, notice, or written proceeding requiring particulars, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just."

Gore-Browne, K.C., and *A. Neilson* for the plaintiff.

Upjohn, K.C., *Frank Russell, K.C.*, and *Douglas M. Hogg, K.C.* for the defendants.

Nov. 21, 1917. **ASTBURY, J.** read a judgment in which he stated facts and continued: As a general rule, the court never orders a defendant to give

particulars of facts and matters which the plaintiff has to prove in order to succeed, and this is especially the case where a defendant has confined himself to putting the plaintiff to the proof of allegations in the statement of claim, the onus of establishing which lies upon him.

The only affirmative plea or defence raised by the defendants in this case is in para. 9 of the defence—viz., that they, acting bonâ fide and honestly in the exercise of their duty and discretion under r. 21, did not re-elect the plaintiff last March, because they did not deem him eligible to be a member of the Stock Exchange for the year following. The plaintiff asks, in the first place, for particulars of the facts or grounds upon which they based this decision. In my judgment, he is not entitled to any such information by way of particulars. It is unnecessary to decide upon this application whether he is entitled to obtain any such information by other means. The plaintiff has alleged in para. 9 of his statement of claim that the defendants did not exercise any discretion bonâ fide, fairly, reasonably, or judicially in coming to the conclusion which they did come to. Unless and until he establishes a case for the defendants to answer on this issue—which is the real issue in the action as the pleadings at present stand—the court has no jurisdiction to sit as a Court of Appeal from their decision, nor will the court presume that their action was not justified, if they do not choose to state their reasons and submit them to the court for decision—a proceeding which they are under no obligation to adopt, and which the court, on an application of this character, has no right or duty to compel. The object of particulars, as *COTTON, L.J.*, said in *Spedding v. Fitzpatrick* (3) (38 Ch.D. at p. 413), is to enable the applicant to know what case he has to meet at the trial, and so to save unnecessary expense and avoid allowing parties to be taken by surprise. The plaintiff here knows perfectly well what case he has to meet, and what the real issue raised by the defendants in para. 9 of their defence is—it is that they acted bonâ fide in accordance with their duty, under the rules which bind him and them alike. *Primâ facie* the court will presume this, and the onus of disturbing this presumption lies upon the plaintiff: see *Re Gresham Life Assurance Society, Ex parte Penney* (4) and *Cassel v. Inglis* (2) and the cases therein referred to.

This plea raised by the defendants, although in form affirmative, is in substance a traverse of the plaintiff's allegation in para. 9 of the statement of claim above referred to, which he must prove in whole or in part in order to succeed. The whole of the remaining issues raised by the defence consist chiefly in non-admissions or traverses of the plaintiff's allegations, the onus of proving all of which rests upon him. But the difficulty, if there be one, in this respect, arises from the fact that the plaintiff has pleaded a large number of negatives—such, for instance, as "nothing has occurred since his election in 1895 or now exists to render him ineligible for election"; "no reason or facts existed which could have legitimately operated in the minds of the defendants, nor did any facts or reasons operate in their minds to induce them properly to deem or decide that the plaintiff was not eligible for re-election," the traverse of which, it is contended, amounts to the assertion of a wide and undefined position. It is submitted on behalf of the plaintiff, in the second place, that he ought not to be forced to trial without notice of any facts or circumstances known to the defendants rendering him, or believed by them to render him, ineligible for re-election, which they on these traverses, as they stand, could at the hearing affirmatively prove or raise against him. This may sound plausible, and if the plaintiff was likely to be injured by the defendants unfairly adopting any such course at the hearing, or if the pleadings disclosed any design on their part to take advantage unfairly of any such position, it might be the duty of the court to guard against it, but I do not think that this is at all the true view of the position as disclosed by the present pleadings. The defendants have informed the plaintiff of the only objection to his re-election made to them under r. 35, and he has dealt with this in his letter of Feb. 19 last. The whole of the remainder of the defence is a reliance on the part of the committee upon the

discretion vested in them under r. 21, which it is their duty to safeguard, and for the rest leaving the plaintiff, as they are obviously entitled to leave him, to prove his own case; for this latter purpose a traverse of his allegations is necessary. If the defendants were to attempt at the hearing to prove some affirmative case against the plaintiff other than that pleaded by them in para. 9 of the defence, and of which no previous notice has been given to him, the court has full power to prevent any injustice being done and could, by adjournment or otherwise, prevent the plaintiff being taken by surprise or otherwise prejudiced. But if an order were made on this application, either directing the defendants to give particulars or directing that no fact or circumstance rendering the plaintiff ineligible for re-election should be proved by the defendants without previous notice thereof being given, the order would not be in accordance with the authorities that I have referred to, and the non-giving of such information might, having regard to the ingenuity displayed in the statement of claim, be used or attempted to be used to prejudice the defendants on the main issue raised by them in para. 9 of their defence.

It is further said that the denial of the contents of the letter of Feb. 19 in para. 6 of the defence is evasive, in that it does not state which of the allegations of fact made therein are intended to be disputed—the defendants have traversed the whole of such allegations, which they are entitled to do, at the risk of costs, if they are so minded—though in reality they are here again merely putting the plaintiff to the proof of his case. Under Ord. 19, r. 7, further particulars may be ordered of any matter “stated” in any pleading requiring particulars. A traverse by a defendant, even of a negative pleaded by a plaintiff, which he must establish in order to succeed, is not, in my judgment, a matter “stated” in the defence within the meaning of this rule. The rules under the Judicature Act abolishing the general issue were intended to limit and define the issues to be tried, but not to force a defendant on a traverse to undertake the burden of proving anything himself, and still less to relieve a plaintiff from any onus of proof resting solely upon him. The plaintiff has relied in support of this application for particulars on a dictum attributed to COLLINS, L.J., in *Alman v. Oppert* (1), the decision in which was that the defendants in an action under the Directors’ Liability Act, 1890, were liable to give particulars of the grounds of their belief, the onus of proving reasonable grounds for which is thrown upon them by the statute. The lord justice is reported to have said, after giving what was the actual decision in the case [1901] 2 K.B. at p. 578:

“There are other cases in which particulars addressed to the state of a person’s mind are ordered as a matter of course, for instance, in an action for malicious prosecution, particulars going to the question whether the defendant had reasonable and probable cause for what he did.”

In actions for malicious prosecution, where the defendant confines himself to traversing the plaintiff’s negative allegation of want of reasonable and probable cause, and where no claim is joined for false imprisonment, in which case the onus is thrown on the plaintiff, it has not been the practice to order particulars from the defendant: see BULLEN and LEAKE’S PRECEDENTS OF PLEADINGS (6th Edn.) p. 877, and 7th Edn. p. 786; except perhaps on very special grounds (as to which see *Roberts v. Owen* (5)). In the present case, however, the reason for not ordering particulars of the defendants’ traverse is much stronger than in the case of malicious prosecution. Here the defendants plead that they had a discretion and a duty to act as they did, under a contract binding both upon the plaintiff and themselves, in the exercise and performance of which they cannot, at all events in the first instance, be called upon to disclose the reasons for their action, and, being in a fiduciary position, they ought not to be prejudiced in their defence, because they decline to admit a number of ingeniously pleaded negative allegations, the onus of proving which is upon the plaintiff, and the non-traverse of which by the defendants would entitle him to judgment. For these reasons I am of opinion

A that the order proposed to be made by the master refusing the plaintiff's application was right. The summons will be dismissed and the defendants' costs will be theirs in any event.

Summons dismissed.

Solicitors: *Herbert Smith, Goss, King & Gregory; Travers-Smith, Braithwaite & Co.*

B [Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.]

C HORWOOD v. MILLAR'S TIMBER AND TRADING CO., LTD.

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Warrington and Scrutton, L.JJ.)
November 30, 1916]

D [Reported [1917] 1 K.B. 305; 86 L.J.K.B. 190; 115 L.T. 805; 33 T.L.R. 86;
61 Sol. Jo. 114]

Contract—Illegality—Public policy—Contract imposing servile conditions—Terms unnecessary for protection of covenantee—Severability of covenant—Assignment of salary as security for loan—Agreement containing a number of obligations involved in each other.

E By an indenture to secure repayment of a loan of £42 odd, with £31 odd for agreed interest, B. assigned to the plaintiff a policy of assurance for £100 on B.'s life, and, further, all the salary or wages then due or thenceforth to become due to him in connection with his engagement or employment with the defendant company or any other situation, post, or office that he might during the continuation of the deed hold in that company or with or in any other company, office, person, or firm whatsoever, together with all overtime, extras, increments, and remuneration and bonuses in connection with any such employment, to hold unto the plaintiffs absolutely, but subject to the proviso for redemption thereafter contained. B. further covenanted that he would diligently and faithfully devote himself to his duties, wherever he might be employed, and that he would not do or suffer anything to be done which might cause him to be dismissed or liable to be dismissed or have his salary reduced, and that he would not without the express sanction in writing of the plaintiff determine his engagement with the defendant company or other his employer for the time being and would not borrow or raise any sum of money whatsoever, whether on security or otherwise, or part with, sell, pledge, or otherwise dispose of any of his furniture in his then residence, nor obtain or endeavour to obtain credit or buy any goods on credit or in any way make himself or his property answerable for any sum or sums of money, whether legally or morally. It was also agreed that, if B. failed to perform any covenant, the whole sum then owing by him to the plaintiff would become due.

I **Held:** (i) the agreement was not reasonable in reference to the interests of the parties or of the public, nor was it necessary for the protection of the plaintiff; it imposed servile obligations on B.; and, therefore, it was illegal and unenforceable as being against public policy: (ii) the agreement containing, as it did, a number of obligations which were involved in each other, and the breach of any one of those obligations resulting in the whole of the money borrowed becoming immediately payable, the assignment by B. of his salary could not be severed from the rest of the agreement and enforced by itself.

Decision of the Divisional Court (LUSH and SANKEY, JJ.), [1916] 2 K.B. 44, affirmed.

Notes. Considered: *Naylor, Benzon & Co. v. Krainische Industrie Gesellschaft*, [1918] 1 K.B. 331. Distinguished: *Denny's Trustee v. Denny and Warr*, [1919] 1 K.B. 533. Referred to: *McEllistrim v. Ballymacelligott Co-operative Agricultural and Dairy Society*, [1919] A.C. 548; *Pratt v. British Medical Association*, [1919] All E.R. Rep. 104; *Hepworth Manufacturing Co. v. Ryott*, [1920] 1 Ch. 1; *King v. Michael Faraday and Partners, Ltd.*, [1939] 2 All E.R. 478.

As to agreements contrary to public policy and severability of promises in an agreement, see 8 HALLSBURY'S LAWS (3rd Edn.) 130, 147, 148, and for cases see 12 DIGEST (Repl.) 269 et seq., 325-331.

Cases referred to:

- (1) *Herbert Morris, Ltd. v. Saxelby*, ante at p. 305; [1916] A.C. 688; 85 L.J.Ch. 210; 114 L.T. 618; 32 T.L.R. 297; 60 Sol. Jo. 305, H.L.; 43 Digest 24, 154.
- (2) *Mason v. Provident Clothing and Supply Co., Ltd.*, [1913] A.C. 724; 82 L.J.K.B. 1153; 109 L.T. 449; 29 T.L.R. 727; 57 Sol. Jo. 739, H.L.; 43 Digest 22, 143.
- (3) *Eastes v. Russ*, [1914] 1 Ch. 468; 83 L.J.Ch. 329; 110 L.T. 296; 30 T.L.R. 237; 58 Sol. Jo. 234, C.A.; 43 Digest 43, 432.
- (4) *Davies v. Davies* (1887), 36 Ch.D. 359; 56 L.J.Ch. 962; 58 L.T. 209; 36 W.R. 86; 3 T.L.R. 839, C.A.; 12 Digest (Repl.) 662, 5135.
- (5) *Tailby v. Official Receiver* (1888), 13 App. Cas. 523; 58 L.J.Q.B. 75; 60 L.T. 162; 37 W.R. 513; 4 T.L.R. 726, H.L.; 20 Digest 334, 770.
- (6) *Mitchel v. Reynolds* (1711), 1 P. Wms. 181; Fortes. Rep. 296; 10 Mod. Rep. 130; 24 E.R. 347; 43 Digest 11, 59.
- (7) *Nordenfelt v. Maxim Nordenfelt Arms and Ammunition Co., Ltd.*, [1894] A.C. 535; 63 L.J.Ch. 908; 71 L.T. 489; 10 T.L.R. 636; 11 R. 1, H.L.; 43 Digest 22, 139.
- (8) *A.-G. of Commonwealth of Australia v. Adelaide Steamship Co.*, [1913] A.C. 781; 83 L.J.P.C. 84; 109 L.T. 258; 12 Asp. M.L.C. 361; 43 Digest 12, 68.

Also referred to in argument:

- North Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd.*, [1913] 3 K.B. 422; 107 L.T. 439; reversed [1914] A.C. 461; 83 L.J.K.B. 530; 110 L.T. 852; 30 T.L.R. 313; 58 Sol. Jo. 338, H.L.; 12 Digest (Repl.) 338, 2619.
- Re Clarke, Coombe v. Carter* (1887), 36 Ch.D. 348; 56 L.J.Ch. 981; 57 L.T. 823; 36 W.R. 293; 3 T.L.R. 818; 31 Sol. Jo. 676, C.A.; 12 Digest (Repl.) 22, 8.
- Re Mirams*, [1891] 1 Q.B. 594; 60 L.J.Q.B. 397; 64 L.T. 117; 39 W.R. 464; 7 T.L.R. 309; 8 Morr. 59; 12 Digest (Repl.) 271, 2080.
- Egerton v. Earl Brownlow* (1853), 4 H.L. Cas. 1; 8 State Tr. N.S. 193; 23 L.J.Ch. 348; 21 L.T.O.S. 306; 18 Jur. 71; 10 E.R. 359, H.L.; 12 Digest (Repl.) 269, 2072.

Appeal to the plaintiff from an order of the Divisional Court.

By an indenture dated July 1, 1913, and made between the plaintiff [a money-lender] and George F. V. Bunyan, a clerk employed by the defendant company at a salary of under £3 a week and in the indenture referred to as the mortgagor, as beneficial owner, in consideration of a loan of £42 8s. 3d., and to secure the repayment of that sum, together with the sum of £31 16s. for agreed interest, assigned to the plaintiff, first, a policy of assurance for £100 on his (Bunyan's) life, and, secondly,

"All that the salary or wages now due or henceforth to become due to him, the mortgagor, in connection with his engagement or employment with Messrs. Millar's Timber and Trading Co., Ltd., or any other situation, post, or office that he may during the continuance of these presents hold in the said company, or with or in any other company, office, person, or firm whatsoever, together with all overtime, extras, increments, and remuneration in connection with any such employment receivable or to be received by him in respect thereof (including any moneys that may or might be paid to him by way of bonus or

otherwise) should he be discharged from or leave his present employment, or that he may or might be paid or become payable to his personal representatives or estate by his firm in the event of his death, to hold unto the lender absolutely; but subject to the proviso for redemption hereinafter contained."

By cl. 3 the deed further provided :

"(d) That during the continuance of these presents the mortgagor shall diligently and faithfully devote himself to his duties wheresoever he may be employed, and will not do or suffer anything to be done which may or might cause him to be dismissed or liable to be dismissed or have his salary reduced, but shall use his best endeavours to advance his position wheresoever employed, and shall not, without the express sanction in writing of the lender, determine his engagement with Messrs. Millar's Timber and Trading Co., Ltd., or other his employer for the time being. . . . (h) That during the continuance of these presents not to borrow, apply for, or attempt in any way to borrow or raise any sum or sums of money whatsoever, whether on security or otherwise, nor part with, give away, sell, settle, pledge, or otherwise dispose of, any of the furniture, chattels, and other goods and effects now in or about or hereafter to be brought upon his present residence (the whole of the existing household furniture, goods, and effects being and it is expressly declared by the mortgagor to be his sole and unincumbered property), and not to obtain or endeavour to obtain credit or buy any articles or goods on credit or to be paid for by deferred payments, nor to pledge the credit of the mortgagor or permit any other person to pledge his credit (save his wife in the case of ordinary tradesmen's books for weekly settlement, such books to be produced to the lender for his inspection on demand); and also not to enter into any gambling contract, bet, or wager, or become bail or surety for or on behalf of any person whatsoever, or in any other way make himself or his property answerable for any sum or sums of money, whether legally or morally. (i) Not without the consent of the lender in writing first had and obtained to remove from or take any other dwelling-house or residence."

By cl. 5 (d) if the mortgagor died, got into financial difficulties, or failed to perform any of the covenants in the indenture the whole sum then owing under the indenture became due. Notice of the assignment was duly given by the plaintiff to the defendant company on June 24, 1915.

The plaintiff brought this action in the City of London Court, claiming that an account should be taken of all salary or wages, and all overtime, extras, increments, remuneration, and bonuses that were due to Bunyan from the defendant company on June 24, 1915, or which had accrued due since that date, and that the defendant company should pay to the plaintiff the amount found due on the taking of such account. The learned judge of the City of London Court decided in favour of the defendants on the ground that the assignment was a conditional and not an absolute assignment within the meaning of s. 25 of the Supreme Court of Judicature Act, 1873. The question whether the instrument was void as being against public policy was not raised before the learned judge. The plaintiff appealed to the Divisional Court (LUSH and SANKEY, JJ.), who decided that the assignment was absolute in form, but that the plaintiff could not recover as the covenants, which were indivisible, unduly fettered the freedom of the assignor, and that, therefore, the assignment was void as being in restraint of trade and contrary to public policy. The plaintiff appealed.

Compston, K.C. (with him *Rowand Harker*), for the plaintiff.

Morten, K.C., and *H. J. Richards* for the defendants, were not called on to argue.

LORD COZENS-HARDY, M.R.—This appeal is one involving questions of interest, of importance, and of difficulty. The last important case relating to these questions that went to the House of Lords is *Herbert Morris, Ltd. v. Saxelby* (1). That case followed *Mason v. Provident Clothing and Supply Co., Ltd.* (2).

There is another case which did not go to the House of Lords but remained here—namely, *Eastes v. Russ* (3), in which the same principles were laid down.

It is argued that, if there is consideration for the deed the court will not measure the consideration, and the question of public policy has nothing to do with the matter. That is a proposition which in this court in *Saxelby's Case* (1), I endeavoured to refute. The view taken in the House of Lords entirely concurred in that, and, if I recollect rightly, in terms approved of my judgment in the court below. What does that mean? It means that we must have regard to considerations of public policy and that it is no answer to say that an adult man, as to whom undue pressure is not shown to have been exercised, ought to be allowed to enter into any contract he thinks fit affecting his own liberty of action. That is not the law. It seems to me that if as a matter of construction I come to the conclusion that the contract is one which puts the covenantor in the position—I cannot think of a better word at the moment to express my view—of *adscriptus glebæ*, as the villein used to be called in mediæval times, on the ground of public policy the law will not recognise such a thing. You have no right so to deal with a man's liberty of action any more than with his property, and the law says it is contrary to public policy.

What is the deed in the present case? It is in some respects the most extraordinary deed it has ever been my fate to read. It is a deed between a clerk in the City of London and a moneylender—not so described, but he is a registered moneylender, as we have been told. It begins by reciting that the mortgagor is indebted to the various persons whose names are set out in the first schedule to the deed in sums amounting to £42 8s. 3d. When I look at the schedule I see that the name of one is Adams, a moneylender, for £8 10s., the second is a moneylender for £8 15s., and the third is a moneylender for £2 7s. 9d. Then there is a draper £3 16s. and a solicitor £5 8s. 6d. There is another man who has claimed £1 5s.; I do not know what that is for. Then there is a cash loan of £4—"Cash to yourself, £4." Then F. Borwood, expenses, £2 2s.; Barnes and Butler, for the cost of the deed, £3 3s.; and lastly, a first year's premium on life assurance policy, £3. So it is apparent that the mortgagor had become the victim of moneylenders. The money that was due was substantially due to moneylenders, including the mortgagee himself, who is apparently stated to have advanced the mortgagor £4, and for the cost of the deed and the costs of the solicitor. Made up in that way, the mortgagor was indebted to various persons in the sum of £42 8s. 3d., which, the deed recites,

"the mortgagor hereby declares to be a complete statement of all his liabilities whatsoever (which declaration is and shall be considered to be the prime factor inducing the lender to enter into this arrangement), and has requested the lender to pay and discharge the same on his behalf, which the lender has agreed to do on having the repayment of such sum of £42 8s. 3d. together with the sum of £31 16s. agreed interest thereon, making a total of £74 4s. 3d., secured to him in manner hereinafter appearing."

Secured how? By the assignment and by all the covenants which are found in the deed. That interest amounted to 60 per cent.

[His LORDSHIP read the clauses of the deed hereinbefore set out, and said that cl. 3, provided that, in further pursuance of the agreement and for the consideration aforesaid, the mortgagor covenanted to pay the principal sum of £74 4s. 3d. by instalments of £2 per month on the first day in each month, the first payment to be made on Aug. 1 next, to hand over the receipt for the premium for the policy, and not to do or suffer anything to be done whereby the policy might become annulled or voidable. There was a rather unusually stringent clause that if there was any default made in paying the premiums the mortgagee might pay them and he should be entitled to demand repayment of any moneys so expended with interest at the rate of sixty per cent. Referring to cl. 3 (d) His LORDSHIP said:]

A That is to say by covenant the mortgagor is to be a—I again use the expression *adscriptus glebæ*. He is not to leave any employment in which he may be without the consent of the mortgagee. Paragraph (e) provides for default being made. The only effect of (f) is that in certain events there is sixty per cent. upon sixty per cent. charged. Paragraph (g) provides that the mortgagor is to keep insured the furniture and household goods in or about his residence, there being no assignment of that furniture and goods at all. He is also to keep himself insured against any liability under the Workmen's Compensation Act in respect of any servant or other employee of his.

B Then comes (h), which is certainly the most extraordinary clause I have ever seen. [His LORDSHIP read the paragraph.] With respect to (i), which is a short clause, but not the least important, and provides that the mortgagor shall not without the consent in writing of the lender remove from or take any other dwelling-house, that seems to me to be exactly *adscriptus glebæ*.

C Can it possibly be doubted that this is a deed which is contrary to public policy? Is it open for a man in consideration of a sum of cash to bind himself not to leave the house where he resides, and not to sell any of his furniture and effects in the house or in any future house he may move into, which furniture is not the subject of any charge in favour of the mortgagee. Is it open to him to say: "Whatever property I may have I will not give any kind of security upon it for any sum of money or for any debt which legally or morally I may desire to pay." It would prevent the man from employing a doctor or a surgeon in the case of illness in his family, or in respect of any children he may have. It would deter him from raising money for their maintenance or that of his wife, or for the education of his children.

D I must say that I think this is a deed which the law must recognise as a bad deed on grounds of public policy of the most well-established kind.

E I do not propose to go through the cases which have been cited to us. But there is one passage in the judgment of BOWEN, L.J., in *Davies v. Davies* (4) which seems to me to be valuable (36 Ch.D. at p. 393):

F "The law of England allows a man to contract for his labour, or allows him to place himself in the service of a master, but it does not allow him to attach to his contract of service any servile incidents."

It seems to me that that observation is just as good in a case of this kind, which relates to a contract for a loan, as it is in the case of a contract for service. It is part of the common law. The law does not allow such a contract to be made.

G Counsel for the plaintiff objected to a word which I used at an early stage of the argument, that the effect of the deed in the present case seemed to savour of slavery. Possibly slavery is too strong a word. But it certainly seems to me to savour of serfdom to say that a mortgagor shall not leave the house in which he is living without the mortgagee's consent; that he shall not dispose of a chair or a table in his house on which the mortgagee has no charge, without his consent; and that, if the mortgagor does so, the whole amount of principal and interest secured by the mortgage will immediately become payable instead of being payable by instalments. I have no hesitation in saying that in my view this is a deed which is contrary to public policy.

H It is said that there is no harm in the assignment of salary. I agree. Salary may be assigned on the principle of *Davies v. Davies* (4), not merely arrears of salary due at the date of the assignment, but future payments may also be assigned. But the argument goes further. It is said, let that be treated as good and never mind what the consideration for it was. For the consideration for it according to the deed was founded upon the terms of the covenants thereafter contained. I cannot accept that view. I think that you must consider the consideration as one and entire, and that the attempt to say that this is a case in which the doctrine of the divisibility of parts of the deed should be applied, is distinctly contrary to the passage in LORD MOULTON's judgment in *Mason v. Provident Clothing and Supply*

Co., Ltd. (2) to which SCRUTTON, L.J., referred in the course of the argument and is contrary, I think, also to a great many other authorities that might be referred to. The consideration is one and entire. You cannot speculate and say that, if part of the consideration had been omitted, if half of the covenants were struck out, if the transaction were left simply as a mortgage of the furniture with the ordinary covenant, if the deed were treated as a covenant for the assignment of wages and a covenant to pay, the result would be good; and that, therefore, the court should strike out and disregard all the other covenants which are made part of the consideration for the deed. I decline to do that. It seems to me that it would be the worst example of allowing a moneylender to get his clutches round a clerk and to put him in a position in which he is not allowed to move to another district and become a clerk elsewhere, not allowed to leave his house however unhealthy it may be, and not allowed to deal with any part of his unincumbered furniture and other property without the leave of the moneylender. It seems to me that the view taken by the court below is perfectly right, and that it is no use for the mortgagee here to claim payment under a deed which on the face of it is bad on grounds of public policy. For these reasons I think that the appeal must be dismissed with costs.

WARRINGTON, L.J.—I am of the same opinion. I am happy to think that it is very seldom that so oppressive a contract as this comes before the court. I am happy also to think that it may be our decision today which will put an end to similar transaction in future.

[His LORDSHIP stated the facts and continued:] I need not read the whole of the restrictive provisions. The first one to which I think it is necessary to refer is cl. 3 (d) which requires the mortgagor to

“diligently and faithfully devote himself to his duties wheresoever he may be employed, and will not do or suffer anything to be done which may or might cause him to be dismissed or liable to be dismissed or have his salary reduced, but shall use his best endeavours to advance his position wheresoever employed.”

Then comes this provision :

“And shall not, without the express sanction in writing of the lender, determine his engagement with Messrs. Millar’s Timber and Trading Co., Ltd., or other his employer for the time being.”

Then by cl. 3 (h) he is

“not to borrow, apply for, or attempt in any way to borrow or raise any sum or sums of money whatsoever, whether on security or otherwise, nor part with, give away, sell, settle, pledge, or otherwise dispose of, any of the furniture, chattels, and other goods and effects now in or about or hereafter to be brought upon his present residence (the whole of the existing household furniture, goods, and effects being, and it is expressly declared by the mortgagor to be, his sole and unincumbered property), and not to obtain or endeavour to obtain credit or buy any articles or goods on credit or to be paid for by deferred payments, nor to pledge the credit of the mortgagor or permit any other person to pledge his credit (save his wife in the case of ordinary tradesmen’s books for weekly settlement, such books to be produced to the lender for his inspection on demand), and also not to enter into any gambling contract, bet, or wager, or become bail or surety for or on behalf of any person whatsoever, or in any other way make himself or his property answerable for any sum or sums of money whether legally or morally.”

Lastly there comes this clause :

“(i) Not without the consent of the lender in writing first had and obtained to remove from or take any other dwelling-house or residence.”

It comes to this. If the mortgagor for some reason thinks that he would rather not remain in the employment of the defendants, but would like to take employment somewhere else, then, unless the lender in whose power he has placed himself consents to that change, he can only make the change on the penalty of having the whole of this money become due at once and bear interest at sixty per cent. per annum. If the mortgagor has a daughter who wishes to be married and he desires to give her a part of the furniture in his house to assist her in furnishing her house he can only do it under the same penalty. If he finds that his child is ill and it is necessary to employ a doctor and not to pay his fees at once, but to obtain credit, he can only do it upon the penalty of having the whole of the money secured by this deed become due. If he finds his residence undesirable for any reason, he cannot change it except on the same penalty. Can it possibly be said that those provisions can be enforceable in any court of this kingdom? The mortgagor has put himself, one may say, almost body and soul in the power of this moneylender. Even in the most trivial incidents of life he cannot do as he pleases. He can only act in a way to which this moneylender will consent. It is unnecessary to read any of the passages in the judgments in the cases which have been referred to in which judges on previous occasions have expressed their view that any contract which tends to impose servile obligations upon any person in this country is void and unenforceable in these courts. If ever there was a contract which placed a man under servile obligations towards the other contracting party this contract is such a contract.

It is said—and this is the only point on which, speaking for myself, I have felt the least difficulty—that you can treat the assignment of wages as a separate matter and enforce that assignment, or give effect to that assignment and neglect the other terms of the contract which are objectionable on the grounds which I have mentioned. In my opinion, the answer to that is this. The assignment is not a separate matter. The assignment with which we have to deal is not the assignment of an actual debt, not the assignment of a chose in action which is in existence, but the assignment of a chose in action, wages which a man is going to earn, which may hereafter come into existence. The effect of that is nothing more than to create a contractual obligation between the two parties. That was stated by LORD MACNAGHTEN in his speech to the House of Lords in *Tailby v. Official Receiver* (5) in these terms (13 App. Cas. at p. 543):

“It has long been settled that future property, possibilities, and expectances are assignable in equity for value. The mode or form of assignment is absolutely immaterial provided the intention of the parties is clear. To effectuate the intention and assignment for value in terms present and immediate has always been regarded in equity as a contract binding on the conscience of the assignor and so binding the subject-matter of the contract when it comes into existence if it is of such a nature and so described as to be capable of being ascertained and identified.”

In other words, the real effect of such an assignment where property is not in existence is that it is carried into effect not because it passes the property, but because it is a contractual obligation binding upon the assignor, and one which can be specifically enforced if the contract and the subject-matter of it are sufficiently definite. One has to look at this deed in the light of a contract, one term of which is that the borrower will make over to the lender his salary when it becomes due, and it may give the lender a right to require the employers to pay him that salary. For all that, it is a contract and nothing but a contract to make over that salary when it becomes due. We find that is a term of a contract which contains a number of other terms, and all those terms, including the one to which I have referred, are part of that which the lender exacts as the security for the money he is going to advance.

It is said that the court can sever some parts of those terms from the other parts of those terms. In certain cases that can be done. But in a case like the present, where a mortgagee lends money on a security which consists of a number of obligations by the person who borrows the money when those obligations are so involved in each other as they are in the present case, and in particular, where the breach of any one of those obligations causes the whole of the money which has been lent to become immediately payable instead of payable by instalments, it seems to me then that the lender has himself rendered it impossible to separate one from the other, and that the contract must be looked at as one entire thing. That being so, the assignment of the wages is just as much void as any other part of the deed. In my opinion, the judgment of the Divisional Court was perfectly right, and I think that this appeal ought to be dismissed.

SCRUTTON, L.J.—I am of the same opinion, and desire, in view of the importance to the public of the subject-matter of this case, to express my opinion in my own words. The only thing that has made me hesitate as to whether I should do so is that I am doubtful whether I can express my judgment in language of sufficiently judicial moderation in view of the facts of this case. Any judge who has heard criminal business in the City of London knows that one of the great evils in London at present is the system by which moneylenders lend money to clerks who have small salaries in offices in London, and, under the terror of telling their employers that they have lent such money, drive clerks to crime and inflict any amount of evil on their families. When sitting as a judge of the King's Bench Division in what is called the "Saturday jurisdiction," when gentlemen bearing royal and noble names pass before one as plaintiffs lending money at very high rates of interest, I have seen a good deal of the ways of moneylenders. But it had not entered into my wildest imagination that any of them could have concocted a document of the nature that we have seen before us in the present case, and I am glad that at last the court has an opportunity of pronouncing an opinion upon it—to which from my experience of moneylenders I do not suppose they will pay any attention whatever.

[His LORDSHIP stated the facts.] The judge of the City of London Court took the view that there was not an "absolute assignment" within the meaning of s. 25 of the Supreme Court of Judicature Act, 1873. The Divisional Court differed from that view, but took the view which jumps to the eyes on looking at the document that it was contrary to public policy. The moneylender now appeals to this court against that decision. What test has the court to apply? Counsel for the plaintiff began by citing *Mitchel v. Reynolds* (6). I think myself that we have got long past *Mitchel v. Reynolds* (6) in the doctrine of restraint of trade. We have now the judgment of LORD MACNAGHTEN in *Nordenfelt v. Maxim Nordenfelt Arms and Ammunition Co., Ltd.* (7), enlarged as it is—and in some respects altered as it is—by the two very luminous judgments of LORD PARKER OF WADDINGTON in *A.-G. of Commonwealth of Australia v. Adelaide Steamship Co.* (8) and *Herbert Morris, Ltd. v. Saxelby* (1). LORD MACNAGHTEN said ([1894] A.C. at p. 565) that in seeing whether any restraint of trade is justified, we have to look to see whether the restraint is reasonable—

"reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to form adequate protection to the party in whose favour it is imposed while, at the same time, it is in no way injurious to the public."

LORD PARKER's valuable criticism in *Herbert Morris, Ltd. v. Saxelby* (1) of the language of LORD MACNAGHTEN in *Nordenfelt v. Maxim Nordenfelt Arms and Ammunition Co., Ltd.* (7) adds to it that, for the restraint to be reasonable in the interests of the parties, it must afford no more than adequate protection to the party in whose favour it is imposed, and in merely considering the interests of the

A parties, you do not take into account the effect on the public, which is a separate matter.

I look at the agreement in the present case from this point of view: Is there no more than is necessary for the protection of the moneylender? It seems to me that there is far more than is necessary for the protection of the moneylender in whose interests it is imposed. Is it reasonable in the interests of the public?

B I can conceive nothing more dangerous to the interests of the public than that a system of moneylending like this to small people in offices where they have great temptations to be dishonest if money pressure is put upon them, and great opportunities, should be allowed to exist for a single minute. Looking at the agreement as a whole, it seems to me to be quite clear that it goes far beyond what is reasonable for the purpose for which it is imposed. But then it is said:

C "Perhaps we have over-reached ourselves; perhaps this very elaborate document now brought to the court, having, no doubt, been used with oppressive effect on a number of other clerks without being brought to the court, may be severed, so that we can pick out of it some parts which may pass, leaving the number of objectionable features which have been referred to without enforcing them." I read with the greatest sympathy and delight the language of LORD MOULTON on this point in
D *Mason v. Provident Clothing and Supply Co., Ltd.* (2) ([1913] A.C. at p. 745):

"My Lords, I do not doubt that the court may, and in some cases will, enforce a part of a covenant in restraint of trade, even though taken as a whole the covenant exceeds what is reasonable. But, in my opinion, that ought only to be done in cases where the part so enforceable is clearly severable, and even so only in cases where the excess is of trivial importance, or merely technical,
E and not a part of the main purport and substance of the clause. It would, in my opinion, be *pessimi exempli* if, when an employer had exacted a covenant deliberately framed in unreasonably wide terms, the courts were to come to his assistance, and by applying their ingenuity and knowledge of the law, carve out of this void covenant the maximum of what he might validly have required."

F I strongly protest when a moneylender has thought fit to have elaborately framed an oppressive document of this sort that the court should then be astute to say "We can give you a certain part of it, although you have asked for far too much." I decline to do so unless obliged by the authorities, and I think that for the reasons given by WARRINGTON, L.J., with which I concur, that I am not bound to assist the moneylender who has framed this document in putting forward a part of it as
G enforceable. I quite agree with the judgments delivered by the other members of the court, and I have the greatest pleasure in delivering this judgment.

Appeal dismissed.

Solicitors: *Barnes & Butler; White & Leonard.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

FOSTER v. FOSTER AND ANOTHER

[CHANCERY DIVISION (Peterson, J.), January 27, 28, 31, 1916]

[Reported [1916] 1 Ch. 532; 85 L.J.Ch. 305; 114 L.T. 405]

Company—Chairman—Tenure of office—Right of board to remove—Director—Remuneration—Right of company to reduce—Managing director—Power of board to appoint—Remuneration—Contract with company—Right of director to vote for own appointment as managing director—Power of board to remove.

By art. 88 of the articles of a company: "The remuneration of the directors shall from time to time be fixed . . . by the company." By art. 89: "Subject to the preceding clauses, the business of the company shall be managed by the directors who may . . . exercise all such powers of the company, and do, on behalf of the company, all such acts as may be . . . done by the company in general meeting . . ." By art. 93: "A director may contract with the company as vendor, purchaser, or otherwise, and may retain the profits of every such contract without liability to account therefor, but a director shall not vote in respect of any contract in which he is interested." By art. 95: "The office of director shall be vacated (a) if he become bankrupt . . . ; (b) if he be found lunatic . . . or go to reside permanently outside of the United Kingdom; (c) if he cease to hold the qualifying number of shares; (d) if by notice in writing he vacates his office." By art. 96: "Until otherwise determined by extraordinary resolution, the directors for the time being shall continue to hold office subject only to cl. 95 and 97 hereof." By art. 97: "The company at any general meeting . . . may . . . remove any director . . . before the expiration of his period of office, and appoint another person in his stead." By art. 99: "The directors may, subject to the preceding clauses, from time to time appoint any one or more of their body to be managing director or directors for such period, at such remuneration, and upon such terms as the directors think fit." By art. 102: "The directors may elect a chairman of their meetings, and determine the period for which he is to hold office . . ."

At an extraordinary general meeting of the company on Jan. 15, 1911, the plaintiff was appointed a director of the company with remuneration of £100 a year, and at a board meeting on the same day he was appointed chairman and managing director without remuneration for those offices. At a board meeting on July 30, 1913, resolutions were passed appointing M. E. F. chairman in place of the plaintiff and joint managing director with him. At an extraordinary general meeting of the company on Aug. 21, 1913, the plaintiff's remuneration as a director was reduced to £25. At a board meeting on Jan. 19, 1915, M. E. F. was appointed sole managing director for a period of ten years at a remuneration of £300 a year with subsequent possible increases according to the amount of profits earned. M. E. F. voted for the resolution so appointing her, and it was only carried by the use of the votes she possessed.

Held: (i) when the directors appointed a chairman without remuneration attaching to the office they appointed him for such time as they thought fit, and there was no contract between the company and the person appointed that he should remain chairman until he ceased to be a director; in the present case, although there had been no express determination within art. 102 of the period for which the plaintiff was to hold office, it was open to the directors at any time to substitute another chairman in his place;

(ii) the directors had power under art. 99 from time to time to appoint any one or more of their body to be managing director or managing directors and were able to substitute a new managing director for the managing director they had appointed if they became dissatisfied with him;

(iii) under art. 88 the plaintiff was not entitled, so long as he remained a director, to the amount fixed for his remuneration when he was appointed a director, and, therefore, it was not out of the power of the company to reduce his remuneration and also to discriminate between directors with regard to the amount of their remuneration;

(iv) the remuneration of directors could not be properly described as "business of the company," and, therefore, under art. 89 the powers of the company under art. 88 were not exercisable exclusively by the directors so that they were themselves to determine what their remuneration should be;

(v) the appointment by the directors of one of their number to be chairman or managing director without remuneration did not give rise to a contract within art. 93, but was merely a delegation of their powers, and, therefore, M. E. F. was not disabled from voting in support of the resolutions passed on July 30, 1913, appointing her chairman and joint managing director; but

(vi) when the resolution was passed at the directors' meeting on Jan. 19, 1915, appointing M. E. F. managing director at a remuneration, she being present and accepting it, there was a contract between the company and her, and under art. 93 she was not competent to vote in support of that contract; accordingly, the resolution appointing her was invalid;

(vii) the remuneration voted by the board for M. E. F. was, however, not excessive or grossly unfair, and her appointment was neither fraudulent nor ultra vires the company; art. 99 did not preclude the company in general meeting from waiving the objection which it could take under art. 93 and confirming the resolution of Jan. 19, 1915; and, therefore, the company being capable of dealing with the matter in general meeting, the plaintiff, as representing a dissentient minority, was not able to sue.

Notes. Referred to: *Kerr v. Marine Products* (1928), 44 T.L.R. 292; *Re Gee, Wood v. Staples*, [1948] 1 All E.R. 498.

As to appointment, removal, powers, and removal of directors and interference by the court in the management of a company, see 6 HALSBURY'S LAWS (3rd Edn.) 274 et seq., 418-420; and for cases see 9 DIGEST (Repl.) 451 et seq., 714 et seq.

Cases referred to:

- (1) *Quinn and Axtens, Ltd. v. Salmon*, [1909] A.C. 442; 78 L.J.Ch. 506; 100 L.T. 820; 25 T.L.R. 590; 53 Sol. Jo. 575; 16 Mans. 230, H.L.; 9 Digest (Repl.) 498, 3283.
- (2) *Re New British Iron Co., Ex parte Beckwith*, [1898] 1 Ch. 324; 67 L.J.Ch. 164; 78 L.T. 155; 46 W.R. 376; 14 T.L.R. 196; 42 Sol. Jo. 234; 5 Mans. 168; 9 Digest (Repl.) 478, 3124.
- (3) *Burland v. Earle*, [1902] A.C. 83; 71 L.J.P.C. 1; 85 L.T. 553; 50 W.R. 241; 18 T.L.R. 41; 9 Mans. 17, P.C.; 9 Digest (Repl.) 645, 4290.
- (4) *Foss v. Harbottle* (1843), 2 Hare 461; 67 E.R. 189; 9 Digest (Repl.) 662, 4382.
- (5) *Mozley v. Alston* (1847), 1 Ph. 790; 4 Ry. & Can. Cas. 636; 16 L.J.Ch. 217; 9 L.T.O.S. 97; 11 Jur. 315; 41 E.R. 833, L.C.; 9 Digest (Repl.) 715, 4740.
- (6) *Menier v. Hooper's Telegraph Works* (1874), 9 Ch. App. 350; 43 L.J.Ch. 330; 30 L.T. 209; 22 W.R. 396, L.J.J.; 9 Digest (Repl.) 659, 4367.
- (7) *MacDougall v. Gardiner* (1875), 1 Ch.D. 13; 45 L.J.Ch. 27; 33 L.T. 521; 24 W.R. 118, C.A.; 9 Digest (Repl.) 619, 4130.
- (8) *Dominion Cotton Mills, Ltd. v. Amyot*, [1912] A.C. 546; 81 L.J.P.C. 233; 106 L.T. 934; 28 T.L.R. 467; 19 Mans. 363, P.C.; 9 Digest (Repl.) 659, 4368.
- (9) *Normandy v. Ind, Coope & Co., Ltd.* [1908] 1 Ch. 84; 77 L.J.Ch. 82; 97 L.T. 872; 24 T.L.R. 57; 15 Mans. 65; 9 Digest (Repl.) 568, 3744.
- (10) *Thomas Logan, Ltd. v. Davis* (1911), 104 L.T. 914; 55 Sol. Jo. 498; affirmed 105 L.T. 419, C.A.; 9 Digest (Repl.) 556, 3679.

- (11) *Barron v. Potter, Potter v. Berry*, [1914] 1 Ch. 895; 83 L.J.Ch. 646; 110 L.T. 929; 58 Sol. Jo. 516; 21 Mans. 260; sub nom. *Re British Seagumite Co., Ltd.*, *Barron v. Potter, Potter v. Berry*, 30 T.L.R. 401; 9 Digest (Repl.) 455, 2984.

Also referred to in argument:

Re Greymouth-Point Elizabeth Railway and Coal Co., Ltd., *Yuill v. Greymouth-Point Elizabeth Railway and Coal Co., Ltd.*, [1904] 1 Ch. 32; 73 L.J.Ch. 92; 11 Mans. 85; 9 Digest (Repl.) 546, 3591.

Russell v. Wakefield Waterworks Co. (1875), L.R. 20 Eq. 474; 44 L.J.Ch. 496; 32 L.T. 685; 23 W.R. 887; 10 Digest (Repl.) 1268, 8963.

Marshall's Valve Gear Co., Ltd. v. Manning, Wardle & Co., Ltd., [1909] 1 Ch. 267; 78 L.J.Ch. 46; 100 L.T. 65; 25 T.L.R. 69; 15 Mans. 379; 9 Digest (Repl.) 498, 3284.

Witness Action in which the plaintiff, Bernard Harvey Foster, suing on behalf of himself and in a representative capacity all other the shareholders of the defendant company, W. Foster & Son, Ltd., except the defendant Mrs. Mary Elizabeth Foster, and also in his individual capacity, claimed declarations and injunctions relating to the appointment of Mrs. Foster as chairman and managing director of the company.

The plaintiff claimed (i) a declaration that resolutions purporting to have been passed at a board meeting of the defendant company on July 30, 1913, appointing the defendant Mrs. Foster chairman of the directors and joint managing director of the defendant company, were invalid; (ii) an injunction restraining the defendant Mrs. Foster from acting or purporting to act as such chairman or such joint managing director; (iii) A declaration that a resolution purporting to have been passed at a board meeting of the defendant company on Jan. 19, 1915, appointing the defendant Mrs. Foster sole managing director was invalid; (iv) an injunction restraining the defendant Mrs. Foster from acting or purporting to act as such sole managing director; (v) a declaration that a resolution purporting to have been passed at the said board meeting on July 30, 1913, purporting to remove the plaintiff from his office as chairman of directors of the defendant company was invalid; (vi) an injunction restraining the defendant Mrs. Foster from excluding from or interfering with him in his office as such chairman; (vii) a declaration that a resolution purporting to have been passed at a general meeting of the defendant company on Aug. 21, 1913, reducing the plaintiff's remuneration as director to £25 per annum was invalid; and (viii) payment by the defendant company of the plaintiff's arrears of remuneration as director at the rate of £300 per annum.

Tomlin, K.C., and *Hodge* for the plaintiff.

Hughes, K.C., and *W. G. Hart (J. M. Gover with him)* for the defendant Mrs. Foster.

P. S. Stokes for the defendant company.

Cur. adv. vult.

Jan. 31, 1916. **PETERSON, J.**, read the following judgment.—This is an action in which Mr. Bernard Harvey Foster sues in his individual capacity and in a representative capacity on behalf of himself and all other the shareholders in the defendant company, except the defendant Mary Elizabeth Foster. The defendants are Mrs. Mary Elizabeth Foster and W. Foster & Son, Ltd. At an extraordinary general meeting of the company on Jan. 25, 1911, Mrs. Foster moved, and Mr. Devlin seconded, and it was carried, that the plaintiff be appointed a director of the company, and that his remuneration should be at the rate of £100 per annum. Then there was a resolution that Mrs. Foster's remuneration as a director should also be at the same rate, and then it was resolved "that the directors shall be paid all their travelling and other expenses properly and necessarily expended by them in and about the business of the company, including their travelling and other

A expenses incurred in attending the board meetings of the company." Mr. Foster, having become in this way a director, on the same day, Jan. 25, at a board meeting Mrs. Foster tendered her resignation of the office of chairman of directors, and Mr. Foster was appointed chairman. On Aug. 14, 1911, at a board meeting, Mr. Hardy, who was one of the directors, proposed and Mrs. Foster seconded: "That Mr. B. H. Foster be and he is hereby appointed managing director of the company." There
B was no remuneration attached to the office of managing director at this time, but the remuneration was in respect of the occupation of the post of director.

Matters appear to have become somewhat uneasy between Mr. and Mrs. Foster by the middle of 1913, because at a directors' meeting on July 30, 1913, Mrs. Foster asked Mr. Foster what he intended to do as to Mr. Hardy's re-appointment as a director, Mr. Hardy only having been appointed for a fixed period, and Mr. Foster replied that he should certainly oppose it. Mrs. Foster thereupon proposed that
C "she be and is hereby appointed chairman in the place of Mr. B. H. Foster," and this was seconded by Mr. Hardy. Mr. Foster asked the reason for this proposal, and Mrs. Foster explained that she had given up the chairmanship in Mr. Foster's favour in January, 1911, on Mr. Cockerton's assurance that Mr. Foster would work amicably with her—Mr. Cockerton was the solicitor acting for Mr. Foster—
D but he had failed to do so, and she, therefore, claimed to be reinstated. Mr. Foster refused to put the resolution to the meeting, and it was, therefore, put to the meeting by Mrs. Foster and carried. Mrs. Foster thereupon took the chair. Mr. Harvey proposed and Mrs. Foster seconded: "That Mrs. Foster be and is hereby appointed joint managing director of the company along with Mr. B. H. Foster." This was carried.

E That is the first of the resolutions to which exception is taken by the plaintiff. Then at the annual meeting of shareholders on Aug. 11, 1913, Mrs. Foster took the chair and Mr. Foster protested against Mrs. Foster taking the chair and asked why he had been deposed, and Mrs. Foster replied. Then a resolution was carried that the joint managing directors, who were Mr. and Mrs. Foster, be voted £150 each as a bonus, and Mrs. Foster moved that, as the period for which Mr. Hardy
F was appointed a director was now expiring, "he be and is hereby appointed an ordinary director of the company at a remuneration of £150 a year inclusive of expenses." Mr. Foster contended that Mr. Hardy could not vote on the question of his own remuneration. Mrs. Foster thereupon withdrew her resolution and moved that "Mr. Hardy be and he is hereby elected an ordinary director of the company," and that was seconded and the resolution was lost on a show of hands.
G But Mrs. Foster demanded a poll, which resulted in 1,048 votes in favour of and 949 against the resolution, which was carried. Mrs. Foster then moved that Mr. Hardy be paid a remuneration of £150 a year including expenses. Mr. Myers seconded this. Mr. Foster moved as an amendment that Mr. Hardy's remuneration be £25 a year, and that was seconded. Then a poll was demanded which resulted
H as follows. If Mr. Hardy was entitled to vote, there were some 1,048 votes against the amendment and 949 in favour of it, and the amendment would be lost and the original resolution would be carried, but if he was not entitled to vote there were only 948 votes against the amendment, which would then be carried. The company's solicitor was not prepared to say offhand whether Mr. Hardy was or was not entitled to vote. Then Mrs. Foster moved and Mr. Hardy seconded that Mr. Bernard
I Foster's remuneration as a director of the company be reduced from £300 to £25 a year. Mr. Foster contended that as no notice of the proposal had been given in the notice convening the meeting it could not be dealt with, and it was thereupon decided to convene an extraordinary general meeting. There were various other resolutions to which exception was taken on similar grounds that notice had not been given.

On Aug. 21, 1913, there was an extraordinary general meeting of the company. Mr. Foster protested against the meeting being held, as he alleged it had not been properly called, and then each of the following resolutions was in turn moved

by Mrs. Foster, seconded by Mr. Hardy, and duly carried: "That Mr. John Myers be and is hereby elected a director of the company; that Mr. John Devlin be and is hereby elected a director of the company; that Mr. Myers' and Mr. Devlin's remuneration be at the rate of £100 a year each; that the remuneration payable to Mr. Bernard Harvey Foster as a director of the company be reduced to £25 a year." To that resolution also the plaintiff takes exception. It appears that no one voted against any of the resolutions. Of course that also involves the fact that Mr. Bernard Harvey Foster did not vote against the resolution, but that could be accounted for by the fact that he considered as he was interested in the question he ought not, therefore, to vote. At this point then Mr. Bernard Harvey Foster was a director at, according to the resolutions, a remuneration of £25 a year and one of two joint managing directors, Mrs. Foster being the other managing director.

On Jan. 19, 1915, there was a board meeting at which Mrs. Foster, Mr. Bernard Foster, and Mr. Myers were present. The chairman—that is, Mrs. Foster—said that after what had been stated at the last board meeting she would only impress upon the board that, in her opinion, it was against the best interests of the shareholders for the management of the company to remain any longer under the existing conditions. She had no hesitation in saying that Mr. B. H. Foster had failed to do his duty, through having entirely neglected to attend to the business for a considerable period. The entire management of the business had devolved upon herself, and she could not undertake the duties any longer, having regard to the responsibility of the position, unless she was made sole managing director. The business was progressing satisfactorily under her management, and she relied with confidence upon receiving the support of the majority of the directors. Mr. Myers expressed entire agreement with the views of the chairman. Mr. Devlin, who was prevented through illness from attending the meeting, wrote saying he agreed with Mrs. Foster's suggestions respecting the change of management. Mrs. Foster thereupon proposed "that the appointment of Mr. B. H. Foster as managing director of the company, and his subsequent appointment as joint managing director along with Mrs. M. E. Foster, be and are both terminated as from this date, and that notice to that effect be at once given to him by the secretary." The plaintiff objects that that resolution is invalid. Then Mr. Myers proposed, and Mrs. Foster seconded, and it was resolved that "Mrs. Foster be and she is hereby appointed sole managing director of the company for a period of ten years from this date, and that her remuneration be at the rate of £300 per annum, except that if and when the net profits earned by the company in any one year shall exceed £2,400 (representing ten per cent. on the whole of the paid-up capital of the company), but shall not exceed £2,680, her remuneration for that year shall be at the rate of £400 per annum" with a subsequent possible increase to £500 per annum. Mr. Foster demanded a poll which was taken with the following result: 1,448 in favour of the resolution, 1,148 against. The chairman declared the resolution carried. That resolution also is alleged by the plaintiff to be invalid.

So far as voting was concerned, the position was this. The capital consisted of 2,000 ordinary shares of £10 each, and 1,000 preference shares of £10 each. The preference shares were divided equally between the plaintiff and Mrs. Foster. The ordinary shares were held in this way—Mrs. Foster held 848 shares, and she had, in addition, as her supporters two directors who held 100 ordinary shares each, making 1,048. Mr. Foster, the plaintiff, held 648, and the balance of 304 shares were held by six shareholders, who, I am told, were supporting him. The result, therefore, was that, so far as the preference shares were concerned, they were divided equally between the plaintiff and Mrs. Foster, and, so far as the ordinary shares were concerned, on those figures Mrs. Foster held or had the support of 1,048 shares, while the plaintiff held or had the support of 952. The majority, therefore, was either with or supported Mrs. Foster.

The first objection which the plaintiffs makes is to the resolutions, passed at the board meeting of July 30, 1913, appointing Mrs. Foster as chairman in place of the

A plaintiff, and also appointing her joint managing director with the plaintiff. The objection is, first, that the appointment of the plaintiff as chairman was under art. 96 of the company's articles which provides that:

"Until otherwise determined by extraordinary resolution, the directors for the time being shall continue to hold office subject only to cl. 95 and 97 hereof."

B Article 95 provides that:

"The office of director shall be vacated (a) if he become bankrupt, or suspend payment, or compound with his creditors; (b) if he be found lunatic or become of unsound mind, or go to reside permanently outside of the United Kingdom; (c) if he cease to hold the qualifying number of shares; (d) if by notice in writing to the company he vacates his office."

C Article 97 provides that:

"The company at any general meeting shall fill up any vacancies in the office of directors, and may, by extraordinary resolution, remove any director other than the said George Harvey Foster [the originator of the company] before the expiration of his period of office, and appoint another person in his stead."

D The power of appointing a chairman is under art. 102, by which

"the directors may elect a chairman of their meetings, and determine the period for which he is to hold office. . . ."

E It is argued that, inasmuch as there has been no express determination of the period for which he is to hold office, it follows that he is to hold office for the whole of the period during which he remains a director. I am unable to accept that argument. When the directors appoint a chairman they appoint him for such time as they think fit, and there is no contract with the person appointed as chairman that he shall remain chairman until he ceases to be a director, but it is open to the directors at any time to substitute another chairman in his place. Therefore, I think that argument cannot succeed. In the same way it is argued that the appointment of the plaintiff as sole managing director was for such time as he should be a director. Here the question depends on art. 99, under which:

"The directors may, subject to the preceding clauses, from time to time appoint any one or more of their body to be managing director or directors for such period, at such remuneration, and upon such terms as the directors think fit."

G In this case also it appears to me that the directors have power from time to time to appoint any one or more of their body to be managing director or directors, and it does not involve as a consequence that, if they are dissatisfied with the person whom they have appointed managing director or think that another of their body would fill the position more adequately, they are unable to substitute a new managing director in place of the old one.

H In opposition to both of these resolutions, it is said that Mrs. Foster was unable to vote in support of herself as chairman or as joint managing director under art. 93, which provides that:

"A director may contract with the company as vendor, purchaser, or otherwise, and may retain the profits of every such contract without liability to account therefor, but a director shall not vote in respect of any contract in which he is interested."

I In my view, however, the appointment by the directors of one of their body as chairman, or the appointment by the directors of one of their number as a managing director, without more, is not a contract within art. 93, but is merely a delegation of their powers, and is very similar to the power which they possess to appoint committees of themselves and delegate their powers to those committees. In my judgment, therefore, the appointments in question of Mrs. Foster as chairman and as joint managing director were not contracts within art. 93, and, therefore, Mrs. Foster was not disabled from voting in support of the resolution.

The next objection taken by the plaintiff is to the resolution, passed at the extraordinary general meeting of the company on Aug. 21, 1913, reducing his remuneration as a director from £300 to £25 a year. His contention is that the resolution was invalid on the ground that it was not competent for the company to reduce his remuneration as a director, and in any event, that it was not competent for the company to discriminate between the directors with regard to the amount of their remuneration. Then there is an allegation that, if the reduction was within the competence of the company, the same was effected by the preponderance of the votes of Mrs. Foster, and was not made in good faith or in the interests of the company, or with any regard to the relative values of the services of the plaintiff and Mrs. Foster.

The first contention is that when the plaintiff was appointed a director at a salary of £100, which was subsequently increased to £300, he contracted that he would act as director at that salary, and, therefore, it was not open to the company so long as he remained a director to cut down the salary which had been voted to him by the resolution passed at the extraordinary general meeting of the shareholders on Jan. 25, 1911, to which I have already referred, where it was resolved that the plaintiff be appointed a director of the company and that his remuneration should be at the rate of £100 per annum, and that the directors should be paid all their travelling and other expenses properly and necessarily expended by them in and about the business of the company, including their travelling and other expenses incurred in attending the board meetings of the company. This resolution was passed under art. 88, which provides that:

"The remuneration of the directors shall from time to time be fixed by the said George Harvey Foster during his life and membership in the company, otherwise by the company."

There is, therefore, power under the articles to fix the remuneration of the directors from time to time, and, in the events that have happened, that remuneration is to be fixed by the company. In my view, that does not involve that the plaintiff, having been appointed a director, is entitled to the amount which was fixed originally at £100 so long as he remains a director—that is to say, until he is removed by an extraordinary resolution of the company which, having regard to the way in which the shares in the company are held, is an impossibility, or until one of the events referred to in art. 95 occurs. This contention involves the result that it would be impossible for the company to alter the terms of the resolution which was passed at the same time as the plaintiff was appointed, under which the travelling and other expenses of the directors are to be borne by the company. This curious result would also happen, that if the plaintiff did absolutely nothing at all as a director, or if he was permanently invalided, as long as he was not found lunatic or of unsound mind, he would still be entitled to the same remuneration as was proposed in the first instance when he was appointed a director. I am unable to accept the argument that, the remuneration of the director having been fixed by the company when he was appointed, he was entitled to insist upon the payment of that remuneration so long as he should remain a director, or that it is now out of the power of the company to reduce the remuneration which is attached to the office of director.

Then the plaintiff makes the further allegation that it is not within the powers of the company to discriminate between directors. I am unable to follow that argument. The provision is that the remuneration of directors shall from time to time be fixed by the company. I do not find any provision, express or implied, that the remuneration of the directors when fixed by the company must be the same for each director, and, although perhaps that is not a very material circumstance, it is clear it was not the view of the plaintiff himself, who, at the early stage of the difficulties which arose between him and Mrs. Foster, proposed that Mr. Hardy's

A remuneration should be reduced from the sum of £100 to the same sum of £25.

It was suggested that it was not open to the company to reduce the remuneration of the plaintiff in consequence of the provisions of art. 89, which directs that:

B "Subject to the preceding clauses, the business of the company shall be managed by the directors, who may pay all such expenses of and preliminary and incidental to the promotion, formation, establishment, and registration of the company as they think fit, and may exercise all such powers of the company, and do, on behalf of the company, all such acts as may be exercised and done by the company in general meeting, or by the said George Harvey Foster, or the manager or managers, subject nevertheless to any regulations of these presents, to the provisions of the statutes, and to such regulations being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting."

C The argument is that by virtue of art. 89 the powers of the company under art. 88 are exclusively exercisable by the board of directors, with the startling result that, although under art. 97 the company is to fill any vacancies in the office of directors, the directors themselves are to determine what their remuneration is to be. On D this point reliance was placed on *Quin and Axtens, Ltd. v. Salmon* (1), where a somewhat similar clause was considered. In that particular case there was a question of acquiring and letting of premises, and LORD LOREBURN, L.C., said, dealing with one of the arguments ([1909] A.C. at p. 444):

"In regard to the second point, I think it is really too clear for argument that the business in question was business within the meaning of the 75th article."

E Can the remuneration of directors properly be described as business of the company within the meaning of art. 89? In my view, it cannot.

F So far I have dealt with the claim of the plaintiff as a person who has been injured in his private as distinct from his representative capacity. But in the statement of claim the plaintiff complains of the resolutions passed at the board meeting of Jan. 19, 1915, when Mrs. Foster and Mr. Myers purported to pass resolutions that the appointment of the plaintiff as managing director of the company be terminated, and that Mrs. Foster be appointed sole managing director of the company for a period of ten years at a remuneration. So far as the resolution for the removal of the plaintiff from the position of joint managing director is concerned, the observations that I have already made with reference to the appointment of Mrs. G Foster as chairman in his place apply, and, in my view, there is no ground of complaint. But the latter resolution stands on a different footing. In that case the complaint is that Mrs. Foster and Mr. Myers passed or purported to pass a resolution appointing Mrs. Foster managing director at a remuneration. In considering this portion of the case, regard must be had to art. 100, which provides that two directors shall be a quorum, and that any question at a meeting of H directors shall be decided by the number of votes, for or against the resolution, which the directors possess as holders of shares. The complaint is that Mrs. Foster in this case, having 1,348 votes, used these votes for the purpose of appointing herself managing director at a salary, and that, as the appointment of Mrs. Foster was only carried by the use of the votes which she herself possessed, the resolution was not properly carried, inasmuch as under art. 93 she was not entitled to vote in respect of the contract. The question, therefore, is whether or not this is a I contract within art. 93.

In *Re New British Iron Co., Ex parte Beckwith* (2) the articles required the directors to possess a share qualification, and provided that the remuneration of the board should be an annual sum of £1,000 to be paid out of the funds, and it was held that, although those provisions in the articles were only part of the contract between the shareholders inter se, the provisions were, on the directors being employed and accepting office on the footing of them, embodied in the contract between the company and the directors. It would be a curious thing if a director

was prohibited under this article from voting in support of a contract of purchase from himself for a comparatively small sum and yet was enable to vote in support of a resolution conferring upon himself a remuneration as managing director at a high salary. In my judgment, if a resolution is passed at a directors' meeting that one of the directors be appointed a managing director at a remuneration, and that director is present and accepts the appointment, there is a contract between the company and the director, and the director is not under art. 93 able to vote in support of such a contract.

That, however, does not determine this portion of the case. This is a matter in respect of which the plaintiff is suing for a wrong that he alleges has been done to the company, and he is suing on behalf of, as he says, the rest of the shareholders of the company, other than Mrs. Foster, though admittedly, in fact, he is suing on behalf of the minority of the shareholders. The question, therefore, is whether he is able to sue in such a case, or whether it is a case in which the matter must be dealt with by a general meeting of the company. The general principles which govern these cases are laid down in *Burland v. Earle* (3), where LORD DAVEY delivered the judgment of the Privy Council, and stated the law in a passage which is very well known ([1902] A.C. at pp. 93, 94):

"It is an elementary principle of the law relating to joint stock companies that the court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so. Again, it is clear law that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should, *prima facie*, be brought by the company itself. These cardinal principles are laid down in the well-known cases of *Foss v. Harbottle* (4) and *Mozley v. Alston* (5), and in numerous later cases which it is unnecessary to cite. But an exception is made to the second rule [that the company ought to bring the action] where the persons against whom the relief is sought themselves hold and control the majority of the shares in the company, and will not permit an action to be brought in the name of the company. In that case the courts allow the shareholders complaining to bring an action in their own names. This, however, is mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress, and it is obvious that in such an action the plaintiffs cannot have a larger right to relief than the company itself would have if it were plaintiff, and cannot complain of acts which were valid if done with the approval of the majority of the shareholders, or are capable of being confirmed by the majority. The cases in which the minority can maintain such an action are, therefore, confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company. A familiar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property, or advantages which belong to the company, or in which the other shareholders are entitled to participate, as was alleged in the case of *Menier v. Hooper's Telegraph Works* (6). It should be added that no mere informality or irregularity which can be remedied by the majority will entitle the minority to sue, if the act when done regularly would be within the powers of the company and the intention of the majority of the shareholders is clear. This may be illustrated by the judgment of MELLISH, L.J., in *MacDougall v. Gardiner* (7)."

That passage is approved in *Dominion Cotton Mills Co., Ltd. v. Amyot* (8) and applied by KEKEWICH, J., in *Normandy v. Ind, Coope & Co., Ltd.* (9).

It is manifest that this is not a case which is *ultra vires* the company. It is obvious that it is not beyond the powers of the company as defined by its memorandum of association to appoint a managing director and to vote him a remuneration. Is it of a fraudulent character? Cases like *Menier v. Hooper's Telegraph Works* (6) are cases where the majority have been engaged in appropriating to themselves

that which ought to be shared between themselves and the minority, but I am not aware of any case in which it has been suggested that if the majority think that one of themselves is the best person to be managing director, and proceed to appoint that person managing director at a remuneration, they appropriate to themselves the assets of the company within the meaning of LORD DAVEY's observations. The company is in such a case obtaining the services for which it is paying, thus getting a quid pro quo, and there is, I think, no foundation for the suggestion that in such a case there is an appropriation of property, in which the minority are interested, for the benefit of the majority. I do not think such a case comes within the scope of the observations of LORD DAVEY in *Burland v. Earle* (3). In this case it is to be observed that there is no evidence of any kind that the remuneration which has been voted by the board of directors, or purported to be voted by the board of directors, is excessive or grossly unfair. I have merely the resolutions as recorded in the minutes, and from them I am unable to infer that the services which Mrs. Foster was to render as managing director were not properly remunerated by the sum which it was proposed that she should receive.

Before I come to consider one other point of law there is one matter with which I should like to deal, and that is the general meeting of the company which was held on Aug. 5, 1915, for the purpose of confirming the resolution which had been passed by the directors in January, 1915. There were two witnesses called, Mr. Nicholson on the one side and Mr. Cockerton on the other. Mr. Nicholson was at that time acting as solicitor for the company. Mr. Cockerton was acting as solicitor for the plaintiff. Mr. Nicholson says, and to this extent the witnesses agree, that Mr. Cockerton took exception to any business being transacted at the meeting until the requisition, which was referred to in the notice convening the meeting, had been produced. It was impossible to produce that at the time as it had been apparently mislaid. Subsequently it was found, shown to Mr. Cockerton, and there was no doubt that the requisition had been made. Mr. Cockerton, however, says that Mrs. Foster, who was the chairman of the meeting, said: "Then I will convene another meeting for the purpose of dealing with this question," and thereupon the meeting dispersed, no resolutions having been passed. Mr. Nicholson, however, says that though Mrs. Foster originally intended to take that view, and apparently so stated, she afterwards on his advice proceeded with the meeting, called for a show of hands, and the show of hands was against the resolution, but then she called for a poll. There was no voting in form on the poll, but the numbers of shares of those who had voted on the show of hands was calculated, and the result announced. There is a direct conflict of testimony in this case between these two gentlemen, who were the only witnesses called to give evidence on this point. In these circumstances I am unable to come to the conclusion that it has been proved that those resolutions were passed at that meeting. For myself I am unable to see that it is very relevant whether the resolutions were passed or not. If the plaintiff is right in the argument addressed on his behalf, the result would be that in any case the resolution, if passed at the meeting, was bad, because according to that argument the company had no power to pass any such resolution. If, on the other hand, he is wrong in the argument, the company has power to deal with the matter at a general meeting, there is admittedly a majority opposed to the plaintiff in this matter, and, therefore, the result would be that the matter would have to go to the general meeting, and the plaintiff could not on behalf of the company complain of the transaction of January, 1915, before this court.

But it is said that the company in general meeting is not capable of dealing with the question, having regard to art. 99—that is, the article under which the directors may, subject to the preceding clauses, from time to time appoint any one or more of their body to be managing director or directors for such period, at such remuneration, and upon such terms as the directors think fit. Reliance was placed upon *Thomas Logan, Ltd.* (10), where art. 99 of a limited company gave the directors power to appoint one of their body to be managing director, and art. 113 provided

that the business of the company was to be managed by the directors—in terms somewhat similar to the present case. At an extraordinary general meeting of the company a resolution was passed that L., who was then the managing director, should be re-appointed sole managing director. The directors nevertheless appointed S., another member of their body, sole managing director. It was held that the provisions of art. 113 making the powers of the directors subject to the regulations of the company related to the general management of the affairs of the company, and not to the appointment of a managing director, or other matters specially placed under the control of the directors by the articles, and that, therefore, the appointment by the board of directors of S. as sole managing director was valid. I am not satisfied that in the circumstances of this case art. 99 can be relied upon. It appears to me that the resolution in January, 1915, was, in fact, an irregularity. If a director votes in respect of a contract of sale, and there is a provision similar to art. 93, the resolution is no doubt open to objection, but I take it that the company in general meeting in such a case could waive the objection and confirm the resolution, which, owing to the irregularity, was open to objection. In other words, the company in such a case in general meeting may waive the objection which it is entitled to take under art. 93. Now, if that be the true view, as I think it is, and this was an irregularity, the result is that the company is capable of dealing with the matter in general meeting, and, therefore, the plaintiff, as representing the minority, is not able to sue in respect of it in this court.

Moreover, there is this further consideration to be observed. Here I think it must be taken on the facts that all parties agreed that a managing director ought to be appointed; there is a contest between the plaintiff and Mrs. Foster, the two persons who hold the largest block of shares, as to which of them should occupy that position. They were apparently the only persons whom any shareholder contemplated as possible managing directors of the company. First one was appointed, then the two were jointly appointed, and then Mrs. Foster insisted on the appointment of herself, and that was objected to by the plaintiff. Owing to the way in which the shareholding of the directors is distributed, neither of them can be appointed. The plaintiff holds a minority of the votes on the board; Mrs. Foster is in the position that she is unable to vote in support of her own appointment. From a business point of view it seems to me that there are only two persons who are possible managing directors, and the board has been reduced to the position that it is unable, owing to internal friction and faction, to appoint anybody as a managing director. In those circumstances I should apply the decision of WARRINGTON, J., in *Barron v. Potter* (11), where he says ([1914] 1 Ch. at p. 903):

“If the directors having certain powers are unable or unwilling to exercise them—are, in fact, a non-existent body for the purpose—there must be some power in the company to do itself that which under other circumstances would be otherwise done. The directors in the present case being unwilling [in the present case unable] to appoint additional directors under the power conferred on them by the articles, in my opinion the company in general meeting has power to make the appointment. The company has passed a resolution for that purpose and, though a poll has been demanded no date or place has yet been fixed for taking it. The result, therefore, is that I must grant”

the relief asked. The result is that the question relating to the appointment of Mrs. Foster as managing director is one with which the general meeting of the company can deal, and recourse must be had to a general meeting, and, therefore, having regard to the authorities, I think that this part of the plaintiff's case also fails.

Solicitors: *Gascotte, Wadham, Tickell & Co.*, for *Goodwin & Cockerton*, *Bakewell; Ridsdale & Son*, for *Nicholson & Co.*, *Wath-upon-Dearne*.

[Reported by J. L. DENISON, Esq., Barrister-at-Law.]

Re CHAFER AND RANDALL'S CONTRACT

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Phillimore, L.J., and Sargant, J.),
March 27, 28, April 7, 1916]

[Reported [1916] 2 Ch. 8; 85 L.J.Ch. 435; 114 L.T. 1076;
60 Sol. Jo. 444]

*Sale of Land—Proof of title—Recital in deed that legal owner of land a trustee
“for A. B.”—No trust instrument mentioned—Admission against interest—
Duty of purchaser to inquire whether owner trustee for someone other than
A. B.*

Although a recital in a deed or other instrument that an owner of the legal estate in land is trustee for A. B. under a will or under a deed affects a purchaser of the land with notice of the contents of the will or of the deed, that doctrine has no bearing upon a case where there is nothing more than a statement (e.g., in a conveyance) that the owner of the legal estate holds upon trust for A. B. Such a statement is an admission against interest by the owner, and no duty is imposed upon the purchaser to inquire whether the owner is not also trustee for someone other than A. B.

Malpas v. Ackland (1827) (1), 3 Russ. 273, discussed.

Re Harman and Uxbridge and Rickmansworth Rail. Co. (1883) (2), 24 Ch.D. 720, applied.

Notes. Considered: *Re Soden and Alexander's Contract*, [1918] 2 Ch. 258. Referred: *Re Balen and Shepherd's Contract*, [1924] All E.R.Rep. 768.

As to proof of title, see 34 HALSBURY'S LAWS (3rd Edn.) 278-284; and for cases see 40 DIGEST (Repl.) 169 et seq.

Cases referred to:

- (1) *Malpas v. Ackland* (1827), 3 Russ. 273; 38 E.R. 578; 43 Digest 891, 3347.
- (2) *Re Harman and Uxbridge and Rickmansworth Rail. Co.* (1883), 24 Ch.D. 720; 52 L.J.Ch. 808; 49 L.T. 130; 31 W.R. 857; 40 Digest (Repl.) 173, 1369.
- (3) *Re Blaiberg and Abrahams' Contract*, [1899] 2 Ch. 340; 68 L.J.Ch. 578; 81 L.T. 75; 47 W.R. 634; 43 Sol. Jo. 625; 40 Digest (Repl.) 171, 1346.
- (4) *Jones v. Smith* (1841), 1 Hare, 43; 11 L.J.Ch. 83; 6 Jur. 8; 66 E.R. 943; affirmed (1843), 1 Ph. 244, L.C.; 35 Digest 528, 2605.
- (5) *Patman v. Harland* (1881), 17 Ch.D. 353; 50 L.J.Ch. 642; 44 L.T. 728; 29 W.R. 707; 40 Digest (Repl.) 166, 1286.
- (6) *London and County Banking Co. v. Goddard*, [1897] 1 Ch. 642; 66 L.J.Ch. 261; 76 L.T. 277; 45 W.R. 310; 13 T.L.R. 223; 41 Sol. Jo. 295; 43 Digest 662, 953.

Also referred to in argument:

Perham v. Kempster, [1907] Ch. 373; 76 L.J.Ch. 223; 96 L.T. 297; 35 Digest 449, 1895.

Carritt v. Real and Personal Advance Co., Ltd. (1889), 42 Ch.D. 263; 58 L.J.Ch. 688; 61 L.T. 163; 37 W.R. 677; 5 T.L.R. 559; 35 Digest 293, 458.

Appeal by the purchaser from a decision of YOUNGER, J. ([1916] 2 Ch. 8), on an adjourned summons taken out by the purchaser for a declaration that a requisition made by him in respect of the hereditaments comprised in the contract of sale had not been sufficiently answered.

By a conveyance dated Nov. 13, 1901, A. C. Corbett conveyed, together with other hereditaments, to H. B. Forbes and J. W. Neil the hereditaments comprised in the contract of sale between the present vendor and purchaser, Randall and Chafer, in consideration of a purchase price which was thereby stated to have been paid by the purchaser out of moneys belonging to them jointly. J. W. Neil

died on Feb. 11, 1906. An indenture dated Nov. 11, 1913, and made between H. B. Forbes, of the one part, and the present vendor, L. Randall, of the other part, recited the death of J. W. Neil and that H. B. Forbes was then seised of the hereditaments comprised in the indenture of Nov. 13, 1901, and other hereditaments as trustee partly for himself and partly for L. Randall, as he, H. B. Forbes, did thereby admit, that it had been agreed between him and L. Randall that the hereditaments should be partitioned, and that the hereditaments thereafter described and intended thereby to be conveyed should be taken by L. Randall as his share. The same indenture further recited the agreement that the said L. Randall should pay to H. B. Forbes by way of equality of partition the sum of £20, and then witnessed that H. B. Forbes as to the whole of the hereditaments thereby conveyed as trustee, and as to all his own beneficial estate, title, and interest therein as beneficial owner, conveyed to L. Randall in fee simple, among other hereditaments, a portion of the premises comprised in a contract of sale dated July 31, 1915, and made between Randall and Chafer. On an investigation by Chafer of the title of the vendor to the premises comprised in the contract, the following requisition was made:

"How did H. B. Forbes become seised of the hereditaments as trustee partly for himself and partly for L. Randall, as recited in the indenture of Nov. 11, 1913? If by deed, such deed should be abstracted and produced."

To which the vendor returned the answer: This question has nothing to do with the title. The purchaser made the following observation upon that answer:

"This requisition is repeated. Notice of a trust is given by the recital in the deed of Nov. 11, 1913, and it appears that Mr. H. B. Forbes was then seised of the hereditaments as trustee thereof. An abstract of his title must be furnished, and the deeds produced for examination. Further requisitions may then have to be made as a title is not now complete."

To which this reply was made:

"The recital gives fully the nature of the trust of which notice is given, and we are not disposed to give any further reply hereto."

Thereupon an originating summons under the Vendor and Purchaser Act was taken out by the purchaser asking that it might be declared that the requisition by himself in respect of the title to the hereditaments comprised in the contract of sale of July 31, 1915, had not been sufficiently answered by the vendor, and that a good title to the hereditaments has not been shown in accordance with the contract of sale. The summons was adjourned into court and came on to be heard before YOUNGER, J., who held that the requisition had been sufficiently answered by the vendor and the purchaser was not entitled to any further reply. From that decision the purchaser appealed.

C. A. Bennett for the purchaser.

H. C. Bischoff, for the vendor, was not called on to argue.

Cur. adv. vult.

April 7, 1916. The following judgments were read.

LORD COZENS-HARDY, M.R., stated the facts and continued: The argument before us of the purchaser's counsel was that the purchaser has constructive notice of any trust there may be for any other person, and he relied upon *Malpas v. Achland* (1) as supporting the proposition that a statement in the conveyance that an owner of the legal estate holds upon a trust gives notice of all the trusts affecting the property. I have examined the original decree in the Record Office, and I am satisfied that it does not bear out the point for which the case was cited. The decision was plainly correct. The recitals in that case showed that the lessor, who had granted a lease for a term of sixty-one years, had not a good title. It is plain law that a lessee, or a purchaser from a lessee, is affected with notice of and takes subject to any defect in the lessor's title. In this point of view the action was

A really undefended. But the Master of the Rolls, afterwards LORD LYNDBURST, gave, so far as the meagre report shows, a very short judgment. The report states as follows (3 Russ. at pp. 276, 277):

B "He was of opinion that the circumstances were such as to have rendered it incumbent on James Gomme to have made further inquiry that he must be considered as having had notice of the title of Mrs. Malpas' children, and therefore that the decree ought to be according to the prayer of the bill."

C If he merely held that the documents which were recited (including the will under which the plaintiff's equitable title arose) gave notice of a trust, his opinion, if I may respectfully say so, was perfectly right. If, however, he thought that a recital that an owner of the legal estate is trustee for A. B. imposes any duty upon the purchaser to inquire whether he is not also trustee for somebody else, I think there is no justification for such a view. I do not entertain any doubt that a recital that an owner of the legal estate is trustee for A. B. under a will or under a deed affects a purchaser with notice of the contents of the will or of the deed. But that doctrine has no bearing upon a case where there is nothing more than a statement that he holds upon trust for A. B. Such a statement is an admission against interest by the owner of the legal estate. So far as I can ascertain, *Malpas v. Ackland* (1) has not been treated as an authority on this point, and it has been questioned in DART'S VENDORS AND PURCHASERS (7th Edn.) p. 883. In my opinion, *Malpas v. Ackland* (1), although rightly decided, cannot be regarded as an authority for the proposition for which it was cited.

E We have had an elaborate argument as to the mode in which, where there is a change of trustees, the highly desirable and perfectly honest object of keeping the trust off the title has been or can be attained. Since *Re Harman and Uxbridge and Rickmansworth Rail. Co.* (2) it cannot be doubted that the mode referred to by MR. LEWIN in his LAW OF TRUSTS (12th Edn.) p. 386, is satisfactory. It was, however, suggested that that doctrine has no application except to a transfer of mortgages. I can see no foundation for this limitation. In that very case there had been a foreclosure decree, and the property transferred was therefore land and not money. Moreover, in the common case of a money settlement containing a power to invest in the purchase of land, which power has been exercised, I feel no doubt that the entire trust property, both land and money, may properly be transferred to new trustees by the method referred to by MR. LEWIN. I may add that in my opinion the passages from MR. CYPRIAN WILLIAMS' work on VENDOR AND PURCHASER (2nd Edn.) pp. 238-240, which are referred to by YOUNGER, J. ([1916] 2 Ch. at p. 12), correctly state the law. The appeal must be dismissed with costs.

I PHILLIMORE, L.J.—I agree that the judgment of YOUNGER, J., is right. I apprehend that upon the purchase of real estate it is settled law that if, in the course of deducing title, there appear upon the abstract a statement or recital of the existence of some deed or other instrument, the purchaser is fixed with constructive notice of all the contents of the instrument. If thereafter some claim arising out of the instrument be preferred, the purchaser will not be able to say that he trusted to the recitals or statements which appeared upon the abstract, and he will not be able to plead that he is a purchaser for value without notice. If, however, a good title both at law and in equity is deduced to a particular grantor A. B., and in the next assurance it is recited that A. B. is trustee of the whole or some part of the property or some defined estate or interest in favour of C. D., and C. D. joins in the assurance for the purpose of conveying or releasing his estate or interest, a subsequent purchaser is not bound to inquire into the circumstances in which C. D. acquired his estate or interest, is not bound to assume that it was created by an instrument, and is not fixed with constructive notice of the contents of the instrument if there should prove to have been one. A. B., who, according to the previous documentary title, has the absolute and unincumbered estate, has made an admission against interest, and his admission

lessens his estate to the extent to which he admits, and in favour of the person or persons in whose interest he admits, but no further. This principle is well illustrated in LEWIN'S LAW OF TRUSTS, chap. 14, s. 4, para. 37. MR. LEWIN is there dealing with the familiar case of trustees who have money to invest on mortgage, and is stating the recognised practice of conveyancers whereby the trusts of the instrument, under which they are trustees, are kept off the title to the property mortgaged. He points out that a formula, once in vogue and having the authority of JARMAN'S BYTHEWOOD, vol. 6, p. 381, that the mortgagees are trustees, is unsafe. This seems obvious. There is a declaration against interest, but nothing to show in whose favour the title is cut down, and, therefore, no release is obtained from the unknown beneficiary. MR. LEWIN, however, proceeds to show that in the common case where new trustees are from time to time appointed, and it is necessary to get a conveyance which will not appear to be a voluntary one from the old to the new trustees, it is right and proper to express that the grantors are trustees for the grantees to whom they are now passing the legal estate. And such a declaration, while affording sufficient consideration for the conveyancer, does not bring upon the title the instrument or instruments under which, in fact, the old trustees had become trustees for the new trustees. The illustration is taken from the case of mortgages, and it is most often in the case of mortgages that the point will arise. But in *Re Harman and Uxbridge and Rickmansworth Rail. Co.* (2) the point arose after foreclosure of a mortgage, and with regard to the conveyance of the foreclosed estate. It was there held that where the executrix of the mortgagee, having foreclosed the mortgage, purported by a deed reciting that her testator had held the mortgage on account of three persons named to convey the estate to them, she was, though an executrix, entitled to put this recital into the deed, and that the purchasers were

"entitled to rely on it as a protection against any trusts of the property which may exist."

Some reliance was placed on the argument before us upon the use of the phrase "on account of" instead of "as trustees for." But the principle is the same. Particular admission against interest is made and then the interest so admitted is got in.

In *Re Blaiberg and Abrahams' Contract* (3) KEKEWICH, J., explains *Re Harman and Uxbridge and Rickmansworth Rail. Co.* (2), and affirms while distinguishing its principle. I quote what he there said ([1899] 2 Ch. at p. 346):

"Perhaps I ought to say that *Harman's Case* (2) does not govern this case, because there the trust deed was not disclosed. All that was disclosed was that the testator was a trustee, and it did not appear that any persons other than the testator ever had anything to do with the trust."

The only decision which appears to create any difficulty is that relied upon by counsel for the purchaser—namely, *Malpas v. Ackland* (1). In that case as reported—not altogether carefully—an argument was offered on behalf of the successful plaintiffs which, if sound, would contravene the principle which I have stated. But there are two observations to make. On the facts stated in the report, which, by inspection of the original record, we find were stated in the plaintiff's bill, the plaintiffs were bound to succeed. The defendant was the assignee of a lease for sixty-one years created by a lessor who admitted that he was a trustee. A lease of this length, and of the particular nature of which it was, was not one that would come within the ordinary powers of a trustee. It was necessary, therefore, to make the beneficiaries parties, and a recital was inserted to show who they were and what their interest was. The recital was incomplete, and excluded those beneficiaries who afterwards became the plaintiffs. This recital could not be conclusive, because a lessee just as much as a purchaser has the obligation to inquire into his lessor's title, and an investigation of the title would have shown that, only seventeen years before, the property—which

A was copyhold—had been surrendered to the uses of a will, and the will which contained the limitations in question was, therefore, upon the title. The case need not have been put on the question of notice, but on a direct infirmity of title. The lessor had not the power to make the lease which he purported to make. The argument, therefore, was unnecessary. But, further, the actual recital that the trustee was seised of the copyhold

“upon trust for the use and behoof of William Malpas and Susannah his wife and George Colman for such estates in possession, reversion, or remainder, as they became entitled to after the decease of Mary Colman, and that the trust had devolved on Henry Hannam,”

was a sufficiently plain indication that there was, if not an instrument creating an original interest, at least some instrument or act in law passing the interest to Malpas and his wife and George Colman, upon the decease of Mary Colman. *Malpas v. Ackland* (1) seems to have been mentioned with some approval, but quite incidentally, in *Jones v. Smith* (4) (1 Hare, at p. 58). It is rarely cited in textbooks, and has been commented on adversely. If it be merely a decision that where upon an assurance there is a recital of an instrument creating a trust, he who takes under that assurance has constructive notice of all the trusts created by the instrument, it is only in accordance with well-recognised law. As a decision on the particular circumstances that where enough is recited to show that there must be a deed there will then be constructive notice of the deed, though a deed be not actually mentioned, it may be of some little importance. If it goes any further, I humbly conceive that it is not good law. Upon the whole, as I have said, I think that this appeal fails.

SARGANT, J.—I am of the same opinion. It has not been contended by the purchaser that the recitals in the indenture of Nov. 11, 1913, indicate that the beneficial interest acknowledged in favour of the present vendor was in any way derived from James Wells Neil or that, though the latter and Henry Bracey Forbes were expressed in the indenture of Nov. 13, 1901, to buy and to take as joint tenants, they were in fact co-adventurers or tenant in common, so that the survivor would hold partly as trustee for the other. It is accepted that the object of reciting the indenture of Nov. 13, 1901, and the death of James Wells Neil was merely to show a complete title in fee simple in Henry Bracey Forbes, and that the statement as to the beneficial interest of the present vendor may be treated as an admission of a trust which is disconnected from the preceding recitals and may have arisen altogether independently of James Wells Neil and subsequently to his death. Nevertheless, it is argued that the bare statement in the indenture of Nov. 11, 1913, as to the trust in favour of the present vendor puts a purchaser upon inquiry as to the origin and nature of this trust, and would in default of inquiry render his title bad as against any other cestuis que trust of Henry Bracey Forbes who have not been satisfied and as to whose existence and interests the purchaser would have become informed in the course of such an inquiry.

It is difficult to discover any sound principle on which this contention can be based. Assuming, as is admitted here, that an indenture discloses what is on the face of it an absolute legal and beneficial title in A, and that A. then proceeds to admit that either in whole or in part he holds for the benefit of or in trust for a definite named person B., I can see no sufficient reason for any inference that A. holds upon any additional or further trust than that disclosed, or that the acknowledged trust originates in any document the examination of which might disclose any such further trust. The admission or acknowledgment is one against interest, and, of course, binds the person making it to its full extent. But there is no reason for enlarging that extent. The very candour of the admission is in favour of its completeness. A trustee who is concealing a trust in favour of C. is not likely to be openly acknowledging at the same moment a trust in favour of B. It is said, however, that the contrary has been decided in *Malpas v. Ackland* (1).

The report of that case is unsatisfactory, but the decision may obviously be supported on either of two grounds. In the first place, any ordinary investigation of the title of the lessor must obviously have resulted in the disclosure of the trusts on which the plaintiff relied. And such an investigation can only be neglected at the peril of a lessee: *Patman v. Harland* (5). In the next place, the reference to the trusts on which John Hannam held was couched in such terms as obviously to suggest what was actually the fact—namely, that there was a series of successive trusts, of which those in favour of William Malpas and Susannah his wife and George Colman formed a part only. I cannot find that in any subsequent case reliance has been placed on *Malpas v. Ackland* (1) as establishing the wide proposition contending for by counsel for the purchaser. And, if it does purport to establish that proposition, it is in conflict with later authorities, such as *Re Harman and Usbridge and Rickmansworth Rail. Co.* (2) and *London and County Banking Co. v. Goddard* (6), and cannot, in my judgment, be any longer relied on. The first of these two cases, indeed, went very much beyond anything that is necessary here, since it not only negated any obligation to inquire into the origin and nature of the trusts on which the deceased mortgagee had held his mortgage, but accepted as against the beneficiaries under his will the statement of the surviving trustee of that will that the deceased had not held beneficially.

Great weight ought also to be attached to the practice of conveyancers in such matters. A common but by no means solitary instance is afforded by the method adopted when on a change of trustees mortgages belonging to the trust have to be transferred from the former trustees to the new trustees. The original mortgages have, of course, been taken in the joint names of the trustees without any disclosure of the trust, and it is equally necessary or desirable that no such disclosure should be permitted on the transfer. A bare recital is accordingly used to the effect that the new trustees have become entitled to the mortgage moneys on a joint account in the place of the old trustees, or that the old trustees now hold the mortgage moneys upon trust for the new trustees or to some other effect, showing that the old trustees admit that their legal title has become subject to an equitable or beneficial title on the part of the new trustees entitling the latter to a transfer. Such a recital is universally accepted as sufficient on any subsequent investigation of title by a purchaser or mortgagee. But the validity of such a recital obviously rests upon the principle that the acknowledgment of the apparent legal owner of a limitation or negative of his legal ownership by means of a trust or its equivalent is to be accepted at its face value, and does not involve any obligation to inquire into the origin or nature of the acknowledged trust. In my view, the judgment of the learned judge was quite right and should be affirmed.

Appeal dismissed.

Solicitors: *Bennett & Ferris; Forbes & Son.*

[Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]

FURNESS, WITHEY & CO., LTD. v. REDERIAKTIEBOLAGET
BANCO AND OTHERS

[KING'S BENCH DIVISION (Bailhache, J.), July 30, 31, 1917]

[Reported [1917] 2 K.B. 873; 87 L.J.K.B. 11; 117 L.T. 313;
62 Sol. Jo. 25; 14 Asp.M.L.C. 137]*Shipping—Charterparty—Exception clause—Restraint of princes—Restraint imposed by foreign government—Shipowner and master within foreign jurisdiction and liable to penalties.*

The defendants who were Swedish and resident in Sweden owned a ship which they chartered to the plaintiffs for six months, the charterparty being made in England and containing a restraint of princes exception. The ship was to be used between certain ports all of which were outside Sweden. At the date of the charter decrees had been made in Sweden which prohibited ships of the tonnage of the chartered ship from carrying goods for freight between ports outside Sweden. After one voyage the plaintiffs proposed to load another cargo at Cardiff for carriage to Italy, but the defendants refused to proceed with the charter on the ground that it would contravene the Swedish decrees. The plaintiffs brought an action to restrain the defendants from using the ship otherwise than in accordance with the terms of the charterparty.

Held: although the restraint arose from a foreign law and the foreign government was not in a position to stop the performance of the contract by force, the restraint could operate—as it could only operate in the case of a ship—on the owner or master who were within the jurisdiction of the foreign government imposing the restraint and were liable to pains and penalties for disobedience, and, therefore, the defendants were entitled to rely on the exception in the charter.

Notes. Referred to: *Manbre Saccharine Co., Ltd. v. Corn Products Co., Ltd.*, [1918-19] All E.R.Rep. 980.

As to charterparties in general, see 30 HALSBURY'S LAWS (2nd Edn.), 272 et seq.; as to restraint of princes, see *ibid.* 319 et seq. For cases see 41 DIGEST 409, 2545-2572.

Cases referred to:

- (1) *Sanday & Co. v. British and Foreign Marine Insurance Co.*, [1915] 2 K.B. 781; 84 L.J.K.B. 1625; 113 L.T. 407; 31 T.L.R. 374; 59 Sol. Jo. 456; 13 Asp.M.L.C. 116, C.A.; affirmed sub nom. *British and Foreign Marine Insurance Co., Ltd. v. Samuel Sanday & Co.*, ante p. 134; [1916] 1 A.C. 650; 85 L.J.K.B. 550; 114 L.T. 521; 32 T.L.R. 266; 60 Sol. Jo. 253; 13 Asp.M.L.C. 289; 21 Com. Cas. 154, H.L.; 29 Digest 276, 2236.
- (2) *Rodocanachi v. Elliott* (1874), L.R. 9 C.P. 518; 43 L.J.C.P. 255; 31 L.T. 239; 2 Asp.M.L.C. 399, Ex. Ch.; 29 Digest 218, 1747.

Action in the Commercial List tried by BAILHACHE, J., without a jury.

The defendants were Swedish subjects ordinarily resident in Sweden and were the owners of the steamship *Zamora*. On Nov. 13, 1916, the plaintiffs chartered the ship on a Baltic and White Sea time charter form for six months to be employed on voyages between certain ports, all of which were outside Sweden. The charterparty was made in England. At that time the King of Sweden, in the exercise of a power given to him by the Swedish emergency legislation, had made decrees prohibiting Swedish ships of more than 200 tons gross register from carrying goods for freight between ports outside Sweden. The ship, having carried a cargo of coal from Barry to Genoa, returned to Cardiff where the plaintiffs proposed to load another cargo of coal for carriage to Italy. The defendants refused to proceed with the charter on the grounds that it would contravene the Swedish

decrees. The plaintiffs brought the present action to restrain the defendants from using the ship otherwise than in accordance with the charterparty.

Leck, K.C., and *R. A. Wright* for the plaintiffs.

Dunlop for the defendants.

BAILHACHE, J.—On Nov. 13, 1916, the Swedish owners of a steamer called the *Zamora* made a six months' time charter with the plaintiffs, Messrs. Furness, Withy & Co. The steamer was then in the United Kingdom, or shortly to come into the United Kingdom, and she was to be employed during the six months on voyages within certain limits. It is sufficient for my purposes to say that all those limits were outside the kingdom of Sweden. The charter was on a Baltic and White Sea time charter form, with which by this time we are all very familiar; and in cl. 14, amongst the exceptions, there was an exception of restraint of princes.

It appears that there was existing at the date of the charter some emergency legislation in Sweden, which apparently is very similar in form to our own emergency legislation, and power is given to the King of Sweden to make certain proclamations and regulations, and then he, under the statute giving him that power, makes these proclamations. He has made proclamations and regulations—decrees I think they are called—and No. 271 and No. 273 are the material ones for this purpose. By decree No. 271 it is provided that

“goods shall not be carried between places outside the kingdom by Swedish vessels of a gross tonnage of 200 tons register or more.”

The effect of that was to prevent the carriage of goods between ports neither of which is in the kingdom of Sweden. Then, by decree No. 273, there is a regulation against making time charters for a longer period than six months. If I had been left alone to read those two decrees together, I should not myself have thought that No. 271 was applicable to No. 273. I should have thought that No. 271 referred to voyage charters and No. 273 referred to time charters; and there might be a time charter for six months which kept or might keep the vessel for the whole of those six months outside Swedish waters. Mr. Schonmeyer, a Swedish advocate, has given evidence here that the effect of the Swedish law is that No. 271 and No. 273 must be read together; and, although you may in a time-chartered ship carry goods outside the kingdom of Sweden, one of the ports between which you carry the goods must be a Swedish port. It may be so; and at any rate for my purpose, as he is the only witness called before me as to the Swedish law, I must accept what he says upon that matter, having no evidence to the contrary.

The vessel was chartered in this country. The contract is an English contract, and no doubt has to be construed according to English law. She did go on one voyage to Genoa, and the owners then objected, not upon the ground that there was any restraint of princes at all, but upon the ground of the danger which the ship incurred in navigating the waters between this country and Italy. It was upon that ground that the owners at first declined to proceed with the time charter. They did not state the restraint of princes point until a later date. But, of course, if they have the restraint of princes point, and can rely upon it, they can justify their refusal to proceed with the charterparty upon any ground which existed at the time and which is in fact a good justification for their refusal.

It is conceded by the defendants, and is, I think, quite clear law that the mere fact that a contract is illegal by the law of a foreign State to which one of the contracting parties is a subject will not make the contract illegal or unenforceable if it is an English contract to be construed according to English law and to be enforced according to the law of this country. Therefore, if it were not for the exception of restraint of princes, the Swedish owners in this case could not rely upon the fact that this charterparty is illegal according to Swedish law. But they have the words “restraint of princes.” I was for some time in doubt whether a restraint arises from a foreign law when the foreign government, against whose

- A law the contract is intended to be performed, is not in a position to stop the performance of the contract by force applied to the subject-matter of the contract—that is, in this case, either to the ship or the cargo. I am not aware of any case in which there has been an instance of restraint of princes in which the foreign government has not been in a position to enforce the restraint by actual physical action upon the subject-matter of the contract—the ship or the cargo. But counsel
- B for the defendants has referred me to a good many expressions in the well-known case of *Sanday & Co. v. British and Foreign Marine Insurance Co.* (1) ([1915] 2 K.B. at pp. 789, 800, 827) (decided last year in the House of Lords) in the judgments of LORD READING, C.J., and BRAY, J., in that case in the Court of Appeal—and, indeed, to my own expressions—and, in particular, to some expressions in the judgment of BRAMWELL, L.J., in *Rodocanachi v. Elliott* (2) (L.R. 9 C.P. at p. 523).
- C Putting all those expressions together, it seems to me that a number of judges have said that you may have a restraint of princes where the restraint can operate, and it can only operate in the case of a ship, upon the owner or the master, and it is a case of restraint of princes if the performance of the contract will render the owner or the master liable to pains and penalties—imprisonment and fine—and the owner and the master are within the jurisdiction of the sovereign government
- D by whose law the performance of a particular contract is illegal. I doubt whether this is not carrying restraint of princes further than it has ever been carried before, certainly further than it has ever been carried in any reported case of which I have any knowledge. But it seems to me to follow from the observations made by BRAMWELL, L.J., in *Rodocanachi v. Elliott* (2) and from the observations made by the Court of Appeal in *Sanday & Co. v. British and Foreign Marine Insurance Co.*
- E (1). The result, although this may be an extension of the doctrine, is that the plaintiffs' case fails, and there must be judgment for the defendants.

Judgment for defendants.

Solicitors: *Downing, Handcock, Middleton & Lewis; Thain Davidson & Co.*

[*Reported by T. W. MORGAN, Esq., Barrister-at-Law.*]

NEW RIVER CO. v. CRUMPTON

[KING'S BENCH DIVISION (Rowlatt, J.), February 21, 1917]

[Reported [1917] 1 K.B. 762; 86 L.J.K.B. 614; 116 L.T. 569]

Landlord and Tenant—Repair—Breach of covenant—Statutory notice—Continuing breach—Acceptance of rent after expiration of notice—Waiver of forfeiture—Need of further notice.

The plaintiffs were the landlords and the defendant was the tenant of premises under a lease which contained covenants by the tenant to repair with a proviso for re-entry on breach. The plaintiffs served a statutory notice to repair on the defendant on Dec. 11, 1914, requiring the defendant to remedy the breaches within three months. When the notice was only partially complied with the plaintiffs accepted rent from the defendant due at Christmas, 1915. No further notice to repair was served on the defendant before the plaintiffs began an action for forfeiture.

Held: (i) acceptance of rent after a breach of covenant to repair amounted to a waiver of forfeiture, but, as the breach of the covenant to repair was a continuing breach from day to day, the acceptance of rent by the plaintiffs only waived forfeiture up to the time of acceptance; (ii) a further statutory notice was not necessary as the original notice served by the plaintiffs remained applicable to the actual state of the premises, the partial repairs carried out by the defendant before the action not rendering the notice inapplicable; and, therefore, the plaintiffs were entitled to succeed.

Penton v. Barnett (1) [1898] 1 Q.B. 276, applied.

Notes. Section 14 (1) of the Conveyancing Act, 1881, was replaced in identical terms by s. 146 (1) of the Law of Property Act, 1925.

As to forfeiture for a continuing breach of covenant, see 23 HALSBURY'S LAWS (3rd Edn.) 673. As to the statutory notice, see *ibid.* 674 et seq. For cases see 24 DIGEST (Repl.) 537, 6613 et seq. For the Law of Property Act, 1925, s. 146, see 20 HALSBURY'S STATUTES (2nd Edn.) 739.

Cases referred to:

(1) *Penton v. Barnett*, [1898] 1 Q.B. 276; 67 L.J.Q.B. 11; 77 L.T. 645; 46 W.R. 33; 14 T.L.R. 11; 42 Sol. Jo. 11, C.A.; 31 Digest (Repl.) 537, 6618.

(2) *Guillemard v. Silverthorne* (1908), 99 L.T. 584, N.P.; 31 Digest (Repl.) 540, 6636.

Action by a landlord for forfeiture of the defendant's lease.

In 1843 the plaintiffs leased to one B. premises for a term of seventy-seven years, the lease containing covenants on the part of the lessee and his assigns to repair and a proviso for re-entry by the landlord on breach of the covenants. The lease subsequently became vested in the defendant. On Dec. 11, 1914, the plaintiffs served upon the defendant a notice under s. 14 (1) of the Conveyancing Act, 1881 [now Law of Properties Act, 1925, s. 146 (1)], specifying breaches of the covenants to repair and requiring the defendant to remedy the breaches within three months. The plaintiffs in January, 1916, accepted from the defendant rent due at Christmas, 1915. No fresh notice of repairs was served after January, 1916, and the defendant had only partially complied with the notice to repair before the plaintiffs commenced this action claiming forfeiture of the lease.

Graham Mould for the plaintiffs.

Van den Berg for the defendant.

ROWLATT, J.—The question I have to decide in this case is whether, where notice has been given under s. 14 of the Conveyancing Act, 1881, and the forfeiture occasioned by non-compliance with such notice has been waived by acceptance of rent, a new notice has to be given in a case where the previous notice has been partly complied with.

A It is, of course, clear that acceptance of rent after a breach of covenant to repair justifying re-entry constituted at common law a waiver of forfeiture. In the present case rent accrued due down to Christmas, 1915, was accepted by the plaintiffs, and therefore, there was a waiver for forfeiture down to that date, and the tenancy subsisted till then. It is also clear that at common law, where there is a covenant to repair, the breach, if not remedied, is a continuing breach from day to day.

B Therefore, when the rent was accepted it only waived forfeiture up to that time. Then comes in s. 14 of the Conveyancing Act, 1881, which requires a notice of breaches to be given, and a question arises whether a notice has been given and then the forfeiture is waived by acceptance of rent a new notice must be given to support the right of action again. Here the notice was given in December, 1914, and rent accrued due at Christmas, 1915, was accepted by the landlords.

C This question came up for decision in *Penton v. Barnett* (1), and the point is perhaps best stated in the judgment of COLLINS, L.J., who said ([1898] 1 Q.B. at pp. 281, 282):

"I think, however, that we ought to construe the words 'particular breach' in the section according to the obvious intention of the legislature, which was that the tenant should be informed of the particular condition of the premises which he was required to remedy. The expression 'breach' means the neglect to deal with the condition of the premises so pointed out, and not merely failure to comply with the covenants of the lease. The common sense of the matter is that the tenant is to have full notice of what he is required to do. He has had notice, and has failed to act on it; and with regard to that, the physical condition of the premises which he was required to make good was the same when the action was brought as when the notice was given. Under these circumstances, I agree that the requirements of the Conveyancing Act have been complied with, and that the tenant has, within the meaning of s. 14, had notice of the breach of covenant, which is the foundation of the action."

F This case is on the same footing in point of fact except that here there has been a partial compliance with the notice to repair since it was given and before the action was brought, and it is said that that renders the decision in *Penton v. Barnett* (1) inapplicable. In that case the breaches of which notice was given were continuing from day to day, and continued until action was brought. In the present case it is suggested that as part of the notice has been complied with another notice before action must be given. It seems to me that what was meant by the Court of Appeal in *Penton v. Barnett* (1) was that the notice must be still applicable to the actual state of the premises at the time when the action is brought; a new notice needed not to be given because the old notice remained applicable, and I do not think that it was meant to say that because some partial repairs have been effected, therefore a fresh notice must be given. The tenant knew what she was required to do and what she had not done, and, I think, that that is enough. I do not think that the partial repairs make the notice inapplicable, or that the Court of Appeal in *Penton v. Barnett* (1) meant so to hold. If the question of waiver had not arisen, no one would argue that you would have to give a fresh notice because part of the repairs had been done. I cannot see why, because the question is complicated by waiver, different considerations should apply. I am not sure whether what RIDLEY, J., decided in *Guillemard v. Silverthorne* (2) is quite in accordance with what I am deciding now. I am not sure that I am following his judgment, but I feel bound to follow what, in my opinion, the Court of Appeal really meant in *Penton v. Barnett* (1). Therefore, this point taken by the defendant fails. That disposes of the only point causing difficulty in this action, and there must be judgment for the plaintiffs.

Judgment for plaintiffs.

Solicitors: *Thompson & Debenham; Engall & Crane.*

[Reported by W. V. BALL, Esq., Barrister-at-Law.]

WILLIAM CORY & SONS, LTD. v. LAMBTON AND HETTON COLLIERIES, LTD.

[COURT OF APPEAL (Swinfen Eady and Bankes, L.JJ., and A. T. Lawrence, J.),
November 6, 7, 1916]

[Reported 86 L.J.K.B. 401; 115 L.T. 738; 10 B.W.C.C. 180;
13 Asp.M.L.C. 530]

Indemnity—Implied indemnity—Request by one party to another to do act gratuitously—Consequent liability of party doing act—Implication of indemnity by other party.

The plaintiffs chartered a ship from the defendants. When preparing to discharge the cargo at the dock, the plaintiffs, at the implied request of the defendants, gratuitously used their (the plaintiff's) machinery to remove the hatch beams in the ship. While doing this a servant of the plaintiffs was killed. The dependants of the deceased servant recovered compensation from the plaintiffs in proceedings under the Workmen's Compensation Act, 1906, and the plaintiffs claimed to be entitled to an implied indemnity from the defendants.

Held: as the accident to the plaintiffs' servant was not the direct or natural consequence of doing the act which was done, but was a consequence of the manner in which the act was done, and, therefore, no inference could be drawn of any agreement by the defendants to indemnify the plaintiffs.

Per BANKES, L.J., and LAWRENCE, J.: Where a person does an act gratuitously at the request of another a promise of indemnity is not necessarily implied.

Notes. The Workmen's Compensation Act, 1906, was repealed by the Workmen's Compensation Act, 1925, which in turn has been almost entirely replaced by the National Insurance (Industrial Injuries) Act, 1946 ([16 HALSBURY'S STATUTES (2nd Edn.) 797]), under which compensation is made by the State for injuries sustained by workmen in the course of their employment.

As to indemnities see 18 HALSBURY'S LAWS (3rd Edn.) 529 et seq., and for cases see 26 DIGEST (Repl.) 232, 1786-1803.

Cases referred to:

- (1) *Dugdale v. Lovering* (1875), L.R. 10 C.P. 196; 44 L.J.C.P. 197; 32 L.T. 155; 23 W.R. 391; 26 Digest (Repl.) 232, 1787.
- (2) *Toplis v. Grane* (1839), 5 Bing. N.C. 636; 2 Arn. 110; 7 Scott, 620; 9 L.J.C.P. 180; 132 E.R. 1245; 26 Digest (Repl.) 232, 1786.
- (3) *Betts v. Gibbins* (1834), 2 Ad. & El. 57; 4 Nev. & M.K.B. 64; 4 L.J.K.B. 1; 111 E.R. 22; 26 Digest (Repl.) 233, 1797.
- (4) *Groves & Son v. Webb and Kenward* (1916), 85 L.J.K.B. 1533; 114 L.T. 1082; 32 T.L.R. 424; 13 Asp.M.L.C. 386, C.A.; 26 Digest (Repl.) 233, 1794.

Also referred to in argument:

- Sheffield Corpn. v. Barclay*, [1905] A.C. 392; 74 L.J.K.B. 747; 93 L.T. 83; 69 J.P. 385; 54 W.R. 49; 21 T.L.R. 642; 49 Sol. Jo. 617; 3 L.G.R. 992; 10 Com. Cas. 287; 12 Mans. 248, H.L.; 26 Digest (Repl.) 237, 1820.
- Donovan v. Laing, Wharton and Down Construction Syndicate*, [1893] 1 K.B. 629; 63 L.J.Q.B. 25; 68 L.T. 512; 57 J.P. 583; 41 W.R. 455; 9 T.L.R. 313; 37 Sol. Jo. 324; 4 R. 317, C.A.; 34 Digest 26, 49.
- Rourke v. White Moss Colliery Co.* (1877), 2 C.P.D. 205; 46 L.J.Q.B. 283; 36 L.T. 49; 41 J.P. 580; 25 W.R. 263, C.A.; 34 Digest 25, 46.
- Coggs v. Bernard* (1703), 1 Salk. 26; 1 Com. 133; Holt, K.B. 13; 2 Ld. Raym. 909; 3 Salk. 11; 91 E.R. 25; 36 Digest (Repl.) 32, 144.

A **Appeal** by the defendants (shipowners) from a decision of RIDLEY, J., sitting with a jury, in an action in which the plaintiffs claimed an indemnity in the circumstances stated in the headnote. The jury found: (i) that the plaintiffs in discharging the cargo from the ship were doing the work of the defendants, and (ii) that the defendants had impliedly undertaken to indemnify the plaintiffs for damage or less occurring during the discharging of the cargo.

B The facts are set out in the headnote and in the judgment of SWINFEN EADY, L.J.

Holman Gregory, K.C., and Alexander Neilson for the defendants.

Rawlinson, K.C., and M. M. Macnaghten (for *Harold Morris*, serving with His Majesty's forces) for the plaintiffs.

C **SWINFEN EADY, L.J.**—This is the appeal of the defendants, the Lambton and Hetton Collieries, Ltd., against the verdict and judgment at the trial of the action before RIDLEY, J., where, upon certain questions being left to the jury, a verdict was returned for the plaintiffs for £283. Against that verdict and judgment the defendants appeal, and they ask in the alternative, first, to have the judgment set aside and judgment entered for the defendants, upon the ground that there was no evidence to go to the jury with regard to the liability to indemnify the plaintiffs in respect of which the action was brought, or, in the alternative, they ask for a new trial.

D The facts out of which this action arises are these. On April 23, 1915, the plaintiffs, William Cory & Sons, Ltd., chartered from the defendants, the Lambton and Hetton Collieries, Ltd., a steamship for the purpose of carrying a cargo of coal. The ship arrived in the Thames, and was moored at the Albert Dock coal hoists, where the plaintiffs, William Cory & Sons, Ltd., have certain machinery and hoists for quickly discharging cargoes of their coal. According to the terms of the charterparty, the time for discharging was to commence when the steamer was moored in her discharging berth ready to discharge cargo. What happened was that, on the arrival of the steamer, and after she was moored, the ship's crew removed the hatches. Then the next step, before having the hatchways cleared to discharge the coal, was the removal of the hatch beams. These hatch beams, which rest by their own weight, are heavy, and no tackle of the ship had been rigged for the purpose of removing them, and there was evidence from which I think the jury were entitled to take view which they did, that William Cory & Sons, Ltd., at the implied request of the ship, proceeded to use their powerful machinery for the purpose of lifting and removing the hatch beams. In doing so, unfortunately an accident occurred to Peacock, who was one of William Cory & Sons' men, and he was killed, or he died from the effects of the injuries that he received during the operation. After his death his dependants took proceedings under the Workmen's Compensation Act, 1906, and obtained a sum of about £283 compensation. The present action was brought by Messrs. William Cory & Sons, Ltd., to obtain from the defendants, the owners of the ship, that sum of £283 upon an implied indemnity, their case being that the plaintiffs did the work of removing the hatch beams at the request of the defendants, and in circumstances from which an indemnity can be implied against all consequences of the act they were requested to do, including in those consequences the liability of the plaintiffs to pay compensation to the dependants of a workman who was killed by the operation which they were asked to undertake.

E The accident happened in this way. After the removal of the hatches the ship lay there, and William Cory & Sons, Ltd., proceeded to remove the hatch beams. There was evidence that the ship was not ready to discharge within the meaning of the charterparty until the hatch beams had been removed. Thereupon William Cory & Sons' men proceeded to do what was necessary to remove the hatch beams. The deceased, Peacock, went into the hold, either standing on the coal, or on the hatch beam itself, but he passed into the ship, and there was a crane man working the crane. Then, according to the evidence of the crane driver, Robert Wing, Peacock, who was a fellow employee of his, in the employ of William Cory & Sons,

Ltd., gave him, from the ship, the order to lower the grab. It was intended doubtless to have a chain or something fastened to the end of the grab to remove the hatch beams. In his evidence Wing said: "He gave me the order to lower the grab, and it touched the fore and aft, and the grab slipped," and then Wing tried to pull it up, but it was too late—that is to say, the grab had rested on the beam which had slipped and tipped over, and injured the deceased or pinned him to the side of the ship. Then in cross-examination Wing said: "Peacock let me [the crane man] go too far; and so it happened." That is to say, Peacock did not give Wing the sign by which he was to stop lowering the grab down, and he let the grab down too far and it tipped over, and although he tried to pull it up and tried to recover himself it was too late. It was in that way that the accident happened. The plaintiffs, being liable, and having paid £233 as compensation to the dependants of their deceased workman, brought this action, on the ground that the work was done by them for the shipowners and it was the shipowners' duty to remove these hatch beams. William Cory & Sons, Ltd., had done the work for them at their request, and they say the circumstances were such that there must be implied a promise on the part of the defendants to indemnify them from consequences of the act which the plaintiffs had performed on their behalf, including this liability to pay compensation.

The claim was put forward originally in the alternative. It was based upon a usage or custom of the Port of London. That was one part of the claim, and it was alleged by the plaintiffs that there was a usage or custom of the Port of London, in reference to colliers at the port, that when a workman employed by the dischargers is injured by accident arising out of and in the course of his employment in the work of removing the hatches and/or the hatch beams of a ship, the shipowners indemnify the dischargers against their liability to pay compensation, or the injured workman or his dependants. That was alleged to be a custom or trade usage of the Port of London. That is now out of the way in this case, because it was conceded in the court below, when the matter was before the jury, that there was no evidence on which the jury could be asked to find such a custom. Then the plaintiffs put their case in the alternative; they put it upon an implication in law from the facts of the case, and they say that where persons request work to be done they impliedly promise, as a necessary implication of law, to indemnify the party doing that work. The learned judge at the trial left three questions to the jury. The first was: "Were the dischargers"—that is, William Cory & Sons, Ltd.—"doing the working of the ship?" That is to say, were they, in removing the hatch beams, doing the work which the shipowners, as between the ship and charterers, ought to do? The jury answered that they were. The second question the learned judge put was: "Were they doing it by implied request?" and the answer was, Yes. That was having regard to the circumstances, the ship drawing up, and there being no machinery immediately available for removing the hatch beams, and the ship not making preparation for doing it, obviously waiting for William Cory & Sons, Ltd., to do it, and one of their men proceeding on to the ship for the purpose of doing it, there was evidence from which the jury were entitled to draw the conclusion that William Cory & Sons, Ltd., were doing the work of removing the hatch beams at the request of the ship. In respect of those two findings there is really no complaint.

The matter turns upon the third question which was put to the jury: "Was there an implied indemnity?" to which the jury said, Yes. The question which we have to consider is not only whether that verdict of the jury was in accordance with the evidence, but whether there was any evidence to go to the jury from which they could arrive at such a decision. The learned judge left it to the jury in this way: After dealing with the first and second questions that I have already dealt with, he said, as to the third question, "Was there an implied indemnity?" That is to say, "When they"—the plaintiffs—"were doing it at the request of the ship, if anything should happen which put a liability upon them, an unforeseen liability

in the course of doing it, have they a right to say, 'You ought to indemnify us because we were doing this work for you?'" His Lordship says:

"[Counsel for the plaintiffs] has been able to quote a sentence which was approved by the courts some time ago on a very similar subject, and it is this,"

and then he reads the extract, which counsel for the plaintiffs had read from *Dugdale v. Lovering* (1). Then the learned judge proceeds:

"Gentlemen, it seems to fall within that principle. I do not see any fact in this case which militates against it. I do not know whether you do; but, unless you see there is any reason in the facts of this case which would make it unjust that the responsibility for the accident should fall upon those whose work it was when the accident occurred, I think it would be a proper finding on your part to say that there was an implied indemnity."

Then the jury answer that by saying there was an implied indemnity.

Was that direction of the learned judge right? The passage which counsel for the plaintiffs read was this—it is in *Dugdale v. Lovering* (1) (L.R. 10 C.P. at p. 200), where BRETT, J., refers to *Toplis v. Grane* (2):

"In which TYNDAL, C.J., one of the most careful expositors of the law ever known, laid down the proposition on the subject in these terms:

'We think this evidence brings the case before us within the principle laid down in *Betts v. Gibbins* (3) that when an act has been done by the plaintiff under the express directions of the defendant which occasions an injury to the rights of third persons, yet, if such an act is not apparently illegal in itself, but is done honestly and bona fide in compliance with the defendant's directions, he shall be bound to indemnify the plaintiff against the consequences thereof.' "

Then it said that this act was done by the plaintiffs, William Cory & Sons, Ltd., under the express directions or under the implied directions—it is immaterial whether it is express or implied if it was under the directions—of the defendants, and they say that that has occasioned an injury to the rights of a third person, the deceased workman, Peacock, so that if the act is not apparently illegal, but is done honestly and in good faith, then the defendants are bound to indemnify the plaintiffs against the consequences thereof. Counsel have urged before us that this case clearly comes within the principle as there laid down.

In my opinion, it does not, and I am satisfied that in the present case there was no evidence to go to the jury of any implied indemnity by the defendants, the shipowners, in respect of any liability of the plaintiffs, William Cory & Sons, Ltd., to their workmen under the Workmen's Compensation Act. The statement of the law which I have just read, in which it is held that the defendant is bound to indemnify the plaintiff against the consequences thereof, must be read as meaning that the plaintiff claiming the indemnity must have acted without negligence, and that the injury to the third party, when it says "the consequences thereof," must be the direct result—that is, the natural and direct consequences—of doing the particular act which he was requested to do, and not a consequence merely arising from the manner in which the act was done. In my view there are no facts in the present case from which any inference whatever can be drawn of any agreement by the ship to indemnify William Cory & Sons, Ltd., the plaintiffs, against any liability of William Cory & Sons, Ltd., to their workmen under the Workmen's Compensation Act in doing the act complained of. It was an unfortunate injury to Peacock, but it was not the direct or natural consequence of doing the act—that is, removing these hatch beams—it was but an unfortunate consequence of the manner in which the act was done. For these reasons I am of opinion that there was no evidence to go to the jury upon the third issue which was material to the success of the plaintiffs, and, that being so, the verdict and judgment ought to be set aside and judgment entered for the defendants.

BANKES, L.J.—I agree. It seems to me that in the court below and here the doctrine, or the principle of the implied request and implied indemnity, or implied contract of indemnity arising out of the request has been attempted to be pressed too far. I think that what SWINFEN EADY, L.J., has just said is a necessary correction or addition to the statement of the law as laid down in *Dugdale v. Lovering* (1), and I think what I said myself in the case which has been referred to of *Groves & Son v. Webb and Kenward* (4) was substantially correct, and I need say nothing more upon that part of the case. But counsel for the plaintiffs has advanced another and different argument, as I understand it, and his contention is that where a request is made to a person to do an act gratuitously, and he does that act gratuitously, the law implies a contract to indemnify him against all the consequences of that act, whatever they may be. Now, there are two objections to that contention, as it seems to me, as applied to this case, and the first is this: That no such contention was raised in the court below, and no question was asked of the jury upon which they could have come to a decision with regard to that particular point, and it seems to me impossible to contend that such an implied promise could arise as a matter of law. It may be that in some cases the fact that the service is done gratuitously may be an element for consideration. I am expressing no opinion about that, but I say that, so far as my opinion goes, it is impossible to contend, and there is no authority to contend, that the law implies such a contract as counsel contends for, from the mere fact that the person performing the act is doing it gratuitously. I agree that there was no evidence fit to go to the jury.

A. T. LAWRENCE, J.—I am of the same opinion. I am assuming that there was sufficient evidence, to justify it being left to the jury, of request to the plaintiffs to do this work. I have some doubt about it myself, but I will assume it for the purpose of the argument. I think the further contention based upon it, that it implied a promise of indemnity, is unsupported by any authority, and is wrong. Counsel for the plaintiffs applies the doctrine of *Dugdale v. Lovering* (1), but the doctrine is applicable to different facts altogether. There the request was to do an act that was apparently quite lawful, but was in fact tortious, and it is the same thing in the case cited in that case of TINDAL, C.J. (*Toplis v. Grane* (2)), which is mentioned there; the act was in fact illegal, though it was not known to be so, and it was from that that the indemnity was implied. But here the request was to do a perfectly lawful act, and there was, therefore, no implied promise of indemnity. Then counsel for the plaintiffs tries to get over that difficulty by suggesting that in all cases in which the request is to do the act without reward the law imports an indemnity. I do not think that is so. There is no case that I am aware of that goes that length, and I know many instances in which there would be the most astounding results if an indemnity were imported into the law. It seems to me that here there was no evidence at all upon which the jury could find the promise to indemnify the plaintiffs for what appears upon the evidence to have been the clear negligence of one of their workmen in doing this act. I, therefore, think that the appeal succeeds, and that judgment must be entered for the defendants.

Appeal allowed.

Solicitors: *Botterell & Roche*, for *Botterell & Roche*, Sunderland; *Barlow, Barlow & Lyde*.

[Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.]

TAFF VALE RAIL. CO. v. CARDIFF RAIL. CO.

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Warrington and Scrutton, L.JJ.), November 7, 8, 9, 20, 1916]

[Reported [1917] 1 Ch. 299; 86 L.J.Ch. 129; 115 L.T. 800]

Compulsory Purchase—Exercise of powers—No wider than needed for purpose authorised—Railway—Construction of junction of two companies' lines—Line capable of being carried by one company over another's land by embankment or bridge—Deposited plans—Effect only so far as incorporated in special Act.

By a special Act the defendants were authorised to purchase and take, and the plaintiffs were required to sell and grant to them, an easement or right of using a strip of land at the foot of an embankment on which ran the plaintiffs' railway lines for the purpose of effecting a junction between those lines and the defendants' lines near by. The defendants claimed the right to purchase and to compel the plaintiffs to sell to them the right to construct an embankment carrying the defendants' new line on the strip of land. The new line could be carried to the plaintiffs' embankment over the strip of land by either an embankment or a bridge. The plans deposited by the defendants for the purpose of the special Act when a Bill showed an embankment in the position in which it was sought to construct one.

Held: (i) where Parliament empowered a person for a specified purpose to buy a right in another person's property it did not intend that the right conferred should be more extensive than was reasonably necessary for accomplishing the particular purpose; the plaintiffs should not be required to grant the defendants a right more extensive than that demanded for the purpose of making the junction; by the construction of an embankment the plaintiffs' use of the strip of land would be virtually prohibited, whereas by the construction of a bridge it would not; (ii) the deposited plans only had effect so far as they were incorporated in the special Act: *North British Rail. Co. v. Tod* (1) (1846), 12 Cl. & Fin. 722, applied; and, therefore, the defendants' claim failed.

Notes. As to the exercise of powers of compulsory acquisition, see 10 HALSBURY'S LAWS (3rd Edn.) 20 et seq., and for cases see 11 DIGEST (Repl.) 105 et seq. For Railways Clauses Consolidation Act, 1845, see 19 HALSBURY'S STATUTES (2nd Edn.) 590.

Cases referred to:

- (1) *North British Rail. Co. v. Tod*. (1846), 12 Cl. & Fin. 722; 4 Ry. & Can. Cas. 449; 10 Jur. 975; 8 E.R. 1595, H.L.; 11 Digest (Repl.) 111, 65.
- (2) *R. v. Caledonian Rail. Co.* (1850), 16 Q.B. 19; 20 L.J.Q.B. 147; 16 L.T.O.S. 280; 15 Jur. 396; 117 E.R. 782; 11 Digest (Repl.) 112, 68.
- (3) *A.-G. v. Great Eastern Rail. Co.* (1872), L.R. 7 Ch. App. 475; 41 L.J.Ch. 505; 26 L.T. 749; 20 W.R. 599; affirmed, L.R. 6 H.L. 367; 22 W.R. 281, H.L.; 11 Digest (Repl.) 112, 69.
- (4) *London Corpn. v. Riggs* (1880), 13 Ch.D. 798; 49 L.J.Ch. 297; 42 L.T. 580; 44 J.P. 345; 28 W.R. 610; 19 Digest 100, 627.
- (5) *Great Western Rail. Co. v. Swindon and Cheltenham Extension Rail. Co.* (1884), 9 App. Cas. 787; 53 L.J.Ch. 1075; 51 L.T. 798; 48 J.P. 821; 32 W.R. 957, H.L.; 11 Digest (Repl.) 107, 37.
- (6) *Escott v. Newport Corpn.*, [1904] 2 K.B. 369; 73 L.J.K.B. 693; 90 L.T. 348; 68 J.P. 135; 52 W.R. 543; 20 T.L.R. 158; 2 L.G.R. 779, D.C.; 11 Digest (Repl.) 146, 246.
- (7) *Chelsea Waterworks v. Bowley* (1851), 17 Q.B. 358; 20 L.J.Q.B. 520; 17 L.T.O.S. 284; 15 J.P. 450; 15 Jur. 1129; 117 E.R. 1316; 80 Digest (Repl.) 338, 5.

- (8) *Metropolitan Rail. Co. v. Fowler*, [1892] 1 Q.B. 165; 61 L.J.Q.B. 193; 65 L.T. 772; 40 W.R. 306; 8 T.L.R. 189, C.A.; affirmed, [1893] A.C. 416; 62 L.J.Q.B. 553; 69 L.T. 390; 57 J.P. 756; 42 W.R. 270; 9 T.L.R. 610; 1 R. 264, H.L.; 11 Digest (Repl.) 120, 126.
- (9) *Reilly v. Booth* (1890), 44 Ch.D. 12; 62 L.T. 378; 38 W.R. 484, C.A.; 19 Digest 16, 45.
- (10) *Senhouse v. Christian* (1787), 1 Term. Rep. 560; 99 E.R. 1251; 19 Digest 112, 726.
- (11) *Great Northern Rail. Co. v. East and West India Docks and Birmingham Junction Rail. Co.* (1852), 7 Ry. & Can. Cas. 356; 38 Digest (Repl.) 335, 275.

Appeal by the plaintiff railway company from the decision of ASTBURY, J., in an action for a declaration that the defendant company were not entitled to the rights they claimed in a notice to treat, which was, accordingly, invalid.

The facts of the case and the arguments of counsel, together with the authorities cited in support thereof, appear from the judgments.

P. Ogden Lawrence, K.C., and *Topham* for the plaintiff company.

Frank Russell, K.C., *J. G. Wood*, and *Trevor Lewis* for the defendant company.

Cur. adv. vult.

Nov. 20, 1916. The following judgments were read.

LORD COZENS-HARDY, M.R.—This appeal raises a question of the validity of a notice to treat served by the Cardiff Rail. Co. upon the Taff Vale Rail. Co. In order to appreciate the question it is necessary to give a short summary of the position of the two companies.

The main line of the Taff Vale Co. runs through the parish of Pontypridd to Cardiff. There are four lines of metals. The traffic, especially the mineral traffic, is very heavy. The Cardiff Co. were anxious to get a competing line, and for that purpose they required to effect a junction with the Taff Vale main line. The Cardiff Railway Act, 1897, purported to secure this. But, for reasons which I need not mention, the company found the Act of 1897 insufficient, and in 1906 a new scheme was brought forward, and to some extent sanctioned by the Cardiff Railway Act, 1906, and it is under this Act that notice to treat was given. The Taff Vale Co. had purchased under compulsory powers a strip of land about 50 ft. wide, bounded on the west by the embankment on which the metals of their main line are placed. It was required for mileage sidings. Plans for that purpose were prepared, but the work has not been begun. The authorised Cardiff line ran up to the edge of the strip which is coloured green on the deposited plans but no further. The Cardiff Co. promoted a Bill for enabling them to purchase and take the green strip and also so much of the Taff Vale embankment as was not actually occupied by the metals. The deposited plans indicated an embankment by means of which the connection with the Taff Vale line would be effected. The Bill was stoutly opposed by the Taff Vale Co. The Act as passed did not give the Cardiff Co. the right to purchase and take the strip, but entitled them to have what may be called a Parliamentary easement or right of user. No such easement or right of user could be granted at common law. The material sections are ss. 2, 3, 4 (1), 13, 14 and 15. Section 2 is:

"The Lands Clauses Acts and the Railways Clauses Consolidation Act, 1845, and Part 1 (construction of a railway) and Part 2 (extension of time) of the Railways Clauses Consolidation Act, 1863 (so far as they are applicable for the purposes of and are not varied by or inconsistent with this Act), are hereby incorporated with this Act."

Section 3 is:

"Subject to the provisions of this Act the company may make and maintain in the line and according to the levels shown on the deposited plans and

A sections, the railway hereinafter described, with all proper stations, sidings, approaches, works, and conveniences connected therewith, and may enter on, take, and use such of the lands delineated on the said plans and described in the deposited books of reference as may be required for those purposes (that is to say):—A railway one furlong nine chains in length (being a deviation of a portion of Railway No. 4 authorised by the Act of 1897), wholly in the parish and urban district of Pontypridd in the county of Glamorgan, near the B Treforest Tin Plate Works, and terminating by a junction with the Taff Vale Railway near the point at the junction of the Barry Railway with the two westernmost lines of the Taff Vale Railway at Treforest.”

Following that perfectly general clause, there is an exception which is introduced in s. 4, and which is very important. Section 4 (1) is:

C “The company shall not under the powers of this Act purchase or take the lands belonging to the Taff Vale Rail. Co. shown in green but the company may purchase and take and the Taff Vale Rail. Co. shall sell and grant to the company an easement or right of using the same for the purposes of the junction by this Act authorised.”

D Section 13 provides:

“The junction of the railway by this Act authorised with the Taff Vale Railway shall be a junction of the said railway with all the four lines of the Taff Vale Railway, and in case any difference shall arise as to the mode of effecting such junction the same shall be referred on the application of the Taff Vale Rail. Co., the Barry Rail. Co. or the company to the determination of an engineer to be appointed by the president for the time being of the Institution of Civil Engineers.”

Section 14 says:

F “The company shall so far as their powers extend simultaneously with the opening for public traffic of the railway by this Act authorised provide in connection with the junction of the railway by this Act authorised with the Taff Vale Railway sidings reasonably sufficient in length and extent for the accommodation of the traffic to and from such junction....”

Section 15 says:

G “The traffic of the company at and approaching the junction between the railway by this Act authorised, and the Taff Vale Railway shall be worked in such manner as to involve no shunting on the main lines of the Taff Vale Railway....”

On July 6, 1914, the Cardiff Co. gave a notice to treat, the validity of which is disputed in this action. The notice to treat in substance stated that the company required to purchase and take in and over the lands coloured green an

H “easement or right for the purpose of making, constructing, maintaining, repairing, and using a junction between the Cardiff Railway and the Taff Vale Railway.”

The description of such easement or right is contained in the particulars attached to the notice, and the easement was thus described:

I “The easement and right of laying and placing and thereafter using, inspecting, and maintaining the railways, together with all convenient and necessary works and other apparatus requisite for effecting the junction between the Cardiff Railway and the Taff Vale Railway in the manner shown and delineated in large scale on the plan marked ‘B’ delivered herewith and the right or easement of depositing upon the said lands the material necessary for constructing an embankment to carry the said railway together with such rights of entry and passage as may be necessary for constructing the said railways and embankment and for effecting the said junction.”

On Sept. 11, 1914, this was followed up by a notice and subsequent proceedings under s. 85 of the Lands Clauses Act, 1845, and the Cardiff Co. claimed to be entitled to enter forthwith. If the notice to treat is valid, the subsequent proceedings are regular.

In these circumstances the Cardiff Co. contend that the deposited plans indicate an embankment, and not a bridge, and that by reason of the provisions of s. 14 of the Railways Clauses Consolidation Act, 1845, and ss. 9 to 11 of the Railways Clauses Act, 1863, they are not only entitled, but bound, to make the connection by means of an embankment. I am unable to accept this view. It has been settled by the House of Lords in *North British Rail. Co. v. Tod* (1) that the deposited plans and sections are not all obligatory upon the company, but only so far as they are expressly or by necessary implication made obligatory by the special Act. In the Act of 1906 the "line" and the "levels" are the only matters expressly referred to. Moreover, the deposited plans were dealing with land, *inter alia*, with the green strip, which the Cardiff Co. proposed and intended to purchase, and they indicated what should be done by the Cardiff Co. on the land when purchased. The conditions were changed when purchase was prohibited, and I do not think the qualified incorporation of the general Acts in s. 2 applies to land of which the Cardiff Co. are not, and cannot become, owners. In my view, Parliament has enabled the Cardiff Co. to get across the green strip on the necessary level, but has not decided the particular mode by which the crossing is to be effected. If only one mode is reasonably practicable, the Taff Vale Co. cannot object to that mode. But if there are two practicable modes—namely, an embankment and a bridge—I am not prepared to say that the Cardiff Co. can, at their own will and pleasure, select the more burdensome mode. The Taff Vale Co. ought not to be required to grant an easement or right of user for the purposes of the junction more extensive than the purposes of the junction demand. It follows that, in my opinion, the notice to treat is bad. It proposes to purchase that which, at the present moment, the Cardiff Co. have no right to compel the Taff Vale Co. to sell. This is sufficient to dispose of the appeal. I do not propose to discuss whether the Cardiff Co. can, by a new notice to treat, get over the difficulty, either by an application to Sir James Inglis, the arbitrator, under s. 13, or otherwise. With great respect to ASTBURY, J., I think the appeal must be allowed, and an order made in the terms of the notice of appeal.

WARRINGTON, L.J.—The defendants, the Cardiff Rail Co., by their Act of 1906 were authorised to construct a short line of railway and to effect a junction thereof with the main line of the plaintiffs, the Taff Vale Rail. Co. The line of the plaintiffs at the place where the junction is to be made runs nearly north and south and is carried on an embankment. The new line of the defendants comes in on the east side of the plaintiffs' line and is also on an embankment. Immediately at the foot of the slope of the plaintiffs' embankment is a strip of land about 50 ft. wide acquired by the plaintiffs under compulsory powers in 1898 and intended by them to be used for a "mileage siding." By s. 4 of the Act of 1906 the defendants are prohibited from purchasing or taking the strip or the slope of the plaintiffs' embankment, but are authorised to purchase and take, and the plaintiffs are required to sell and grant to them,

"an easement or right of using the same for the purposes of the junction by this Act authorised."

Under this provision the defendants claim the right to purchase and to compel the plaintiffs to sell the right to continue the embankment carrying their new line upon the strip of land and the slope of the plaintiffs' embankment, and have given notice to treat for the purchase of that right. The sole question for decision is whether the defendants have in fact the right they claim. If they have not, the notice to treat would be in excess of their powers and the plaintiffs would be

A entitled to a declaration accordingly and to an injunction restraining them from continuing on the land under s. 84 and s. 85 of the Lands Clauses Consolidation Act, 1845, as they are proposing to do. ASTBURY, J., has dismissed the plaintiffs' action. Hence this appeal. The court has only to determine the question stated above. It is no part of its duty to say what right the defendants have if they have not the right they claim.

B What, then, is the meaning of "an easement or right of using the land for the purposes of the junction"? It is clearly something short of total expropriation of the land. On general principles it may, I think, be assumed that where Parliament gives one man a right for a specified purpose to buy an undefined interest in another man's property it does not intend that such interest should be larger or more extensive than is reasonably necessary for accomplishing the particular purpose. In this case to construct an embankment on the land would for all practical purposes be to exclude the plaintiffs altogether from the land occupied by the embankment, for, though it is true that in law the new surface thus created and the body of the embankment itself would be the property of the plaintiffs, it would be of no practical use to them. It is said they might run a tunnel through it, but I apprehend they would run some risk of letting down the defendants' line, especially having regard to the very small space there would be between the line and the roof of any tunnel, if the tunnel was to be of the slightest use to the plaintiffs. It is clear that, though, no doubt, to carry their line across the strip would be less expensive and more convenient to the defendants than the alternative plan of a bridge, it is not reasonably necessary to do so for accomplishing the purpose of making a junction with the plaintiffs' line. I am of opinion, therefore, that upon the true construction of s. 4 of the Act of 1906, the defendants are not entitled to purchase and take the right they claim. It is said that even if the defendants construct a bridge, this would necessitate the exclusive occupation of some parts of the land by abutments, piers, and so forth. This may be true, but if such occupation be necessary for accomplishing the purpose, then it would, in my opinion, be justified by the Act.

F But the defendants say that under the Act of 1906, read as a whole with the Railways Clauses Consolidation Act, 1845, and in particular with s. 14 of that Act, they are not only entitled, but are bound to construct an embankment. The deposited plans indicate an embankment at the place in question, and the defendants insist that, this being so, they are not entitled to substitute a bridge for this without the certificate of the Board of Trade. I think the answer is that the operation of s. 14 is controlled by the provisions of the special Act, and if, as I think is the case, the latter gives the defendants no right to construct an embankment, the provisions of s. 14, so far as they are inconsistent with this, are of no effect. In the view I take of the true construction of s. 14 it is unnecessary for the purposes of this case to decide whether, under s. 13 of the Act of 1906, the question as to the mode in which the railway is to be carried over the strip of land is to be settled in the manner thereby provided. I will only say that I am not satisfied that the words "mode of effecting the junction" ought to bear the narrow construction contended for by the defendants. It seems to me to be unnecessary to consider the earlier history of the relations of the two companies or their conduct in reference to this matter of the junction. We have to decide the question of strict right, and this depends on the true construction and effect of the Act of 1906.

I I think the appeal ought to be allowed and a declaration made substantially as asked by the statement of claim.

SCRUTTON, L.J., stated the facts and continued: After the service of the notice to treat the Taff Vale Co. started this action for a declaration that the Cardiff Co. were not entitled to the right which they claimed in their notice to treat. The Taff Vale Co. alleged that an embankment or the right to build it

could not be an easement, or, at any rate, was a greater use of their property than was necessary for the purpose of the junction which could be adequately or satisfactorily effected by railway lines on a bridge, which would not completely occupy or sever their land. The Cardiff Co. replied that their deposited plans showed an embankment which was authorised by their statute, and that the effect, if any, of severance of the Taff Vale land could be dealt with afterwards on an application for increased compensation or for accommodation works. ASTBURY, J., has held that the Cardiff Co. is given by statute a right to use the Taff Vale Co.'s land "for the purpose of bringing up the level thereof necessary to make the junction of the new line with the old in accordance with the deposited plans," that is, by an embankment; and that the notice to treat is, therefore, good, as the right proposed to be purchased is conferred on the Cardiff Co. by statute. The Taff Vale Co. appeals.

It is common ground that the plans deposited in this case show a solid embankment. What, then, is the effect of deposited plans? The result of the decision of the House of Lords in *North British Rail. Co. v. Tod* (1) is clear. The plans can have no avail as representation must be made good. They are proposals which are only of effect "so far as their representation is incorporated and made part of the Act of Parliament" and "a plan is . . . not to be referred to for the purpose of construing the enactment as to any part of it, except so far as is referred to and incorporated in the Act" (12 Cl. & Fin. at pp. 732, 735, 736)—both passages from LORD COTTENHAM's judgment. LORD CAMPBELL says (*ibid.*, at p. 738):

"There certainly was a representation [by the deposited plans as to surface levels] . . . That Act of Parliament must be considered as overruling and doing away with everything that has taken place prior to the time when the Act of Parliament passed, and renders the representation or proposal of the company pending the Act of Parliament of no avail."

In that case, therefore, though the deposited plans showed a deep cutting and a low bridge with train out of sight and bridge inconspicuous, and the railway company proposed a shallow cutting and high bridge, with train in full view, and bridge "a deformity," as the Act of Parliament only incorporated the plans as to "line and datum level," the complainant had no remedy. LORD CAMPBELL again repeats the same principle in *R. v. Caledonian Rail. Co.* (2) (16 Q.B. at p. 30).

"The mere exhibition of these plans and sections while the Bill was depending in Parliament does not make them obligatory on the promoters after the Act has passed unless there be something in the special Act when passed, or in the general Act with which it is incorporated, which requires that the plans should be followed."

In *A.-G. v. Great Eastern Rail. Co.* (3), MELLISH, L.J., says (L.R. 7 Ch. App. at p. 482):

"It has been settled law since the case of *North-British Rail. Co. v. Tod* (1) that a company is not bound by the mere fact of a representation having been made on a plan deposited by them, unless the representation is incorporated in the Act."

If the company is not bound, neither can the landowner be bound. One must see, therefore, whether the embankment shown on the plans is imposed on the landowner and the company by the special Act. Now, the special Act empowers the company

"to make and maintain in the line and according to the levels shown on the deposited plans and section the railway hereinafter described, with all proper . . . works."

A This only incorporates the deposited plans in respect of "line and levels," which do not, in my opinion, include the nature of the construction by which the line or levels are maintained or carried. I do not understand that the Cardiff Co. allege that these words do have that effect, but they say that the embankment or mode of construction on the deposited plans is made binding by the incorporated provisions of the Railway Clauses Consolidation Act, 1845. They especially refer to s. 13, which reads thus :

"Where in any place it is intended to carry the railway on an arch or arches or other viaduct, as marked on the said plan or section, the same shall be made accordingly."

They also refer to the preamble and third provision of s. 14, which says :

C "It shall not be lawful for the company to deviate from or alter the gradients, curves, tunnels, and other engineering works described in the said place or section, except within the following limits and under the following conditions, that is to say : It shall be lawful for the company to make a tunnel not marked on the said plan or section, instead of a cutting, or a viaduct instead of a solid embankment, if authorised by such certificate as aforesaid from the Board of Trade."

D The Cardiff Co. say that the plan did show an embankment and not a viaduct or bridge or arches, and it is, therefore, unlawful to alter this without the sanction of the Board of Trade. By the special Act these clauses are only incorporated

E "so far as they are applicable for the purposes of and are not varied or inconsistent with this Act."

In *A.-G. v. Great Eastern Rail. Co.* (3) the plans proposed to cross S. Street on an arch. But the special Act contained a provision that the company might stop up all streets in a particular area, which included S. Street. It was held that the special Act controlled and overruled the provisions of ss. 13 and 14 of the Railway Clauses Act as to bridges, and the company need not make the bridge shown on the plans.

F What, then, does the special Act in this case provide? Whereas the plans and Bill proposed to take the Taff Vale lands for an embankment, s. 4 of the special Act provides that the Cardiff Co. shall not take or purchase these Taff Vale lands, but the Cardiff Co. may purchase and take and the Taff Vale Co. shall sell and grant to the Cardiff Co.

G "an easement or right of using the same for the purpose of the junction by this Act authorised."

H This, in my view, is an option to the Cardiff Co. to take a Parliamentary grant of a right to use the Taff Vale lands for the purposes of the junction. The means of user is not specified, but as it is a compulsory grant not of the whole interest in the lands, but of a limited user of them, I think it is clear that this should be limited to such a right of user as is necessary for the purpose of the grant, and no more. This is the same principle which SIR GEORGE JESSEL applied to "ways of necessity," where he said in *London Corp'n. v. Riggs* (4) (13 Ch.D. at p. 807) :

"If that is the true rule, that he is not to have more than necessity requires, as distinguished from what convenience may require, it appears to me that the right of way must be limited to that which is necessary at the time of the grant."

Here the deposited plans, incorporated as to levels in the special Act clearly show that the new line is to cross above the level of the existing land. This may be by a bridge, of a single span, on one or more piers, or by a solid embankment. It is sufficient to say that a solid embankment is obviously not the least onerous use of the servient land. The embankment occupies all the surface of a strip of land,

and entirely excludes the previous owner and severs his land. The bridge occupies only so much of the land as is occupied by its piers, if any, and does not sever the land except by its piers. It is impossible to say that s. 4 by itself is necessarily, or even probably, the grant of an embankment. The situation seems to be that described by LORD BRAMWELL in *Great Western Rail. Co. v. Swindon and Cheltenham Extension Rail. Co.* (5) (9 App. Cas. at p. 812):

"What right had the respondents [the Cardiff Co.] to act [by a notice to treat] as though these easements were granted to them before they were granted, and before the extent and limits of the right, and how it was to be enjoyed were ascertained?"

I am, therefore, of opinion that, as the special Act does not incorporate the provision in the plans for an embankment crossing the Taff Vale lands, the provisions in the general Act incorporated—namely, that it shall not be lawful for the company to deviate from the engineering works described in the plan, that is an embankment except with the authority of a certificate of the Board of Trade, is not "applicable to the purposes of this Act" as the embankment in question, though described on the plans, is not made part of the special Act, which only confers a lesser benefit on the Cardiff Rail. Co., a lesser burden on the landowner.

This would be enough to decide the case; but it was also put from the point of view of the landowner in another way, which, as it is of general importance, I desire to consider. It was said that this Act gives an easement, and that an embankment which appropriates the whole of the land and excludes beneficial ownership by the landowner could not be an easement. An easement of appropriating the whole land is not known to the law. If the exercise of any easement did appropriate the whole land it was because the part appropriated was so small and so incidental to the use of a wider easement that the law overlooked it. Thus in *Escott v. Newport Corpn.* (6) the space occupied in land by tramway standards was held not to be land taken within the Lands Clauses Acts, and in *Chelsea Waterworks v. Bowley* (7) the space occupied in land by water pipes was held not to be land or an interest in land but an easement. And it was said that a solid embankment was far beyond a negligible quantity of space. It is undoubted that Parliament and Parliamentary draftsmen have used the term "easement" in relation to various rights which no lawyer would ordinarily describe as "easements." The Cardiff Railway Act, 1897, talks about the "easement or right of constituting a tunnel." In the various stages of *Metropolitan Rail. Co. v. Fowler* (8) the position of such a tunnel was discussed, and it was held by the House of Lords to be far more than an easement.

"There is no easement known to law which gives exclusive and unrestricted use of a piece of land" (per LOPES, L.J., in *Reilly v. Booth* (9), 44 Ch.D. at p. 26).

But it is clear that Parliament can confer certain rights not previously known to the law, and can call them by what names it pleases, however previously inappropriate. Then KAY, L.J., says in *Metropolitan Rail. Co. v. Fowler* (8) ([1892] 1 Q.B. at p. 183):

"Even an Act of Parliament cannot make a freehold estate in land an easement any more than it could make two plus two equal five."

I respectfully disagree with him, and think that "for the purposes of the Act" it can effect both these statutory results. And if Parliament in this case had said "an easement or right of constructing and maintaining an embankment across the land for the purposes of a railway," the court would and could have given effect to it. Parliament would have meant that the landowner should retain the ownership, subject to the existence of the embankment and the right of running a railway over it, and with such rights of ownership as were consistent with this "easement." The landowner could walk on the embankment without being a trespasser so long as he did not interfere with the trains; he could cut the grass on the

A embankment; he could bore holes in the arches in the embankment so long as he did not endanger its stability. He would remain owner subject to the limited right. I do not, therefore, agree with this way of putting the Taff Vale Co.'s case, and prefer to rest my judgment on the fact that the Cardiff Co. have not been granted the power to acquire a right of using the Taff Vale lands by a solid embankment. What right have they? My first answer is they have the right to use the lands B to the extent that is necessary to cross them by an elevated railway for the purposes of the authorised junction and no further. What this extent is would, if necessary, be decided by the court on evidence, as was done in *Senhouse v. Christian* (10), where the jury found what use of the land was necessary to enable the grantor of a right of way to carry coals, to exercise his right commodiously. But, in this Act, differences as to the mode of effecting the junction are to be C determined under s. 13 by an engineer, and as these lands are to be used, s. 4, "for the purposes of the junction," I think differences of opinion as to the way of using them come within the words "differences as to the mode of effecting the junction," and a mode of deciding these differences has been provided in the Act. The argument of Mr. Bethel and the judgment of the Vice-Chancellor thereon in *Great Northern Rail. Co. v. East and West India Docks* (11) (7 Ry. & Can. Cas. at D pp. 366, 368, 369) seem to assist this conclusion. I think I understand, and, to some extent sympathise, with the reasons connected with the conduct of the Taff Vale Co. which assisted ASTBURY, J., to arrive at his conclusions. But I think also that if the Cardiff Co. had used reasonable diligence, and reasonable intelligence, they could have got their junction years ago, and I do not see my way to allowing the ethical merits or demerits of the parties to defeat the view I have formed as E to their strict legal rights. In my view, the appeal must be allowed with costs here and below, and a declaration made that the notice to treat of July 6, 1914, is invalid, the defendants not being at present entitled to the right for which they claim to treat. I say, "present" because it is conceivable that the arbitrator might say that the embankment was the necessary means of exercising the right conferred. It is now a matter for the court. I think it was in excess of the necessary F means.

Appeal allowed.

Solicitors: *Williamson, Hill & Co.*, for *Ingledeu & Sons*, Cardiff; *Torr & Co.*, for *Corbett, Chambers & Harris*, Cardiff.

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

Re PALMER. PALMER v. PALMER

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Pickford, L.J., and Neville, J.),
May 28, 24, 25, June 8, 1916]

[Reported [1916] 2 Ch. 391; 85 L.J.Ch. 577; 115 L.T. 57;
60 Sol. Jo. 565]

Estate Duty—Incidence—Settled legacy—Cesser of annuity charged on residuary estate—Finance Act, 1894 (57 & 58 Vict., c. 30), s. 2 (1) (b), s. 5 (2), s. 7 (7)—Finance Act, 1914 (4 & 5 Geo. 5, c. 10), s. 14.

By his will, a testator who died in 1913 settled his Berkshire estates, subject to his wife's life interest therein, on his nephew and the nephew's issue in strict settlement, with remainders over; and he directed that £25,000 should be provided out of the proceeds of his residuary estate, and the income thereof paid during the life of his wife to the person who would for the time being be entitled as tenant for life or tenant in tail male or in tail to his Berkshire estates if his wife were then dead. He then declared that the legacies, annuities, and bequests thereinbefore given or made should "be handed over or paid free of all duties and deductions in respect of duties (other than income tax)" to the several legatees or annuitants entitled thereto respectively. He devised and bequeathed the residue of his estate on trust that during the period of accumulation (which was defined) his trustees should out of the income of the settled residue pay an annual sum of £3,000 to the person who, under the limitations of his settled estates, would for the time being and from time to time be entitled thereto as tenant for life or tenant in tail male or in tail if his wife were then dead. The testator's nephew died in May, 1915. Thereupon estate duty became payable (a) in respect of the £25,000 fund, an exemption (which would have applied on the nephew's death) under the Finance Act, 1894, s. 5 (2), having been removed by the Finance Act, 1914, s. 14, and (b) under the Finance Act, 1894, s. 2 (1) (b) on a notional "slice" of the testator's estate ascertained under s. 7 (7) of the Act of 1894.

Questions arose as to the incidence of the estate duty payable on the nephew's death.

Held: (i) on the true construction of the will, the estate duty payable in respect of the £25,000 fund must be borne by that fund and not by the whole of the testator's estate; (ii) the notional sum in respect of which estate duty was payable by reason of the cesser of the annuity of £3,000 had no existence in fact and could not be charged with the duty, which must, therefore, be borne by the whole of the testator's residuary estate, on which the annuity was charged.

Re Parker-Jervis, Salt v. Locker (1), [1898] 2 Ch. 643, applied.

Decision of YOUNGER, J., [1916] 1 Ch. 395, reversed.

Notes. Applied: *Re Stoddart, Bird v. Granger*, [1916] 2 Ch. 444; *Re Hatch, Hatch v. Hatch* (1917), 86 L.J.Ch. 454; *Re Tinkler, Loyd v. Allen*, [1917] 1 Ch. 242. Considered: *Re Eve, Hall v. Eve*, [1917] 1 Ch. 562; *Re Parker, White v. Stewart* (1917), 86 L.J.Ch. 766; *Re Wedgwood, Allen v. Public Trustee*, [1921] All E.R.Rep. 545; *Re Cassel, Public Trustee v. Mountbatten*, [1927] All E.R.Rep. 739; *Re Cassel's Will Trusts, Public Trustee v. A.-G.* (No. 2), [1947] Ch. 1; 13. Explained: *Re Duke of Norfolk, Public Trustee v. I.R.Comrs.*, [1950] 1 All E.R. 664. Applied: *Re Weigall's Will Trusts*, [1956] 3 W.L.R. 12. Referred to: *Re Sutherland, Chaplin v. Leveson-Gower*, [1922] 2 Ch. 782; *Re Howell, Drury v. Fletcher*, [1952] 1 All E.R. 36.

As to incidence of estate duty, see 15 HALSBURY'S LAWS (3rd Edn.) 130 et seq.; and for cases see 21 DIGEST 29 et seq.

Cases referred to:

- (1) *Re Parker-Jervis, Salt v. Locker*, [1898] 2 Ch. 643; 67 L.J.Ch. 682; 79 L.T. 403; 47 W.R. 147; 21 Digest 41, 261.
- (2) *Re Snape, Elam v. Phillips*, [1915] 2 Ch. 179; 84 L.J.Ch. 803; 113 L.T. 439; 59 Sol. Jo. 562; 21 Digest 35, 219.

Also referred to in argument:

- Re March, Mander v. Harris* (1884), 27 Ch.D. 166; 54 L.J.Ch. 143; 51 L.T. 380; 32 W.R. 941, C.A.; 44 Digest 535, 3517.
- Re Bridge, Brompton Hospital for Consumption v. Lewis*, [1894] 1 Ch. 297; 63 L.J.Ch. 186; 70 L.T. 204; 42 W.R. 179; 10 T.L.R. 153; 38 Sol. Jo. 111; 7 R. 78, C.A.; 44 Digest 535, 3518.
- Re Rayer, Rayer v. Rayer*, [1903] 1 Ch. 685; 72 L.J.Ch. 230; 87 L.T. 712; 51 W.R. 538; 21 Digest 41, 264.
- Re Countess of Orford, Cartwright v. Duc del Balzo*, [1896] 1 Ch. 257; 65 L.J.Ch. 253; 44 W.R. 883; sub nom. *Re Earl of Orford, Neville v. Cartwright, Cartwright v. Duc del Balzo*, 72 L.T. 681; 21 Digest 41, 257.
- Berry v. Gaukroger*, [1903] 2 Ch. 116; 72 L.J.Ch. 435; 88 L.T. 521; 51 W.R. 449; 19 T.L.R. 445; 47 Sol. Jo. 490, C.A.; 21 Digest 27, 155.
- Lord Advocate v. Miller's Trustees* (1884), 11 R. (Ct. of Sess.) 1046; 21 Sc.L.R. 709; 21 Digest 78, n.
- Earl Cowley v. I.R.Comrs.*, [1899] A.C. 198; 68 L.J.Q.B. 435; 80 L.T. 361; 63 J.P. 486; 47 W.R. 525; 15 T.L.R. 270; 43 Sol. Jo. 348, H.L.; 21 Digest 7, 27.
- Re Turnbull, Skipper v. Wade*, [1905] 1 Ch. 726; 74 L.J.Ch. 438; 53 W.R. 440; 49 Sol. Jo. 417; 21 Digest 48, 317.

Appeal and Cross-Appeal from an order of YOUNGER, J., dated Feb. 1, 1916.

George William Palmer by his will settled his Berkshire estates on his wife for life, with remainder to his nephew, Ronald William Palmer, for life, with remainder to his issue in strict settlement, with remainder to his nephew, Eustace E. Palmer, for life, with remainder to his issue as he should appoint; in default of appointment to his issue in strict settlement, with divers remainders over; and with an ultimate remainder to the testator's own right heirs. For the immediate wants of the future owner of these Berkshire estates the testator provided two funds (i) a settled legacy of £25,000 payable out of the proceeds of sale and conversion of his residuary estate, and (ii) an annuity of £3,000 payable out of the income of his residuary estate. Subject to payments which he directed to be made out of that residuary estate, the testator directed it to be accumulated for twenty-one years, or during the life of his widow, or until she should determine the period of accumulation, as she was empowered to do, and he directed, putting it generally, that the accumulated residue was to be treated after the period of accumulation had come to an end as capital moneys arising from the sale of his Berkshire estates.

By cl. 11 of his will the testator bequeathed the settled legacy of £25,000 in the following terms:

"I bequeath to the persons hereinbefore appointed to be the trustees hereof the sum of £25,000 upon trust that my trustees shall at their discretion invest the same in their names in any mode of investment hereinafter authorised, with power for my trustees at their discretion from time to time to vary such investments or any of them within the authorised range, and shall stand possessed of the said sum of £25,000 and of the investments for the time being and from time to time representing the same upon trust during the life of my said wife to pay the income arising therefrom to the person who, under the limitations of the settled hereditaments hereinafter contained, would for the time being and from time to time be entitled as tenant for life or tenant in tail male or in tail to the possession or receipt of the rents and profits of the said hereditaments if my said wife were then dead, but without regard to the provisions for cesser or shifting of estates hereinafter contained. And from and after the death of my said wife I direct that the said sum of £25,000 and

the investments representing the same shall fall into and form part of the settled residue (hereafter defined) and so as to form one fund therewith for all purposes, but not so as to increase or multiply charges or powers of charging."

By cl. 13 the testator declared:

"All the legacies, annuities, and bequests whatsoever hereinbefore given or made, and all legacies, annuities, and bequests which may be given or made by any codicil hereto, shall be handed over or paid free of all duties and deductions in respect of duties (other than income tax) to the several legatees or annuitants entitled thereto respectively under the preceding clauses of this my will."

By cl. 22 the testator devised and bequeathed the residue of his estate on certain trusts and then continued as follows:

"Upon trust that during the period of accumulation (meaning by such expression, wherever the same is used in this my will, the period commencing from my death and terminating at the expiration of twenty-one years from my death or at the previous death of my said wife, or at such earlier time as my said wife shall by deed appoint and direct in this behalf) my trustees shall out of the income of the settled residue pay an annual sum of £3,000 to the person who, under the limitations of the settled hereditaments hereinbefore contained, would for the time being and from time to time be entitled as tenant for life or tenant in tail male or in tail to the possession or receipt of the rents and profits of the settled hereditaments if my said wife were then dead."

The testator died on Oct. 8, 1913. Ronald William Palmer died in May, 1915, a bachelor. Eustace E. Palmer had two sons and a daughter living at the testator's death. On the death of Ronald William Palmer estate duty was claimed and it was paid by the executors of the will in respect of the £3,000 a year, calculated on a notional sum of £75,000, which was taken to be the amount of capital represented by the annual sum of £3,000, subject to certain deductions on which no question arose.

An originating summons was taken out by the trustees of the will of the testator for the determination of the questions how as between the beneficiaries under the will estate duty ought to be borne which became payable in respect of the passing of (a) the settled legacy of £25,000, and (b) the annual sum of £3,000, or the notional sum required to produce the same, on the death of Roland William Palmer, who, until his death, was the person entitled to the income both of the settled legacy and the annual sum. The summons was adjourned into court and came on to be heard before YOUNGER, J., on Jan. 26 and 27, 1916, when his Lordship reserved judgment. On Feb. 1, the learned judge delivered judgment, in which he decided that under cl. 13 of the will the testator intended the sum of £25,000 to be free from all duties in all events and to be enjoyed intact; and that therefore the estate duty payable under s. 14 of the Finance Act, 1914, on the death of Roland William Palmer in respect of the £25,000, though imposed by an Act passed after the death of the testator, must be borne by the residue of the estate and not by the legacy itself. His Lordship distinguished *Re Snape, Elam v. Phillips* (2), but he decided that on the construction of the will this ruling did not apply to the annual sum of £3,000, which therefore must bear its proportion of the estate duty.

From the foregoing decisions Eustace E. Palmer and Alfred Palmer, the heir-at-law of the testator, respectively appealed and cross-appealed.

Romer, K.C., and *Tyldesley Jones* for Eustace E. Palmer.

H. B. Vaisey for parties in the same interest.

Grant, K.C., and *A. B. Nutter* for Alfred Palmer.

J. E. Harman for the trustees of the will of the testator.

Cur. adv. vult.

June 3, 1916. The following judgments were read.

A **LORD COZENS-HARDY, M.R.**—This originating summons raises two questions on the will of a testator, as affected by the Finance Act, 1914. He died in October, 1913, leaving a very large fortune. His widow took an annuity of £12,000 for her life. He devised his Berkshire real estates, after his widow's death, to his nephew Ronald William Poulton and his issue in strict settlement, with remainder to his nephew Eustace Exall Palmer and his issue in strict settlement with remainder **B** over. And he gave to his trustees the sum of £25,000, and directed the income thereof during the life of his widow or the expiration of twenty-one years from his death to be paid to the person who would be entitled as tenant for life in tail to the possession or receipt of the rents and profits of the Berkshire estates if his widow were then dead, and after her death the fund was to fall into, and form **C** part of, the settled residue.

The nephew Ronald died a bachelor in May, 1915. On Dec. 3, 1913, the trustees appropriated certain securities of the value of £25,000, and thenceforward the income was paid direct to Ronald, and after his death to Eustace. Estate duty and settlement estate duty were paid out of the testator's estate, and according to the Finance Act, 1894, this payment of settlement estate duty exempted the £25,000 from estate duty until some person became able to dispose of the corpus. **D** This exemption was taken away by s. 14 of the Finance Act, 1914. Estate duty was paid by the testator's executors on the death of Ronald. And the first question is how, as between the beneficiaries, this estate duty ought to be borne. Eustace says it ought to be borne by the residuary estate, and YOUNGER, J., has so decided.

In my view there is no general principle which can be relied on. A testator may use language which is sufficient to cover a duty not in force at his death, and in one, at least, of the clauses of his will he has done so. His intention must be **E** found from the language of the will.

Clause 13, which follows the gift of the £25,000, is as follows [His LORDSHIP read the clause and continued:] I think the date of payment or handing over is the critical date. When once the executors have paid all duties exigible at that date the operation of cl. 13 is ended. The £25,000 was in effect "handed over" by the **F** executors to themselves as trustees on Dec. 3, 1913. This was a perfectly proper act, and none the less so because the beneficiaries under the trust could not have enforced payment from the executors before the end of twelve months. In my opinion the estate duty on the £25,000 must be paid out of the investments representing the £25,000, and not out of the residue.

The second question relates to a gift in cl. 22 of the will, where the testator **G** directs the trustees out of the income of the settled residuary personal estate to pay an annual sum of £3,000 to the person who, under the limitations of the Berkshire estates, would, for the time being and from time to time, be entitled thereto as tenant for life or tenant in tail if his wife were then dead.

On Ronald's death estate duty was claimed and paid by the executors in respect of the £3,000 a year on "a notional sum" of £75,000, subject to certain deductions **H** upon which no question arises. This proceeds plainly on s. 2 (1) (b) and not on s. 1 of the Finance Act, 1894. It is not for us to consider whether the view of the commissioners was correct. We must assume its correctness and consider how the amount ought to be borne as between beneficiaries. The commissioners treated the £3,000 payable to Ronald as an annuity, which ceased on his death, to be followed by a subsequent annuity of the like amount payable to Eustace. They **I** then applied s. 7 (7) (b), a subsection which is so obscure as to be almost unintelligible. But I accept the method by which the figure was arrived at. £75,000 is a purely fictitious sum, or a "notional sum." The annuity was chargeable on the whole residue, and not on any particular £75,000. No charge can be given under s. 9 on a non-existing fund. It is the whole residue which has derived benefit from the cessation of the annuity, and the burthen on the income of the residue must be apportioned on the footing of cl. 14, or in accordance with general principles which lead to the same result. In my opinion there is no justification

for throwing the whole duty on an imaginary £75,000, with the consequence that the annuitant would have to pay the full interest on the amount paid. The annuitant must bear its rateable proportion only, in accordance with *KEKEWICH, J.'s* rule in *Re Parker-Jervis, Salt v. Locker* (1). The figures will, I presume, be arranged. I should say that cl. 13 of the will has no bearing on this question. The declarations made by *YOUNGER, J.*, on both points must be varied.

PICKFORD, L.J.—This is an appeal from *YOUNGER, J.*, raising questions as to the duties payable by the testator's estate consequent on the death of his nephew.

The testator died in October, 1913, and by his will left his Berkshire real estates to his wife for life, and after her death to his nephew Ronald William Poulton and his issue in strict settlement with remainder to Eustace Exall Palmer with remainders over.

With the object of providing an income during the life of his widow for the person entitled in reversion to his Berkshire property, he left a sum of £25,000 by the following clause of the will. [His LORDSHIP read cl. 11 and continued:] The first question relates to this sum of £25,000. Ronald Poulton, who had taken the name of Palmer, died in May, 1915, a bachelor, and, according to the Finance Act, 1914, estate duty became payable in respect of this sum of £25,000, credit being given for settlement estate duty which had been paid under the Finance Act, 1894. This duty was paid by the testator's executors, and the first question is whether it is to be borne by the securities representing the sum of £25,000, or by the residuary estate. This depends on the construction of cl. 13 of the will, which has already been read. It was contended on the one hand that the operation of this clause was confined to duties in existence at the time of the testator's death, and for this *Re Snape, Elam v. Phillips* (2) was cited. It was contended, on the other hand, that it extended to all duties which came into existence while the fund was in the hands of the trustees until on the death of the testator's widow it became part of the residue.

No general rule for the interpretation of a clause freeing legacies from duty can, in my opinion, be laid down; the decision must rest in each case on the words of the particular clause. In this case I think the time at which the duties are to be ascertained is when the bequests are handed over or paid. They are to be handed over or paid free of all duties and deductions, &c., and that must, in my opinion, mean duties existing at that time. I do not see how that can be otherwise in the case of the other bequests left by the will, and the only reason for making any difference in this case can be that it never is handed over or paid until on the widow's death it falls into the residue. I do not think that this is so. If the bequest were to other trustees it clearly would be handed over or paid to them, and I do not think it can make any difference that the bequest is to the persons hereinbefore appointed to be the trustees hereof—i.e., the same persons who were also appointed executors.

On Dec. 3, 1913, the executors appropriated certain securities to themselves as trustees in satisfaction of this bequest, and from that time the income arising from those securities was paid to Ronald Poulton during his life, and after his death to E. E. Palmer. This was done perfectly bona fide, and was a proper thing to do, and it amounted, in my opinion, to a handing over or payment just as much as if the trustees had been different persons from the executors. It was argued that as this duty came into existence before the expiration of twelve months from the testator's death, and the appropriation was made within that time, it was made prematurely, and that the rights of the parties must be ascertained at the end of the twelve months given to the executor to pay legacies. I do not agree with this contention. The executor is not bound to wait twelve months before he hands over or pays a legacy, and if, as in this case, he does so bona fide, before the expiration of that time the date of actual handing over or payment is the date to be taken in applying cl. 13. I think therefore, that this duty must be borne by the securities representing the £25,000.

A The second question arises as to a sum of £3,000 mentioned in cl. 22. That clause devises and bequeaths the residue of the testator's estate upon certain trusts, and then goes on as follows. [His LORDSHIP read the relevant part of cl. 22 and continued:] On Ronald Palmer's death estate duty was paid, calculated on a notional sum or slice of £75,000, out of the testator's estate, taken to be the amount of capital represented by the annual sum of £3,000. This evidently
B regards the duty as payable under s. 2 (1) (b) of the Finance Act, 1894, and we must on this summons take it as rightly so paid on an annuity which ceased on Ronald Palmer's death, when a different annuity payable to E. E. Palmer came into existence. The notional sum only comes into existence to ascertain under s. 2 (1) (b) and s. 7 (7) (b) the amount to which the estate has benefited by the
C cesser of Ronald Palmer's annuity, and it has no existence in fact as a separate fund, as is shown by its being called a notional sum.

It cannot, therefore, be correct, in my opinion, as was argued by the respondent, that s. 9 (1) charges the duty on this notional sum of £75,000 with the result of making the annuitant bear the whole of the interest upon the amount paid. Section 9 is for the purpose of giving the Crown the benefit of a first charge on the property liable to pay the duty, and it cannot be applied to give a charge only on something which has no separate existence at all.

D The annuity was charged on the whole estate, and the residue, the whole of which derives benefit from its cesser, must pay the duty, and it will be apportioned as described by the Master of the Rolls in accordance with *Re Parker-Jervis, Salt v. Locker* (1).

E **NEVILLE, J.**—With regard to the duties payable in respect of the legacy of £25,000 I think the question is purely one of construction of the will. To construe the will I think the right course is to read the whole will, or such parts as are material to the matter in hand, and if the words used convey an intelligible meaning to give effect to them unless prohibited by some rule of law. Dealing with the will in this manner, the meaning is, I think, fairly plain. Clause 13 declares
F that all legacies thereinbefore given shall be handed over or paid free of all duties and deductions in respect of duties to the legatees entitled thereto. It seems to me that so soon as the trustees have handed over or paid a legacy free of all the duties then charged on it, or payable in respect of it, they have exhausted their duties under cl. 13. I cannot see anything in this clause giving the legatee any further claim against the trustees in case further duty should be subsequently
G imposed. But it is said that in the present case there has been no handing over nor payment, and this is, in one sense, true, for inasmuch as the legatees of the trusts legacy were the same persons as the trustees of the will no actual handing over or payment was possible.

H On Dec. 3, 1913, however, the trustees set apart and appropriated investments in satisfaction of the legacy, and from this time these investments ceased to be part of the general estate, and the risk of them fell on the persons beneficially entitled to the legacy. I think that this was equivalent to payment, and that no subsequent imposition of duty can give the legatees any further right under the will. Indeed if appropriation is not equivalent to handing over or payment then, as it appears to me, cl. 13 does not apply to this legacy at all, and it is not exonerated from any duty.

I With regard to the annual sum of £3,000, it appears to me that the duty was assessed and paid under s. 2 (1) (b) and that all the court can do is to determine on that footing the ultimate incidence of the duty. For this purpose we must consider both s. 2 (1) (b) and s. 7 (7) (b) with the result, in my opinion, that the recipient of the annual sum will have to pay interest on such a sum as represents the proportion borne by the notional sum of £75,000 to the residuary estate of the testator. In my opinion s. 9 (1) does not apply to the present case.

Order varied as to both points.

Solicitors: Waterhouse & Co.

[Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]

GOLDREI, FOUCARD & SON v. SINCLAIR AND RUSSIAN CHAMBER OF COMMERCE IN LONDON

[COURT OF APPEAL (Pickford and Bankes, L.JJ., and Sargant, J.), October 31, November 14, 1917]

[Reported [1918] 1 K.B. 180; 87 L.J.K.B. 261; 118 L.T. 147;
34 T.L.R. 74]

Estoppel—Estoppel by record—Judgment against one joint tortfeasor—Bar to action against other joint tortfeasor—Need for cause of action against both tortfeasors to be the same—Claim for damages for fraudulent representation against both—Claim for rescission of agreement and return of money paid against one.

By their statement of claim the plaintiffs claimed damages against the defendant S. and the defendant company for fraudulent misrepresentation whereby they were induced to subscribe £105 to become founders of the defendant company, and they also claimed against the company only rescission of an agreement by the plaintiffs to become founders of the company and the repayment of £105 paid by them to that end with interest. The company did not deliver a defence, and upon motion for judgment the plaintiffs recovered final judgment against them for rescission and repayment of the £105. The company did not repay the £105, the action proceeded against the defendant S., and the jury awarded the plaintiffs £105 damages against him.

Held by PICKFORD, L.J., and SARGANT, J., BANKES, L.J., dissenting: on the claim for damages for misrepresentation the plaintiffs, to be successful, must prove fraud, but on the claim for rescission of the agreement and return of the money paid no such proof was necessary; therefore, the causes of action were different and the judgment against the company did not bar the plaintiffs from proceeding on their claim against S.

Notes. Referred to: *Parr v. Snell*, [1922] All E.R.Rep. 270; *Lynn v. Barber*, [1930] 2 K.B. 72.

As to estoppel by record, see 15 HALSBURY'S LAWS (3rd Edn.) 191-201; and for cases see 21 DIGEST 198 et seq.

Cases referred to:

- (1) *King v. Hoare* (1844), 13 M. & W. 494; 2 Dow. & L. 382; 1 New Pract. Cas. 72; 14 L.J.Ex. 29; 4 L.T.O.S. 174; 8 Jur. 1127; 153 E.R. 206; 21 Digest 218, 538.
- (2) *Kendall v. Hamilton* (1879), 4 App. Cas. 504; 48 L.J.Q.B. 705; 41 L.T. 418; 28 W.R. 97, H.L.; 21 Digest 218, 540.
- (3) *Brinsmead v. Harrison* (1872), L.R. 7 C.P. 547; 41 L.J.C.P. 190; 27 L.T. 99; 20 W.R. 784, Ex. Ch.; 21 Digest 221, 556.
- (4) *Redgrave v. Hurd* (1881), 20 Ch.D. 1; 51 L.J.Ch. 113; 45 L.T. 485; 30 W.R. 251, C.A.; 35 Digest 47, 417.
- (5) *Re Metropolitan Coal Consumers' Association, Karberg's Case*, [1892] 3 Ch. 1; 61 L.J.Ch. 741; 66 L.T. 700; 8 T.L.R. 608, C.A.; 9 Digest (Repl.) 116, 598.
- (6) *Read v. Brown* (1888), 22 Q.B.D. 128; 58 L.J.Q.B. 120; 60 L.T. 250; 37 W.R. 131; 5 T.L.R. 97, C.A.; 1 Digest 13, 107.
- (7) *Cooke v. Gill* (1873), L.R. 8 C.P. 107; 42 L.J.C.P. 98; 28 L.T. 32; 21 W.R. 334; 1 Digest 13, 106.
- (8) *Swinfen v. Lord Chelmsford* (1860), 5 H. & N. 890; 29 L.J.Ex. 382; 2 L.T. 406; 6 Jur.N.S. 1035; 8 W.R. 545; 157 E.R. 1437; 35 Digest 68, 654.
- (9) *Williamson v. Allison* (1802), 2 East, 446; 102 E.R. 439; 39 Digest 416, 498.
- (10) *Nelson v. Couch* (1863), 15 C.B.N.S. 99; 2 New Rep. 395; 33 L.J.C.P. 46; 8 L.T. 577; 10 Jur.N.S. 366; 11 W.R. 964; 1 Mar.L.C. 348; 143 E.R. 721; 21 Digest 201, 443.

- (11) *Phillips v. Berryman* (1783), 3 Doug.K.B. 286; 99 E.R. 658; 18 Digest (Repl.) 381, 1318.
- (12) *Brunsdon v. Humphrey* (1884), 14 Q.B.D. 141; 53 L.J.Q.B. 476; 51 L.T. 529; 49 J.P. 4; 82 W.R. 944, C.A.; 21 Digest 207, 480.
- (13) *Jackson v. Spittall* (1870), L.R. 5 C.P. 542; 39 L.J.C.P. 321; 22 L.T. 755; 18 W.R. 1162; 1 Digest 13, 104.
- (14) *Drake v. Mitchell* (1803), 3 East, 251; 102 E.R. 594; 21 Digest 220, 552.
- (15) *Midland Rail. Co. v. Martin & Co.*, [1893] 2 Q.B. 172; 62 L.J.Q.B. 517; 69 L.T. 353; 58 J.P. 39; 17 Cox, C.C. 687; 5 R. 489; sub nom. *Martin & Co. v. Midland Rail. Co.*, 9 T.L.R. 514, D.C.; 21 Digest 228, 603.

Also referred to in argument:

- Brown v. Wootton* (1605), Cro. Jac. 73; Moore, K.B. 762; 79 E.R. 62; sub nom. *Broome v. Wootton*, Yelv. 67; 21 Digest 221, 555.
- Young v. Thomas*, [1892] 2 Ch. 134; 61 L.J.Ch. 496; 66 L.T. 575; 40 W.R. 468; 36 Sol. Jo. 412, C.A.; Digest (Practice) 850, 3964.
- Thurman v. Wild* (1840), 11 Ad. & El. 453; 3 Per. & Dav. 289; 113 E.R. 487; 43 Digest 414, 367.
- Salford Corpn. v. Lever*, [1891] 1 Q.B. 168; 60 L.J.Q.B. 39; 63 L.T. 658; 55 J.P. 244; 39 W.R. 85; 7 T.L.R. 18, C.A.; 1 Digest 483, 1626.
- Wegg Prosser v. Evans*, [1894] 2 Q.B. 101; 63 L.J.Q.B. 728; 70 L.T. 664; 42 W.R. 639; 10 T.L.R. 414; affirmed [1895] 1 Q.B. 108; 64 L.J.Q.B. 1; 72 L.T. 8; 43 W.R. 66; 11 T.L.R. 12; 39 Sol. Jo. 26; 9 R. 830, C.A.; 21 Digest 221, 554.

Appeal by the defendant Sinclair from a decision of A. T. LAWRENCE, J., on further consideration of an action for damages for fraudulent misrepresentation.

Patrick Hastings for the defendant, Sinclair.

Holman Gregory, K.C., and *C. Zeffertt* for the plaintiffs.

Cur. adv. vult.

Nov. 14, 1917. The following judgments were read.

PICKFORD, L.J.—This is an appeal by the defendant Sinclair against a judgment of A. T. LAWRENCE, J., given in the following circumstances. The plaintiffs sued the defendant Sinclair and a company called the Russian Chamber of Commerce in London to recover damages for fraudulent misrepresentation made to them by the defendant Sinclair with the knowledge and authority of the defendant company, alleging that they were induced by such representations to subscribe £105 to become founders of the defendant company. A cheque for the amount was given to the defendant Sinclair and handed by him to his co-defendants. The plaintiffs also claimed as against the defendant company rescission of the agreement to take shares and a return of the money paid with interest. The defendant company made default in delivering a defence, and on motion made by the plaintiffs judgment was given against the company for rescission of the agreement and the return of the money paid with interest. This judgment is, so far as the return of the money is concerned, still unsatisfied. The action proceeded against the defendant Sinclair, and the jury found a verdict against him on the ground of fraudulent misrepresentation, and assessed the damages at £105. The defendant Sinclair, by an amendment to his defence, pleaded the fact of the judgment against the defendant company, and alleged that thereby the plaintiffs were estopped from maintaining or further proceeding with the action against him. Such a defence is entirely technical and has no substance or merits but the defendant Sinclair has a right to succeed on it if it be established.

The main ground of the contention was that the case fell within the principle of the decisions in *King v. Hoare* (1), *Kendall v. Hamilton* (2), and *Brinsmead v. Harrison* (3). That principle, as I understand it, is that if judgment be given against one of two joint tortfeasors the whole cause of action merges in that judgment, and, therefore, the action cannot proceed against the other tortfeasor.

Obviously this must depend upon whether the judgment is in respect of the same cause of action, for a judgment against one tortfeasor for a cause of action other than the joint tort cannot affect the cause of action on the joint tort. A. T. LAWRENCE, J., held that in this case there were two causes of action, and that the judgment was in respect of a cause of action other than that arising from the joint tort.

I think his decision was correct. A person who has been induced by misrepresentations to take shares in a company has two remedies open to him. He may bring an action against the company only for rescission of the contract and return of the money paid, or he may bring an action for fraudulent misrepresentations against both the company and its agent where the two have joined to commit the fraud. He may also take both these courses if he wish. In the former case—that is, an action for rescission and return of the money paid—the plaintiff need not prove fraud, but will succeed if he establish an innocent misrepresentation: *Redgrave v. Hurd* (4) and *Re Metropolitan Coal Consumers' Association, Karberg's Case* (5). He can in such an action obtain no relief against the agent of the company. If he do prove fraud, in an action solely for rescission and return of the money he is in no better position than if he had proved innocent misrepresentation. In an action for damages arising from misrepresentations made jointly by the company and its agent he cannot succeed unless he prove that the misrepresentations were made fraudulently, and the measure of damages in such an action is not necessarily the amount of the money paid to the company.

The question seems to me to be whether these two actions are founded on the same or different causes of action. A cause of action has been defined to be every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court: *Read v. Brown* (6), per LORD ESHER, M.R. (22 Q.B.D. at p. 131), citing *Cooke v. Gill* (7). In these two actions there is a fact—that is, fraud—which if traversed must be proved to support the action for damages for misrepresentation, but if disproved in an action for rescission still leaves the plaintiff entitled to a judgment if he proves misrepresentation in fact. In addition the remedy is against the company only in the latter case, and against both the company and its agent in the former, and the measure of relief is not necessarily the same. I think, therefore, that the two forms of action are founded upon different causes of action.

It remains to apply this principle to the present case. In paras. 1-15 of the statement of claim the plaintiffs allege fraudulent misrepresentations by the defendant Sinclair on behalf and with the knowledge and authority of the defendant company, and if the claim stopped there it would have been an action for damages only. But in para. 16 the plaintiffs claim rescission and return of the money paid, and allege as a ground of their claim the fraudulent representations set out in the previous paragraphs, expressly stating them to have been made fraudulently. They then in the prayer of the statement of claim ask against both defendants damages for fraud and against the company only rescission and repayment. I think para. 16 alleges a different cause of action from that alleged in the previous paragraphs. It was hardly contested that, if para. 16 had claimed rescission by reason of an innocent misrepresentation, it would have alleged a different cause of action; but it was contended that because fraud was alleged and admitted by the default of defence the whole claim was in respect of fraud and was only one cause of action. Reliance was also placed, as I understood the argument, upon the fact that the sum recovered against the defendant Sinclair was of the same amount as that which the company were ordered to repay. It seems to me that the fact that the sums recovered on the two causes of action happen in this case to be of the same amount cannot show that the causes of action are the same. If, as I have stated before, fraud is not a necessary part of the cause of action in a claim for rescission, the fact that it is alleged and admitted is immaterial. If disproved, the plaintiffs could still recover, and the allegation and admission of an immaterial fact cannot

change the nature of the cause of action. This is in accordance with *Swinfen v. Lord Chelmsford* (8). That was a case of an unnecessary allegation of fraud. In *Williamson v. Allison* (9) LAWRENCE, J., said (2 East at p. 452):

"If the whole of an averment may be struck out without destroying the plaintiff's right of action, it is not necessary to prove it; but otherwise, if the whole cannot be struck out without getting rid of a part essential to the cause of action."

The judgment that was signed in this case was signed only upon the claim for rescission, and no judgment was given on the claim for fraudulent misrepresentation. If given, it could only have been an interlocutory judgment. For these reasons I think the judgment given was not in respect of the cause of action on which judgment had been given against the defendant Sinclair, and his main point fails.

I have not dealt with the question whether Ord. 27 applies to this case. I am inclined to think it does not, though I do not understand why when the doctrine of *King v. Hoare* (1) and *Brinsmead v. Harrison* (3) was abolished by the rules in some cases it was not abolished in all.

The defendant Sinclair also contended that the fact that no judgment was signed and no further proceedings taken on the claim for fraud against the company operated as a release of that cause of action against him. This contention, as I understand it, is not on the ground of merger, but on the ground that the plaintiffs released the company from any claim of fraud by taking judgment on the claim for rescission only, and so released also their joint tortfeasor the defendant Sinclair. I think the plaintiffs had no intention of releasing anyone, and this is shown by the fact that no judgment was given in favour of the company on the claim for fraud. It may be, though I do not say it is the fact, that the circumstances may give the company some right to object to further proceedings against them in the action, but I do not see anything in the circumstances to operate as a release of the defendant Sinclair. I think the appeal should be dismissed with costs.

BANKES, L.J.—This is an appeal from a judgment of A. T. LAWRENCE, J. It raises the question whether the plaintiffs are entitled to proceed with their action against the defendant Sinclair after having signed judgment in default of defence against the other defendants in the action, the Russian Chamber of Commerce in London.

It is, I think, clear that the plaintiffs cannot bring their case within any of the rules of Ord. 27 so as to be able to claim the relief afforded by those rules to a plaintiff who signs judgment against one of several joint contractors or joint tortfeasors, as the case may be. The rule of law applicable to the case is, therefore, laid down by PARKE, B., in *King v. Hoare* (1) (13 M. & W. at p. 504):

"If there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim, transit in rem judicatam—the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher. This appears to be equally true where there is but one cause of action, whether it be against a single person or many. The judgment of a court of record changes the nature of that cause of action, and prevents its being the subject of another suit and the cause of action, being single, cannot afterwards be divided into two."

WILLES, J., in *Nelson v. Couch* (10) points out what must be shown under the plea of exceptio rei judicatae; and the first instance he gives is a merger of the entire cause of action in the judgment which it alleges. The rule apparently applies also

to cases where, although the cause of action may not in the sense sometimes given to the expression be the same, a second action is brought in respect of the same subject-matter: see *Phillips v. Berryman* (11) and the observations of BRETT, M.R., and BOWEN, L.J., in *Brunsdon v. Humphrey* (12) (14 Q.B.D. at pp. 146, 152), and the definition of "cause of action" in its popular sense given by BRETT, J., in *Jackson v. Spittall* (13) (L.R. 5 C.P. at p. 552).

It is necessary, therefore, in the present case to look closely into the statement of claim in order to ascertain what the case of the plaintiffs is. The statement of claim sets out very fully the facts. It is, I think, quite clear that the plaintiffs' claim is founded upon fraud and upon fraud only. The claim being so framed, the plaintiffs had the right, if the fraud was proved, to rescission of the agreement. This, however, was a remedy against the Chamber of Commerce only. The claim to damages was a claim against both defendants as joint tortfeasors. The statement of claim, in my opinion, discloses no grounds upon which the plaintiffs could recover any damages beyond the 100 guineas paid to the Chamber of Commerce. So far, therefore, as the claim of the plaintiffs is a claim for damages the statement of claim alleges but one cause of action. If it is permissible upon the present statement of claim to say that the plaintiffs have claimed a return of the 100 guineas with interest, as though they had alleged an inducement to enter into the contract by innocent misrepresentation, the result must, I think, be the same. The action is in respect of the same subject-matter, and having signed judgment for the 100 guineas the plaintiffs cannot now ask a jury to award them the same sum as damages in respect of the same misrepresentations. Even if it were open to the plaintiffs to say that as against the defendant Sinclair they are alleging that the misrepresentations relied on were false to his knowledge, whereas in their claim against the chamber of commerce they were content to treat them as innocent, the case is not thereby taken out of the rule laid down by BULLER, J., in *Phillips v. Berryman* (11), that a recovery in one personal action is a bar to all other personal actions in respect of the same subject-matter.

In my opinion, the present is a case in which, so far as the claim for damages is concerned (which is the only matter with which the defendant Sinclair is concerned), the plaintiffs had alternative remedies for the same subject-matter, but not collateral concurrent remedies, as in *Drake v. Mitchell* (14), or alternative remedies in respect of different subject-matters, as in *Midland Rail. Co. v. Martin & Co.* (15). Even if the statement of claim discloses different causes of action, namely, a claim for rescission of the agreement and a return of the money paid on the ground of innocent misrepresentation as well as a claim for rescission of the agreement and for damages on the ground of fraud, which I doubt having regard to the fact that judgment was signed by default, I consider that no sufficient distinction can be drawn between the claim to recover the 100 guineas with interest for which judgment has been signed and the claim for the £105 damages which the jury have awarded, to take the case out of the rule upon which the defendant, Sinclair, relies. Both claims appear to me to arise out of the same act on the part of that defendant, and, according to the definition of BRETT, J., in *Jackson v. Spittall* (13), the plaintiffs, therefore, have only one cause of action. I think that the appeal should be allowed, but as the other members of the court think otherwise it will be dismissed.

SARGANT, J.—In this case I agree with the other members of the court that the rule in *Brinsmead v. Harrison* (3) has not been altered as regards joint tortfeasors by any of the rules of Ord. 27. For some reason or other, very likely in view of the difficulty of obtaining final judgment in the case of unliquidated damages until the actual assessment of damages as therein mentioned, rr. 2 and 3 of that Order are carefully worded so as to apply only to the analogous cases of persons jointly liable in debt or liquidated damages. It is unnecessary for me to add anything further on this point.

It follows, therefore, that if the plaintiffs had recovered judgment against the Russian Chamber of Commerce for an ascertained amount of damages in respect of the fraudulent misrepresentations alleged in the statement of claim, this judgment would operate to prevent their subsequently recovering damages against the defendant Sinclair. The fraudulent misrepresentations alleged against each defendant are the same, and the defendant Sinclair is alleged to have made each misrepresentation as the agent and on behalf and with the knowledge of the defendant company. In these respects the analogy with *Brinsmead v. Harrison* (3) is complete. But it has been pointed out by A. T. LAWRENCE, J., and is a consideration of some importance, that the plaintiffs could not under the procedure they have adopted—that is, on motion for judgment—have obtained judgment against the defendant company for any definite sum in respect of their fraudulent misrepresentations. They could only have got judgment for an amount of damages to be subsequently assessed by a jury. And in this case under Ord. 27, r. 5, these damages would normally have been assessed “at the same time with the trial of the action” against the defendant Sinclair. So that even had the plaintiffs proved their claim for damages for fraudulent misrepresentation against the defendant company, and not their claim for rescission, the difficulties pointed out in *Brinsmead v. Harrison* (3) would not have arisen. In fact, however, the plaintiffs have taken judgment against the defendant company on the alternative claim made against them, and against them only, in the pleadings—namely, a claim for rescission and as incidental thereto for the return of the amount paid by the plaintiffs. This alternative claim constitutes, in my judgment, a separate and distinct cause of action resting on a different foundation and involving very different remedies. To obtain rescission not only is it not necessary to prove fraud—a distinction which perhaps is not of so much importance here, since it is fraudulent misrepresentation that is alleged throughout by the statement of claim—but it is not necessary to prove damage. And rescission involves, not the ascertainment and payment of any damages, but the repayment of such a sum and the doing of such other acts as shall effect a *restitutio in integrum*. The fact that in the present case the measure of damages for fraudulent misrepresentation may approximate to, or even be identical with, the amount payable under a judgment for rescission is not, in my opinion, of any real importance, especially in the case of a judgment which has not been satisfied. On the whole I can see no reason for extending the highly technical rule in *Brinsmead v. Harrison* (3) to a case so widely different as the present. It is essential to the application of the doctrine in that case and the previous case of *King v. Hoare* (1) that the judgment which operates as a bar should be in respect of the same cause of action. As regards any suggested release or abandonment by the plaintiffs, I agree with LAWRENCE, J., in failing to find any intention either to release or abandon any right or remedy against the defendant Sinclair. In my opinion, therefore, the appeal should be dismissed.

Appeal dismissed.

Solicitors: Woodthorpe, Browne & Co.; Poole & Robinson.

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

Re TRAVERS. HURMSON v. CARR

[CHANCERY DIVISION (Eve, J.), October 20, 1916]

[Reported 86 L.J.Ch. 123; 115 L.T. 604; 33 T.L.R. 17;
61 Sol. Jo. 56]

Will—Gift to servants—Legacies to four named servants followed by gift “to each of my servants a further sum” equalling one year’s wages—Further gifted limited to servants named in will—Claim by resident nurse employed by testatrix at her death to legacy of one year’s wages.

By her will, made in 1907, the testatrix gave pecuniary legacies to four named servants and the will then continued: “and to each of my servants a further sum equal to their respective wages for one year, and such mourning as my executors may consider reasonable.” In January, 1916, the plaintiff, a nurse, was engaged on a permanent basis to attend the testatrix who was then bedridden at her residence. The plaintiff was paid a weekly wage, and was in the employment of the testatrix at the date of her death, some two weeks later.

Held: on the true construction of the will the legacies of one year’s wages were further legacies limited to the servants named in the will to whom the original legacies were given, and, accordingly, the plaintiff, although she was a servant of the testatrix at the time of her death, was not entitled to a legacy of one year’s wages.

Notes. As to gifts to servants, see 34 HALSBURY’S LAWS (2nd Edn.) 323–325, paras. 373–374; and for cases see 44 DIGEST 899–903.

Cases referred to in argument:

Re Lawson, Wardley v. Bringlee, [1914] 1 Ch. 682; 83 L.J.Ch. 519; 110 L.T. 573; 30 T.L.R. 335; 58 Sol. Jo. 320; 44 DIGEST 900, 7593.

Re Earl of Sheffield, Ryde v. Bristow (1911), 80 L.J.Ch. 313; 104 L.T. 412; affirmed, [1911] 2 Ch. 267; 80 L.J.Ch. 521; 105 L.T. 236, C.A.; 44 DIGEST 903, 7634.

Re Ravensworth, Ravensworth v. Tindale, [1905] 2 Ch. 1; 74 L.J.Ch. 353; 92 L.T. 490; 21 T.L.R. 357, C.A.; 44 DIGEST 903, 7633.

Parker v. Marchant (1842), 1 Y. & C. Ch. Cas. 290; 11 L.J.Ch. 223; 6 Jur. 292; 62 E.R. 898; affirmed (1843), 1 Ph. 356, L.C.; 44 DIGEST 899, 7585.

Adjourned Summons to determine the construction of a will.

By her will, dated July 24, 1907, the testatrix, Marion T. Travers, bequeathed “to my following servants, Caroline Smith, one hundred pounds; Alice Malyn, ten pounds; Edith Pocknell, five pounds; and G. Wicks (if in my service at the time of my death) five pounds; and to each of my servants a further sum equal to their respective wages for one year, and such mourning as my executors may consider reasonable and suitable.”

By a codicil to the will, dated May 18, 1911, the testatrix revoked the legacy of ten pounds given by the will to Alice Malyn “who was then but is not now in my service as cook” giving her in lieu a legacy of four guineas, and also revoked the legacy of five pounds given by the will to her gardener, George Wicks, giving him in lieu thereof, “if he shall be in my service at the time of my death,” a legacy of twelve pounds. In all other respects the codicil confirmed the will. By a further codicil dated July 15, 1912, the testatrix revoked “the legacy of five pounds and all other benefits given by my said will to Edith Pocknell.” In January, 1916, it was considered necessary for the testatrix to have a nurse in place of one who was leaving and on Jan. 17, her medical adviser engaged the plaintiff, Ellen Hurmson, to attend the testatrix who was bedridden at her residence as a hospital and mental nurse, from 9 a.m. to 10 p.m. The plaintiff was

A engaged at a weekly wage of two guineas; nothing was said regarding the duration of her employment but she understood that she was engaged as a permanent nurse. In fact she remained in the service of the testatrix from Jan. 22, 1916, until the day after the testatrix's death on Feb. 3, 1916. The plaintiff took out this originating summons, to which the executors of the testatrix's will were made defendants, claiming that as a servant in the employ of the testatrix at the date of her death
B she was entitled on the true construction of the will to a legacy of £115 14s. representing a sum equal to her wages for one year. There was evidence that during 1907, the year in which the will was made, the only servants employed by the testatrix were the four servants mentioned in the will.

Horace Freeman for the plaintiff.

C *John M. Stone* for the defendants.

EVE, J.—I think that this short clause in the testatrix's will is one which might give rise to substantial questions of construction, but the only one I am called upon to decide is whether the plaintiff is or is not a legatee thereunder.

D The testatrix, it is to be observed, does not in terms refer to servants in her employ at the date of her death, nor does she impose upon any legatee any length of service as a condition of participating in her bounty. But one may, of course, on looking at the will as a whole, come to the conclusion that the testatrix was in fact dealing with the servants in her employ at the date of her death, and the question I have to ask myself is whether, having regard to the context which immediately precedes the words I have to construe, and which rather points to the
E conclusion that the testatrix intended to refer only to those servants who were in her employ at the date of her will, the words of gift and the subsequent provisions of the will show that after all the testatrix did intend these benefits for servants in her employ at the date of her death? The testatrix bequeaths pecuniary legacies to three female servants by name and to her gardener, but in his case if in her service at the time of her death, and then proceeds, "and to each of my servants
F a further sum equal to their respective wages for one year." Counsel for the plaintiff argues that the measure by which the amount of those further legacies is to be ascertained points rather to the date of the death than of the will, and he relies also on the provision for reasonable and suitable mourning which immediately follows, and which, as he says, would seem to be more appropriate for servants employed at the date of the death than for those who had already ceased to be
G employed.

I do not think the fact that the further legacy is to be ascertained with reference to the wages really assists counsel for the plaintiff, but he is entitled to insist on the point as to the reasonable and suitable mourning, though I do not think it is of sufficient weight to outweigh the difficulty he is faced with in the terms in
H which the legacies to the servants are here given. The bequest is in substance the bequest of a further or additional sum to each servant, and this seems to me to involve the finding of an original legacy to the individual who is designated as the recipient of the additional legacy. You cannot say that you give an additional legacy to a legatee to whom at that moment of time you have given nothing, and, although it is true that in her codicils the testatrix revoked the actual pecuniary
I legacies bequeathed by her will to the servants named in her will, she only did so for the purposes of altering the amounts bequeathed, except in one case, and in that case she revoked the pecuniary legacy and "all other benefits given by my said will." I think that the result is that the legacies of one year's wages must be treated as further legacies limited to the servants named in the will, and that the plaintiff, although a servant of the testatrix at the time of her death, cannot substantiate her claim. Although the plaintiff fails, the question being one of construction raised in consequence of doubt caused by the testatrix, I think justice

will be done if I make no order as to costs, except that those of the executors, to be taxed as between solicitor and client, are to be paid out of the estate of the testatrix.

Summons dismissed.

Solicitors: *Morris & Bristow*, for *Bretherton & Murton-Neale*, *Tunbridge Wells*; *G. F. Hudson*, *Matthews & Co.*

[*Reported by W. P. PAIN, Esq., Barrister-at-Law.*]

CROSSFIELD & CO. v. KYLE SHIPPING CO., LTD.

[COURT OF APPEAL (Swinfen Eady, Phillimore and Bankes, L.J.J.), June 21, July 10, 1916]

[*Reported* [1916] 2 K.B. 885; 85 L.J.K.B. 1310; 115 L.T. 285; 13 Asp.M.L.C. 410; 22 Com. Cas. 67]

Shipping—Bill of lading—Liability of shipowners—Bill to be conclusive evidence of quantity delivered to ship—Cargo checked on loading into lighters, not when brought alongside—Surveyors' figures in bill when signed by master—Short delivery at destination—Admissibility of evidence of loss from lighters while loading into ship.

By a charterparty dated May 28, 1913, the steamship K., belonging to the defendants, was chartered to proceed to a named port and there load a cargo of timber and therewith proceed to M. All responsibility of the charterers under the charter was to cease as soon as the cargo was alongside. The exceptions in the charterparty included "perils of the sea." The captain or his agent was empowered to sign bills of lading which should be "conclusive evidence against the owners as establishing the quantity delivered to the ship as stated therein." The K. was loaded from lighters, the contents of which had been checked by surveyors before they left the shore, there being no further checking or tallying when the timber was brought alongside. Owing to rough weather, a quantity of the timber fell between the lighters and the ship and was lost. The master of the vessel, however, signed a clean bill of lading in this form: "Shipped, in good order and well conditioned, on board the steamship K." the quantities of timber contained in the surveyors' reports. On arrival at M. the cargo was found to be short. In an action by the plaintiffs, who were indorsees of the bill of lading, for damages for short delivery the shipowners contended that the timber was lost through perils of the sea, since by the charterparty, the terms of which must be incorporated in the bill of lading, the responsibility of the charterers ceased as soon as the cargo was alongside, whereby the responsibility of the shipowners commenced, and the exception of "perils of the sea" came into operation.

Held: the shipowners were bound by the statement in the bill of lading that the whole of the timber had been shipped on board, and could not give evidence that certain portions of the timber had been lost after they had been put into lighters but before they had been received on board, and, therefore, the plaintiffs were entitled to succeed.

Lishman v. Christie (1) (1887), 19 Q.B.D. 333, applied.

Notes. As to the liability of a shipowner under a bill of lading, see 30 HALSBURY'S LAWS (2nd Edn.) 373-381, 385-391; and for cases see 41 DIGEST 373-384.

Cases referred to:

(1) *Lishman v. Christie* (1887), 19 Q.B.D. 333; 56 L.J.Q.B. 538; 57 L.T. 552; 35 W.R. 744; 3 T.L.R. 710; 6 Asp.M.L.C. 186, C.A.; 41 Digest 380, 2253.

- A** (2) *Fisher, Renwick & Co. v. Calder & Co.* (1896), 1 Com. Cas. 456; 41 Digest 380, 2260.
- (3) *Pyman v. Burt* (1884), Cab. & El. 207; 41 Digest 378, 2240.
- (4) *J. Lohden & Co. v. C. Calder & Co.* (1898), 14 T.L.R. 311; 41 Digest 381, 2266.
- B** (5) *Mediterranean and New York Steamship Co. v. Mackay*, [1903] 1 K.B. 297; 72 L.J.K.B. 147, C.A.; 41 Digest 659, 4904.

Also referred to in argument:

Brenda Steamship Co., Ltd. v. Green, [1900] 1 Q.B. 518; 69 L.J.Q.B. 445; 82 L.T. 66; 48 W.R. 321; 16 T.L.R. 226; 44 Sol. Jo. 277; 9 Asp.M.L.C. 55; 5 Com. Cas., C.A.; 41 Digest 609, 4363.

C **Appeal** by defendants (shipowners) from a decision of BAILHACHE, J., in an action in the Commercial List.

D On April 11, 1913, the plaintiffs, Crossfield & Co., timber merchants, of Barrow-in-Furness, entered into a contract with J. Nelson Smith, of St. John, New Brunswick, to buy a cargo of wood which was to be shipped at Grindstone Island for Manchester on c.i.f. terms. On May 28 J. Nelson Smith chartered the steamship *Kylestrom*e to load the cargo in question. By the charterparty it was agreed that the steamship *Kylestrom*e should, with all convenient speed, sail and proceed to Grindstone Island, New Brunswick, and there load a cargo of timber, and being so loaded should therewith proceed to a number of named ports (including Manchester) as ordered on signing bills of lading. The charterparty continued in these terms:

E "2. Freight payable on measurement of quantity delivered as and when ascertained at the port of discharge. . . All responsibility whatsoever of the charterers hereunder ceases as soon as the cargo is alongside. 3. The act of God, perils of the sea, &c., always mutually excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners. . . 12. The usual custom of the wood trade of each port is to be observed by each party on customary terms. 13. Captain or agent to sign bills of lading as per surveyors' return for the cargo, and, if required, for separate parcels and delivery accordingly. 14. Bills of lading shall be conclusive evidence against the owners as establishing the quantity delivered to ship as stated therein. The captain's or agent's signature to be accepted in all cases as binding on owners."

G On June 28 the *Kylestrom*e arrived at Grindstone Island. On June 30 loading commenced, it being done from lighters which carried their cargo stowed athwartships. The captain's agent signed the bills of lading in these terms:

H "Shipped in good order and well conditioned by J. Nelson Smith on board the steamship called the *Kylestrom*e . . . 177,281 pieces of deals, battens, &c., containing 3,170,555 superficial feet . . . in accordance with charterparty dated May 28, 1913, the terms, conditions, and exceptions (including negligence clause) contained in which are herewith incorporated and form part hereof. In witness whereof the master of the said vessel hath affirmed to two bills of lading all of this tenor and date, one of which being accomplished, the other to stand void.—(Signed) J. F. KNIGHT & Co., Agents.—Harvey, N.B., July 16, 1913."

I On July 17 the *Kylestrom*e left Grindstone Island. On arrival at Manchester it was found that the cargo was short by eighty-five standards. The plaintiffs in consequence brought this action against the shipowners to recover £558 damages for non-delivery of cargo, which they alleged had been lost. The shipowners in their defence said that the cargo was lost while alongside the ship; that the loss was, therefore, due to perils of the sea; and that in consequence responsibility on their part was excluded by the exceptions clause in the charterparty. BAILHACHE, J.,

held that the words in the bills of lading "shipped... on board the steamship *Kylestrom*" were inconsistent with the provision in the charterparty that the cargo was only to be delivered alongside, and must prevail; that in consequence the exception of "perils of the sea" never came into operation; and that the plaintiffs were, therefore, entitled to succeed. The shipowners appealed.

A. A. Roche, K.C., and R. A. Wright for the shipowners.

F. D. MacKinnon, K.C., and W. A. Jowitt for plaintiffs.

Cur. adv. vult.

July 10, 1916. The following judgments were read.

SWINFEN EADY, L.J., stated the facts and the terms of the charterparty and bill of lading, and continued: Having regard to the terms of this charterparty, and especially to cl. 14, the plaintiffs contend that the shipowners have bound themselves by contract to treat the bills of lading as conclusive evidence of the quantity delivered to the ship as stated therein—that is, as they contend, of the quantity "shipped on board"—and cannot now question the amount. A bill of lading is, generally speaking, *prima facie* evidence against the shipowner of the shipment on board of the quantity of goods thereby acknowledged by him to have been so shipped, but it is not conclusive; the parties, however, may by contract agree to make it conclusive evidence, and the question here is whether that is the true effect of the clause in the charterparty incorporated in the bill of lading. If the true meaning of cl. 14 is that the bill of lading is to be conclusive evidence against the owners that the quantity stated therein as having been "shipped... on board" has in fact been actually shipped and placed on board, then the appeal cannot succeed; there was the short delivery of eighty-five standards, and it is not suggested that any lumber actually shipped on board was subsequently lost by any excepted peril. The defendants, however, contend that cl. 14 only means that the bill of lading is to be conclusive evidence of the quantity "delivered to ship"; that if, in accordance with the contract, delivery of lumber by the shipper alongside the ship, in lighters or floating in the water, is delivery to the shipowner so that his responsibility for cargo then commences, and his lien for freight then attaches, the bill of lading is only conclusive evidence of such delivery; and that the words "as stated therein" refer only to quantity as stated in bill of lading and do not refer to and make conclusive the statement in the bill of lading "shipped... on board."

It must be assumed that the parties to the charterparty contemplated that the bill of lading would be in the form in common use in the timber trade at the port of loading. That states the quantity of timber mentioned therein as having been "shipped on board," which can only mean actually shipped on board. What is the object of such a provision in a charterparty as cl. 14? This question was put and answered by LORD ESHER, M.R., in *Lishman v. Christie* (1). He said (19 Q.B.D. at p. 338):

"What can be the meaning of such a provision but to get rid of the liberty of the shipowners to show that the quantity stated to have been shipped was not really put on board and to make the bill of lading an estoppel? The provision is a good business provision for the purpose of avoiding disputes as to quantity shipped where there is no dishonesty on either side."

In that case it was provided by the charterparty that the bills of lading should be conclusive evidence against the owners of the quantity of cargo "received as stated therein." Here it is "delivered to ship as stated therein." I see no distinction between delivered to ship and received by ship. They both describe the same transaction looked at from opposite points of view. The Master of the Rolls said (*ibid.*):

"The provision is that the bill of lading is to be conclusive evidence of the quantity of cargo received as stated therein. How is any quantity stated to have been received by a bill of lading? By the word 'shipped,' of course."

A In that case the express terms of the contract required the cargo which was to be carried to be brought alongside the ship at merchants' risk and expense, and excluded the custom of the port of Memel, by which captains of ships took delivery of timber to be shipped at timber ponds a mile and a half away, the timber being subsequently rafted down to the ships; and it was urged that the captain had exceeded his authority in signing bills of lading with regard to goods for which the

B mate gave receipts a mile or more away, and which had been lost in rafting down. But assuming that the shipowner was bound by the bills of lading (as the court held he was), the further question arose as to the meaning of the words "received as therein stated." Indeed, the same point was raised in that case as is raised here—that "received" did not mean more than received by the ship and did not extend to shipped on board as stated in the bill of lading, and, accordingly, as the

C owners were held liable for goods received by the mate at the timber ponds, the owner ought to be allowed to prove loss by an excepted peril in process of loading while being rafted down the river. It was, however, determined that the object of the clause as to conclusive evidence was to prevent that very kind of dispute and to make the statement in the bill of lading as to shipment on board an absolute estoppel as against the shipowner. As LINDLEY, J., said (*ibid.* at p. 340):

D "The shipowner has agreed to be bound by the statement in the bill of lading, and by that he must stand or fall."

Fisher, Renwick & Co. v. Calder & Co. (2) is to the same effect. In that case, tried before MATHEW, J., timber had been brought alongside the vessel to be shipped therein, and was then delivered into the custody of those in charge of the vessel,

E by whom it was properly secured alongside her by booms and ropes. Subsequently, by reason of violent weather, a quantity of that timber was lost before it could be actually shipped on board. The master signed bills of lading for the whole quantity brought alongside, without deducting so much as had never been actually shipped on board. In an action by the consignees against the shipowners for the value of the timber so lost, it was held that the plaintiffs were entitled to recover. MATHEW, J., said:

F "In the shipment of timber cargoes troublesome questions frequently arise as to whether timber, which is found at the time of delivery to be missing, was lost before or after shipment. With a view to disposing of all such questions, the clause in this charterparty provides that the bills of lading shall be conclusive evidence against the owners of the quantity of cargo shipped

G on board as stated therein. What is contemplated is that the bills of lading should pass from hand to hand, and that the consignee should have by the acknowledgment therein conclusive evidence of the quantity shipped. In this particular case the shipowners have sought to show that the timber in question was lost by reason of the excepted perils. But I must give effect to the words of the contract. These goods never were shipped, and therefore the

H exception of the specified perils did not operate."

Pyman v. Burt (3) cannot be considered an authority to the contrary, as the case was decided upon the grounds that the special circumstances were such as to prevent the conclusive evidence clause in the charterparty from being held binding.

I I am of opinion that no encouragement should be given to a practice of signing clean bills of lading for goods which the master knows have not been put on board, and with the intention that the actual shipment shall be subsequently disputed. In SCRUTTON ON CHARTERPARTIES (7th Edn.), p. 58, the learned author states that recently

"the shipowners have met the difficulty by adding to the statement of cargo shipped in the bill of lading a marginal note 'so many timbers of above lost alongside' or similar words. This seems to make the bill of lading contain no conclusive statement of quantity shipped, and it was so treated (by BIGHAM, J.) in *J. Lohden & Co. v. C. Calder & Co.* (4)."

The bill of lading there stated that the full quantity of whole sleepers or half-sleepers had been shipped on board, but a note was put in the margin in these words :

"Hereof about 1,000 half pieces, and about 400 whole pieces lost through weather as per protest dated Riga, 5-17 Nov., 1897."

In that case it was held that there was no estoppel (although the charterparty contained a conclusive evidence clause), as the bill of lading did not amount to such a clear statement of the quantity taken on board as to justify the court in holding that the owners of the ship were precluded from showing that part of the goods were not shipped on board the vessel. In my opinion, the effect of the conclusive evidence clause was settled by *Lishman v. Christie* (1) nearly thirty years ago, and a method has since been pointed out by which, by means of a note in the margin of a bill of lading, shipowners can protect themselves if cargo is known to be lost before actual shipment on board, and it would only unsettle the law if fine distinctions were now to be drawn depending upon slight verbal differences in the language of the conclusive evidence clause.

The appeal fails and should be dismissed.

PHILLIMORE, L.J.—The plaintiffs in this case, being the receivers of a cargo of timber delivered at the port of Manchester, sought for and have obtained judgment against the defendants, the shipowners, for short delivery. Hence this appeal. [His Lordship stated the facts.] The defences raised for the shipowners are: (i) That if the bill of lading is to be construed as meaning that the quantities mentioned had been actually taken on board, the statement therein is not a statement establishing "the quantity delivered to ship as stated therein" within the meaning of cl. 14 of the charterparty, and is, therefore, a simple statement by the master which, though *prima facie* evidence against the shipowners, is rebuttable and was rebutted. (ii) If, on the other hand, the bill of lading means that the quantities had been delivered into the possession of the master so that the shipper's risk was ended and that of the shipowner had begun, then the loss was subsequent and was due to a peril excepted by the bill of lading—to wit, perils of the seas.

For the second question, which I propose to take first, it is necessary to ascertain at what period of the adventure the risk of the shipper ended and that of the shipowners began. For some time I was of opinion that the risk of the shipowners began at a period anterior to the actual shipment, and, indeed, I think that in the argument there was almost an agreement between the two parties as to this, except that counsel for the shippers would date back the dividing period even further than the shipowners need for the purposes of their defence. In *Lishman v. Christie* (1), decided in this court, and in some cases in courts of first instance, the dividing period was that which is usual in cases of shipment. The cargo had to be brought alongside at merchants' risk and expense, "alongside" meaning in ordinary cases by and level with the ship's rail, but very likely in shipments of timber or other bulky materials which must be raised by the ship's gear within reach of the ship's tackles. In these cases the short period of time spent in the act of shipping is not treated as a separate period, and the master signs or should sign for goods so brought level with the rail, or in appropriate cases within reach of the ship's tackles, as "shipped on board." Counsel for the shipowners contended that the effect of cl. 13—that the captain was to sign bills of lading as per surveyors' return—coupled with the practice by which the final surveyor's return was merely an arithmetical result of the several returns made by the surveyors who measured the timber as it was put upon the several lighters up country, made the shipowners responsible at least for the totals of cargo put on board the lighters which arrived at the ship without apparent loss by the way, and counsel for the shippers (as I understood the argument) ante-dated this liability to the times of the original shipments up country. If either of these contentions were correct, I should think that whenever the shipowners' liability began the excepted perils

A also attached. Otherwise there would be two contracts by the shipowners, one of ordinary bailment and another for carriage upon the terms of the bills of lading. But upon reflection I do not think that either of these contentions is correct. The clause by which the charterer's responsibility ceases as soon as the cargo is alongside, though in form a cesser clause, sufficiently shows what is intended. There is no reason for giving "alongside" any other meaning than the usual one, which

B was that given to it in *Lishman v. Christie* (1).

The clause requiring the captain to sign bills of lading "as per surveyors' return"—cl. 13—must be given a reasonable construction. By it the captain may be precluded from questioning the measurements of the original surveyors or the arithmetic of the final surveyor. But he is not compelled to sign bills of lading according to a return which neglects such an occurrence as the non-arrival of a lighter or its arrival with half its cargo. Nor is he compelled to sign clean bills of lading if after the arrival of the lighters he knows that portions of the cargo have got adrift before they were actually brought on board. He can either insist upon the proper deductions being made, or he can (as has been done in other cases) sign for the quantities specified in the final return, with a note that so many pieces of such and such a description were lost or are short. If there is a

D dispute, the matter must be settled by arbitration, as provided by cl. 16 of the charterparty. If this be so, then the present case is on all fours with *Lishman v. Christie* (1). In this case, as in that, the master was not bound to sign bills of lading which admitted without qualification that the sum of the quantities of timber collected up country had been shipped on board. Having, however, so signed and the conclusive evidence clause being in the charterparty, his owners were precluded from contesting the quantity, and could not rely upon an excepted

E peril as no such peril had occurred after shipment. I should say a word on the phrase in the charterparty "as stated therein." I think that the meaning is that the bill of lading is to be conclusive evidence establishing not only the quantity delivered to the ship, but also that the total quantity is made up according to the details stated therein—that is to say, that there are so many "pieces," so many "deals and battens" containing so many cubic feet, so much "scanting," so many "deal ends" and "boards," and thus conclude the shipowners from raising, or successfully raising, the point raised in *Mediterranean and New York Steamship Co. v. Mackay* (5). Therefore, I think that these words do not help the shippers. But, for the reasons already given, the second point taken for the defence fails.

F

As to the first point taken for the defence, that, if the words "shipped on board" are to be given their precise meaning, then the master had no authority within the conclusive evidence clause to make this admission, but had only authority to sign for what was delivered to the ship; if delivery and receipt are correlative terms, and if receipt is by shipment, then the master has, by signing the bills of lading, established the quantity delivered to the ship, and this is what he had authority to do. I think, therefore, that the appeal fails.

G

H **BANKES, L.J.**—This is an action in which the plaintiffs claimed as indorsees of a bill of lading for damages for short delivery of a quantity of timber. The bill of lading incorporated all the terms, conditions, and exceptions of a charterparty, and the main contest between the parties was whether, by the terms of the charterparty, the bill of lading was made conclusive evidence against the shipowner in regard to the quantity of timber short delivered at the port of discharge.

I **BAILHACHE, J.**, decided against the defendants, the shipowners, upon the ground that he considered the case was covered by the decision of this court in *Lishman v. Christie* (1).

[His Lordship referred to the facts.] It seems to me clear from the affidavits that in the case of wood goods dispatched from the interior, of which the present cargo consisted, the only measurements taken were those taken by the appointed surveyors when the goods are loaded on board lighters for the purpose of being conveyed alongside the ship. These measurements are taken in the first instance

for the purpose of ascertaining the price to be paid for the timber as between the original vendors of the timber and their buyer or buyers, and the measurements may be (as they were in this case) taken by a number of different surveyors at a number of different places. The measurements so taken are checked by a selected surveyor who checks the same and prepares a summary, the total figures so arrived at being inserted in a bill of lading which is presented to the master for signature. Having regard to the purpose for which the measurements are taken, this checking must, I think, be a checking of the figures as relating to the quantities loaded on board the lighters, and not as relating to the quantities which arrive alongside the ship. The position created by the purchase contract, therefore, appears to be this. The invoice is made out on, and the buyer must pay for, the quantities of timber loaded into the lighters; but the seller must deliver the timber to the vessel, and is responsible for any deterioration of quality or condition until the timber is sent alongside the vessel—the seller consequently is responsible in damages for any loss or deterioration arising between the time when the goods are loaded on to the lighter and the time when they arrive alongside.

The question which has to be determined in the present appeal has reference to the position of the charterer and the shipowner, and the contract of purchase can only be material (if material at all) as explaining the course of business and the custom of the port [relating to the preparation of the complete surveyors' return: see above]. For the purpose of enabling him to fulfil his contract with the plaintiffs, Mr. Nelson Smith, the seller, chartered the steamship *Kylestromc*. The charterparty is dated May 28, 1913. [His Lordship read cl. 2, 3, 12 and 13.]

The parties in the present case appear to have expressed in their written contract the extent to which they intended to be bound by the custom of the port, so that no question arises with regard to the custom apart from the construction of the written contract. By cl. 13 the shipowners agreed that the captain or agent should sign bill of lading "as per surveyors' return." The result of this agreement is that the parties assented to the course of business [relating to the surveyors' return: see above]. The conclusive evidence clause is the one upon which the questions involved in this appeal turn. The custom of the port does not touch this clause, in the sense that the shipowner is perfectly free, so far as the custom of the port is concerned, to decide whether he will or will not agree to any form of conclusive evidence clause. The shipowner must be taken to understand what his position is when he has undertaken to sign bills of lading "as per surveyors' return," and he must protect himself by the language used in the clause itself if he decides to bind himself by a conclusive evidence clause, or by a note in the margin of the bill of lading, if the master is compellable to sign for a quantity not received. I think that the expression "delivered to ship" in cl. 14 means delivered alongside in the sense that the goods have reached the ship and are under the control of the master, so that the responsibility of the charterer under cl. 2 ceased.

The precise dispute between the parties may conveniently be stated at this point. The shipowners do not now dispute that the out-turn of the cargo at the port of discharge was some eighty-five standards short of the bill of lading quantity, nor do they dispute that the bill of lading quantity was delivered alongside the ship, but they allege that the whole of the missing timber was lost by peril of the sea whilst being loaded from alongside on to the vessel, and they claim the right to give evidence of that fact. The plaintiffs on the other hand, say, "No—you cannot do that—you are estopped by the terms of the bill of lading from disputing that the full bill of lading quantity was shipped on board your vessel." This brings me to a consideration of the terms of the bill of lading. The question of the proper construction to be put upon that document, having regard to the provisions of cl. 14 of the charterparty, is the real question in the case. The bill of lading is in the usual form "shipped in good order and well conditioned by J. Nelson Smith on board the steamship *Kylestromc*." Then follows a statement

A of pieces and quantities as per surveyor's return. The concluding paragraph incorporates all the terms, conditions, and exceptions contained in the charterparty. The shipowners put their argument in two ways. Their first contention was that the bill of lading should be construed as an acknowledgment merely that the goods were delivered alongside. I cannot accept this argument. The language of the bill of lading is too clear to admit of any such construction. The expression
B "shipped on board" means and means only, in my opinion, what it says. The alternative contention is in substance this. If the bill of lading is to be treated as an acknowledgment of the receipt of the goods on board, then it does not come within the exclusive evidence clause of the charterparty at all. If the charterer had desired to bind the shipowner by that clause he should have tendered a document which dealt with the delivery of the goods alongside, and not with the receipt of the goods on board.

C At this point it becomes material to consider whether any distinction can be drawn between the present case and *Lishman v. Christie* (1). In that case, as in this, by the terms of the charterparty (though in different language) the cargo had to be brought to the ship at charterer's risk and expense. In that case the conclusive evidence clause was framed to cover "cargo received as stated therein."
D In the present case it is "quantity delivered to ship as stated therein." In that case the bill of lading contained the word "shipped" only. In the present case the words are "shipped on board." The argument in that case was, as here, that the conclusive evidence clause provided that the bill of lading should be conclusive evidence only that the goods were received as therein stated, not that they were shipped on board. In that case the charterparty contained no similar provision
E to that contained in the charterparty under consideration requiring the master to sign bills of lading in any particular form or for any particular quantity, but, material as such a clause may be as between shipowner and the holder of the bill of lading, it does not, in my opinion, affect the liability of the charterer to bring the goods alongside. Under these circumstances I am unable to draw any sufficient distinction between the facts in *Lishman v. Christie* (1) and those in the
F present case to justify the conclusion that the decision in that case does not apply also to the present. For these reasons I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Trinder, Capron & Co.; William A. Crump & Co.*

[*Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.*]

Re COPAL VARNISH CO., LTD.

[CHANCERY DIVISION (Eve, J.), July 19, 1917]

[Reported [1917] 2 Ch. 349; 87 L.J.Ch. 132; 117 L.T. 508]

Company—Shares—Transfer—Registration—Restriction on right of transfer—Consent of directors—Director's persistent refusal to attend board to prevent necessary quorum—Registration of transfer by order of court—Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 32.

In 1908 a company, incorporated in 1883, was converted into a "private company" within the meaning of the Companies Act, 1907. There were two directors, E. and P., the quorum necessary being two, and E., the chairman, having a casting vote. The articles of association gave the registered owners of shares power to transfer their shares, but it was provided that no share should be transferred to any person who was not a member of the company without the consent of the directors. E., without the consent of the board, transferred some of his shares to transferees who were not members of the company and lodged the executed transfers with the company for registration. P. purposely kept away from the board meeting summoned to consider the transfers of shares in order to prevent a quorum being formed. On a motion by the transferees for rectification of the register,

Held: E. had a right of property in his shares of which he was entitled to dispose subject to the express restrictions in the articles; there was nothing in the articles of the company which required the consent of the directors before execution of the transfers, but legal transfer was not complete until the board had consented and registration had been effected; and, therefore, P.'s persistent abstention in order to prevent a quorum was unavailing and the transferees must be entered on the register.

Notes. Section 32 of the Companies (Consolidation) Act, 1908, has been replaced by s. 116 of the Companies Act, 1948: see 3 HALSBURY'S STATUTES (2nd Edn.) 549. Regulations 8 and 66 of Table A scheduled to the Companies Act, 1862, have been replaced by regs. 22 and 98 and 99 of Table A scheduled to the Companies Act, 1948, respectively.

Referred to: *Re Keith, Prowse & Co., Ltd.*, [1918-19] All E.R.Rep. 946; *Lyle and Scott v. Scott's Trustees*, *Lyle and Scott v. British Investment Trust, Ltd.*, [1959] 2 All E.R. 661.

As to rectification of the register of members, see 6 HALSBURY'S LAWS (3rd Edn.) 216 et seq.; and for cases see 9 DIGEST (Repl.) 215 et seq.

Cases referred to:

- (1) *Re Bede Steam Shipping Co., Ltd.*, [1917] 1 Ch. 123; 86 L.J.Ch. 65; 115 L.T. 580; 33 T.L.R. 13; 61 Sol. Jo. 26, C.A.; 9 Digest (Repl.) 392, 2524.
- (2) *Barrow v. Isaacs & Son*, [1891] 1 Q.B. 417; 60 L.J.Q.B. 179; 64 L.T. 686; 55 J.P. 517; 39 W.R. 338; 7 T.L.R. 175, C.A.; 31 Digest (Repl.) 547, 6696.
- (3) *Gilbey v. Rush*, [1906] 1 Ch. 11; 75 L.J.Ch. 32; 93 L.T. 616; 54 W.R. 71; 22 T.L.R. 23; 50 Sol. Jo. 26; 40 Digest (Repl.) 815, 2940.

Originating Motion under s. 32 of the Companies (Consolidation) Act, 1908, by the plaintiffs, Frederick Cradock Edwards and eleven other persons as transferees, for an order that the register of members of the company might be rectified by removing therefrom the name of Ernest Randall as the holder of twelve preference shares in the capital of the company and by entering on the register in the place of the name of Ernest Randall in respect of and as holders of the same shares the names of the plaintiffs respectively "to whom the said shares have been transferred," and that the company might be ordered to pay the costs of the motion.

The company was incorporated in 1883 under the Companies Act, 1867 to 1880,

A by T. B. Randall, the father of Ernest Randall, and his elder brother, Percy Randall, an added defendant to the motion, as a company limited by shares. The capital of the company originally consisted of ordinary shares. The issued capital of the company at the material dates consisted of 541 cumulative preference shares (held as to 105 shares by Ernest Randall and 105 shares by Percy Randall, and as to the remaining 331 by them as trustees for their two sisters) of £10 each and
B sixty ordinary shares (twenty-nine of which latter shares being registered in the names of Ernest Randall and his wife and Percy Randall and his wife respectively) of a similar nominal value. The two sisters of Ernest Randall and Percy Randall were thus beneficially entitled to a life interest in the majority of the preference shares in the company, which also constituted a majority of the share capital, and such shares were registered in the joint names of Ernest Randall and Percy
C Randall as trustees of a settlement. No chairman of the company had been formally appointed since the death of T. B. Randall. The articles of association as originally framed contained the following clauses:

D "15. The person or persons for the time being registered as the owner or owners of any shares may (subject to the regulations of the company) transfer the same to any person not being an infant, a lunatic, or by marriage or otherwise under any legal disability. . . . 17. The directors may decline to register any transfer of shares made by any person who is indebted to the company for any money then due and payable, or who may be solely or jointly liable to it for any call whether payable or not, or any interest thereon, or in respect of any debt, notwithstanding that the same may not then be due, or where the proposed transferee is a person engaged in business of a similar character to the
E business of the company, or who otherwise may be a competitor in trade with the company, or in any case where the directors shall consider the proposed transfer will not be conducive to the interest of the company."

When the company was converted, by special resolution duly passed and confirmed on May 27, 1908, and June 15, 1908, into a "private company" within the
F meaning of the Companies Act, 1907, the following addition was made to cl. 17:

"No share shall be transferred to any person who is not already a member of the company without the consent of the directors."

The minutes of the extraordinary general meeting of June 15, 1908, were signed
G "Ernest M. Randall, Chairman." Clause 18 of the company's articles of association was as follows:

"The company shall not be bound to register as a member the nominee of any person entitled to a share . . . if the directors shall consider . . . that the registration of such nominee will not be conducive to the interests of the company."

H To this clause the following addition had been made by special resolution:

"The directors of the company shall not have power to register any transfer of shares which if completed would increase the number of shareholders to more than fifty."

I The regulations contained in Table A in Sched. 1, of the Companies Act, 1862, were with specified exceptions made applicable to the company, including regs. 8 and 66. Clause 28 of the articles of association provided that "the number of directors shall not be less than two or more than seven." Regulation 8 of Table A provided as follows:

"The instrument of transfer of any share in the company shall be executed both by the transferor and transferee, and the transferor shall be deemed to remain a holder of such share until the name of the transferee is entered in the register book thereof."

Clause 66 of Table A provided as follows :

"The directors may meet together for the dispatch of business, adjourn, and otherwise regulate their meetings as they think fit, and determine the quorum necessary for the transaction of business; questions arising at any meeting shall be decided by a majority of votes; in case of an equality of votes the chairman shall have a second or casting vote; a director may at any time summon a meeting of the directors."

The quorum of directors was two, and the only directors were Ernest Randall and Percy Randall.

On June 7, 1917, Ernest Randall, without the consent of the board, executed transfers of twelve of his shares to the plaintiffs who were not members of the company and lodged them with the secretary for registration. On June 8, 1917, the secretary sent a written notice to Percy Randall, in which a meeting of directors was summoned and the agenda contained the item "transfers of shares." On June 12, 1917, Percy Randall replied, stating: "It will be impossible for me to attend the meeting of directors called for next Wednesday, the 13th inst." On June 12, 1917, the secretary, by letter, informed Percy Randall that the meeting had been postponed until June 20. On June 18, 1917, Percy Randall wrote to the secretary that, having regard to the addition made to art. 17 by the special resolution passed on May 27, 1908, he was advised that the transfers of shares, of which notice had been given, were invalid, as the consents of the directors had not been obtained, and as that was the only business on the agenda for the meeting he did not propose to attend.

On June 23, 1917, the notice of originating motion was served on the company, and on that day the secretary wrote to Percy Randall and invited him to attend a board meeting on June 27, 1917, to consider the notice of motion. There was some conflict of evidence as to what occurred on June 27, 1917, and whether Percy Randall opposed Ernest Randall acting as chairman, and proposed himself as chairman of the meeting, and on not being allowed to take the chair he withdrew from the meeting. At the hearing an offer was made that the motion should be adjourned to enable Percy Randall to attend a board meeting to consider the transfers, but this offer was refused.

Maugham, K.C., and *Frank Evans* for the plaintiffs, the transferees.

Edward Clayton, K.C., and *F. Whinney* for Percy Randall.

Percy Wheeler for the company.

EVE, J.—In my opinion there is no answer to this motion. [His Lordship referred to the facts and found on the evidence that Ernest Randall was and had always been recognised by Percy Randall as chairman, and that Percy Randall purposely kept away from the meeting which had been summoned in order to prevent a quorum being present for the transaction of business, and continued:] The only point which I have to consider is what are the legal rights of the persons who are now applying to have the register rectified? In order that there may be no doubt as to the standpoint from which I approach this question, I wish to say that, alike in a public and a private company, a shareholder has, in my opinion, to use the language of LORD COZENS-HARDY, M.R., in *Re Bede Steam Shipping Co., Ltd.* (1) ([1917] 1 Ch. at p. 182):

"a property in his shares, a property which he is at liberty to dispose of, subject only to any express restriction which may be found in the articles of association of the company."

That statement is, I think, as applicable to a private company as to a public one, subject only to this observation, that, whereas in a public company it is not necessary that there should be any agreement inter socios operating as a restriction of the right of transfer, in the constitution of a private company some restriction must be found. It follows that in the present case Ernest Randall had a property in

A his shares of which he had a right to dispose, subject only to any express restrictions in the articles of association. Those express restrictions are to be found in art. 17 as amended by the special resolution passed in June, 1908.

It is not suggested that art. 17 as it stood prior to that amendment would operate in any way so as to prevent the registration of the transfers now in question, but it is said that the addition to the article that "no share shall be transferred to
B any person who is not already a member of the company without the consent of the directors" imposes upon an intending vendor of shares an obligation to obtain the consent of the directors to the reception into the company of the proposed purchaser before he can proceed with the transaction to the point of executing the transfer, and *Barrow v. Isaacs & Son* (2) and *Gilbey v. Rush* (3) were cited in support of that contention. I think this argument loses sight altogether of the
C essential difference between the nature of the transactions under consideration in those cases and the successive steps which it is necessary to take in order to bring about a final and effectual transfer of a share. The execution of the transfer of a share has no such immediate effect as was brought about by the execution of the assignment in *Barrow v. Isaacs & Son* (2), and the operation of legally transferring a share is, indeed, one of some complexity. In the first place, there is the contract
D of sale followed by the execution of an instrument of transfer containing an agreement by the purchaser to accept the shares subject to the several conditions on which the vendor held the same immediately prior to the execution of the transfer—that is to say, subject, among other things, to the conditions imposing restrictions on the vendor's right to transfer to that particular purchaser. Up to this point all that has been done is to pass an equitable interest in the shares to the
E transferee. There has been no legal assignment completed; indeed, the most crucial point in the transaction has not been reached—the acceptance of the transfer by the board of directors and the passing of it for registration; and even then the matter is not completed, because, until the actual entry of the name of the transferee on the register, the transferor remains the legal holder of the shares.

Such being the successive operations by which a legal transfer can be effectuated,
F what is there in the wording the clause to which I have referred which imposes upon an intending transferor any obligation to approach the directors and ask them if they will approve of an intended transferee before executing the document, which is only one of the series of operations and creates no title in the transferee of which the company can take any note until the directors have sanctioned its
G registration? I cannot see anything in the article which imposes any such obligation, and I think it would be an unreasonable construction to hold that there is any obligation to apply for the consent before the transfer is tendered for acceptance and registration. So long as prior to the completion of the transaction an opportunity is given to the directors, sitting as a board, to determine whether the proposed transferee is a person whom they are prepared to admit as a member
H of the company, the conditions imposed by the article are, in my opinion, complied with, and the contract into which the vendor on becoming a shareholder entered with his co-shareholders is sufficiently discharged. The argument that if the directors only give their consent after the vendor has purported to transfer the shares—that is, ratification by the directors, and not the antecedent consent on their part contemplated by the article—is based upon an exaggerated estimate of the instrument of transfer; its efficacy depends solely on the question of its registration, and it is for the directors, by giving or withholding their consent to this,
I to determine whether the whole transaction is to be effective or not. In my opinion, Percy Randall has taken up an attitude in this dispute which is untenable, and, bearing in mind that he was added as a party to this motion at his own request in an order directing the company to rectify the register by giving effect to these transfers, I must at the same time order him to pay the costs of the motion.

Solicitors: *Francis Miller & Steele, Perowne & Co.; Lewin, Gregory & Anderson.*

[Reported by W. P. PAIN, Esq., Barrister-at-Law.]

HUGHES v. LIVERPOOL VICTORIA LEGAL FRIENDLY SOCIETY AND ANOTHER

[COURT OF APPEAL (Swinfen Eady, Phillimore and Banks, L.J.J.), May 2, 3, 19, 1916]

[Reported [1916] 2 K.B. 482; 85 L.J.K.B. 1643; 115 L.T. 40;
32 T.L.R. 525]

Insurance—Life assurance—Assured induced to take up policy by fraudulent misrepresentation of insurers' agent—Right to recover premiums.

Where an illegal contract of life assurance is entered into, the assured being ignorant of the law and being induced to enter into the contract by a fraudulent misrepresentation of the law by the agent of the assurers, which the assured believes, the parties are not in *pari delicto*, and the assured may recover premiums which he has paid.

British Workman's and General Assurance Co., Ltd. v. Cunliffe (1) (1902), 18 T.L.R. 502, applied.

Harse v. Pearl Life Assurance Co. (2), [1904] 1 K.B. 558, distinguished.

Notes. Referred to: *Parkinson v. College of Ambulance, Ltd.*, [1924] All E.R. Rep. 325.

As to return of insurance premiums, see 22 HALSBURY'S LAWS (3rd Edn.) 238-242; and for cases see 29 DIGEST 45, 46, 61-63, 370-372.

Cases referred to:

- (1) *British Workman's and General Assurance Co., Ltd. v. Cunliffe* (1902), 18 T.L.R. 425; affirmed 18 T.L.R. 502, C.A.; 29 Digest 61, 208.
- (2) *Harse v. Pearl Life Assurance Co., Ltd.*, [1903] 2 K.B. 92; 72 L.J.K.B. 638; 89 L.T. 94; 19 T.L.R. 474, D.C.; on appeal [1904] 1 K.B. 558; 73 L.J.K.B. 373; 90 L.T. 245; 52 W.R. 457; 19 T.L.R. 264; 48 Sol. Jo. 275, C.A.; 29 Digest 62, 209.
- (3) *Evanson v. Crooks* (1911), 106 L.T. 264; 28 T.L.R. 123; 29 Digest 62, 212.
- (4) *Howarth v. Pioneer Life Assurance Co., Ltd.* (1912), 107 L.T. 155; 29 Digest 62, 210.
- (5) *Refuge Assurance Co., Ltd. v. Kettlewell*, [1909] A.C. 243; 78 L.J.K.B. 519; 100 L.T. 306; 25 T.L.R. 395; sub nom. *Kettlewell v. Refuge Assurance Co., Ltd.*, 53 Sol. Jo. 339, H.L.; 29 Digest 63, 218.

Also referred to in argument:

Re Griffin, [1902] 1 Ch. 135; 71 L.J.Ch. 112; 86 L.T. 38; 50 W.R. 250; 18 T.L.R. 142; 46 Sol. Jo. 122, C.A.; 25 Digest 307, 148.

Appeal by the plaintiff from a decision of SCRUTTON, J., on further consideration by him of an action, tried by him with a jury, in which the plaintiff claimed from the defendants the return of the premiums which she had paid on five policies of insurance on the lives of three persons, alleging that the premiums had been obtained from her by fraud, or, alternatively, that she had paid them on a consideration which had failed. SCRUTTON, J., gave judgment for the defendants on the ground that the policies were illegal under the Assurance Companies Act, 1909.

The facts appear from the judgments.

Trevor Hunter for the plaintiff.

Gore-Browne, K.C., and *Artemus Jones* for the defendants.

Cur. adv. vult.

May 19. The following judgments were read.

SWINFEN EADY, L.J.—The plaintiff claims £52 13s. 6d. by way of return of premiums on life policies, which amounts she contends were obtained from her by the fraudulent misrepresentations of the defendants' agents. At the trial the

A judge left certain questions to the jury, and, having obtained their findings of fact, he directed judgment to be entered for the defendants. The plaintiff appeals, and contends that upon the findings of the jury she is entitled to judgment against the defendant society for the amount claimed.

In the years 1908 and 1909, John Henry Thomas, a grocer, effected with the defendants in their industrial branch five policies—namely, two on the life of Mrs. Elizabeth James, one on the life of James Morgan, and two on the life of Thomas Petty. The weekly premiums varied between 4d. and 1s., and the total aggregate amount assured by the five policies was £65 8s. At the trial Thomas said that Mrs. James owed him money, but that the defendant society's local agent, the co-defendant William Evans, forced him to take out the other two policies, and added that a tradesman had to do that in many cases. Evans, who was called by the society, said that all three lives were customers of Thomas according to him. No question on this point was left to the jury. Assuming that Thomas had an insurable interest on all three lives, the policies taken out by him would be valid. Upon the face of each policy there is nothing to indicate that it is an assurance effected by one person on the life of another. Only the name of the assured is mentioned. After a short time, Thomas determined to allow the policies to drop. He stopped paying premiums, and burnt the policies. He never was asked to sell or to consent to the sale of the policies, and never asked for the issue of any duplicate policies. In December, 1910, the agent Evans approached the plaintiff, Mrs. Hughes, whose husband keeps the Railway Inn at Maesteg, with a view to her keeping up the policies. There was a question at the trial whether the arrangement come to was with Mr. Hughes, or with his wife, the plaintiff, and the jury found that it was with the plaintiff. The plaintiff's account was that Lloyd, the defendants' superintendent, and Evans, the defendants' agent, came to her; that she was told that arrears of premiums were owing upon the policies, and that if she paid the arrears, and the future premiums, everything would be all right. She believed what she was told, and then and there paid the arrears of £3 14s. 2d. Subsequently Evans came alone, bringing with him five duplicate policies, which the plaintiff noticed were not the usual policies, but duplicate copies, whereupon Evans assured her that everything would be all right, which assurance she believed, and paid the premiums on the policies which subsequently accrued. At a later date Lloyd left the society's service, a new superintendent called upon the plaintiff, and, after his visit, she took advice, refused to pay any more premiums, and brought this action. The application to the head office to issue duplicate policies is a printed form, filled up in the handwriting of Evans, and gives no reason why duplicate policies should be issued. We were told on the hearing of the appeal that the several proposals to the office to effect the original five policies had been destroyed, although these policies had been taken out so recently as 1908 and 1909. Each policy contains a provision that the policy shall become void, and the society shall not be liable to pay any sum whatsoever on account of the assurance, and all premiums paid shall be forfeited to the society, if the policy shall be in any way assigned, transferred, or otherwise parted with—nomination or will excepted. By r. 24 of the amended rules of the society, the secretary is to keep a book in which the members may nominate in writing the person to whom the insurance money shall be paid on their decease, such person being the husband, wife, father, mother, child, brother or sister, nephew or niece of such member. Any member may revoke such nomination by a written notice to that effect, signed by himself. No nomination was ever signed in respect of any of the five policies.

It appears from this short statement of the facts that the plaintiff never acquired any valid title to any of the policies, or any legal right to enforce payment by the insurance company on the death of any of the assured. No assignment of the policies was, indeed, ever agreed to be made by Thomas, who effected them, nor

does it appear that he was ever aware of what Lloyd and Evans were doing with regard to them.

The learned judge left the following questions to the jury:

"(2) Was the effecting or transfer of the policies induced by any fraudulent representation of fact or law? If so, what was the representation and who made it?—Answer: Yes. Assurances to Mrs. Hughes that, by paying arrears due and keeping up the premiums, everything would be all right. Made by Lloyd. (3) Was the payment of premiums after the handing over of the duplicate policies induced by any fraudulent representation of fact or law? If so, what was the representation and who made it?—Answer: Yes. Assurances to Mrs. Hughes, when she knew that they were duplicate copies, that everything would be all right. Made by Evans."

The learned judge during the course of his summing-up, and before leaving the second and third questions to the jury, pointed out to them what would be a fraudulent statement and what would not; also what would be a statement of fact and what would be only a statement of opinion as to the future; the distinction between a statement which meant: "You may trust to the honour of the society; you cannot recover in law, but you are safe in dealing with them; they are honourable people, and will not take your money and not pay", and a statement which meant: "You can recover in law on this policy." The learned judge told the jury that he had asked them whether there was any fraudulent misrepresentation of fact or law, and they must attend to that in the sense that he explained to them. The findings of the jury, therefore, amount to this, that the society, by their agent, had made representations which led the plaintiff to believe that the policies were effectual and valid in law and that the plaintiff on paying became legally entitled to them, and that the plaintiff paid the arrears and continued to pay the future premiums relying on these representations. There is no complaint of the summing-up or of the findings of the jury, and it cannot be doubted that there was ample evidence for the jury to find fraud. Evans knew that the policies had been effected by Thomas, that Thomas had determined not to keep them up (although no notice of intention to forfeit had ever been given by the society under the Collecting Societies and Industrial Assurance Companies Act, 1896 [repealed, Industrial Assurance Act, 1923]). Thomas had never been approached with a view to his assigning the policies. Assuming in favour of the defendants that they were assignable and had been effected by a person having an insurable interest, the facts known to Evans showed that the plaintiff would acquire no title at all. The obtaining duplicate policies was a part of Evans' fraud, the personal gain to himself being that he would continue to receive a commission on the premiums which the plaintiff could be induced to pay.

In my judgment, the present is a clear case of fraud, established to the satisfaction of the jury, and a much stronger case of fraud than *British Workman's and General Assurance Co., Ltd. v. Cunliffe* (1). In that case the policy was issued to Cunliffe upon the life of Peter Hampson, his brother-in-law, in which he had no insurable interest. The policy contained a reference to a proposal and declaration in writing, signed by Cunliffe. No such proposal and declaration were ever put in evidence, and Cunliffe and his wife swore that they had not signed such a document. Bibby, the insurance agent, knew that Cunliffe had no insurable interest on the life. The justices arrived at the conclusion that the society, by Bibby their agent, had made representations which led Cunliffe to believe that the policy would be valid and effective in law, and that Cunliffe had effected the policy and paid the premiums, relying on these representations. The fraud there was pointed out by VAUGHAN WILLIAMS, L.J. Bibby knew that by law it was necessary that the insurer should have an insurable interest in the life assured, and he knew that Cunliffe had no such interest in the life of his brother-in-law, yet, to induce him to insure, he made a statement of which the obvious meaning was that Cunliffe would be entitled to enforce payment of the policy money, although he had no

A insurable interest. That was fraud. In *Harse v. Pearl Life Assurance Co., Ltd.* (2), COLLINS, M.R., pointed out ([1904] 1 K.B. at p. 563) that the Court of Appeal in *British Workman's and General Assurance Co., Ltd. v. Cunliffe* (1) affirmed the decision of the Divisional Court that the money could be recovered, expressly on the ground that the statement on which the assured acted was fraudulently made. The facts of the present case afford much stronger evidence of fraud than

B the facts in *British Workman's and General Assurance Co., Ltd. v. Cunliffe* (1), and the fraud is established by the verdict of the jury.

[His LORDSHIP commented on "the extremely loose and careless manner in which the business of the defendants appeared to be conducted, and concluded:] In *Harse v. Pearl Life Assurance Co., Ltd.* (2) and in *Evanson v. Crooks* (3) there was no fraud, and the plaintiff was in *pari delicto*, and so failed to recover, but those cases must not be regarded as deciding that where a person is induced to insure a life, in which he has no insurable interest, by an insurance agent making a misrepresentation of fact, that the parties are necessarily in *pari delicto*. If insurance agents were carefully instructed not to procure or accept proposals for insurances on lives where the insurers have no insurable interest, there would not be so many actions brought for the return of premiums. In this case the appeal

D should be allowed, and judgment entered for the plaintiff for the amount claimed with the costs of the action and of this appeal.

PHILLIMORE, L.J.—The plaintiff sues for the recovery of money paid in premiums on five policies of insurance on the lives of three persons, alleging that it was money obtained by fraud, or, alternatively, paid on a consideration that failed. The defendant society denies her rights generally, specifically denies

E that it issued any policies to her, and further pleads that, if the policies were issued to her, "such policies were null and void, and were illegal for want of insurable interest under the Life Assurance Act, 1774, and the plaintiff was a party to such illegality and in *pari delicto* with the defendants, and moneys paid thereunder are irrecoverable in law."

F [His LORDSHIP stated the facts and continued:] The transaction which led to the plaintiff paying the premiums on these policies can be looked at in two ways. It was either one by which she—to use the language of Evans—took the old policies on, or it was a series of insurances *de novo* by her on the lives which had been previously assured by Thomas. In the former case, two of the policies were good policies; the other three were taken to have been illegal and void. But they might have been good if the persons, whose lives are assured, had been debtors to

G Thomas, and there was no reason why the plaintiff should not suppose that they were or accept the statement by the society's servants that they were all right. But the plaintiff, having no title from Thomas, would have no right to the policies or the policy moneys. It is true that by virtue of the statute governing these matters [now Industrial Assurance Act, 1923, s. 23] no lapse of a policy can be effected without previous notice to the assured. But Thomas had abandoned the policies, and had destroyed them and his premium books, and it was not with his consent that the application was made to Mrs. Hughes to take them over. Unless he assigned his interests under the policies, Mrs. Hughes would never get the policy moneys, and, if the case is to be regarded from this point of view, there was a clear fraud practised upon her by Evans and Lloyd, and no case of *par delictum*.

I **SCRUTTON, J.**, however, seems rather to have taken the view that the other aspect of the transaction was the right one, and that the plaintiff was effecting these five policies *de novo*. There is considerable difficulty in this position. The request made to the plaintiff was to keep the policies on. The documents issued to her were copies or duplicates of the old policies with the old date, and, as I understand, with the age of the several assured at the times when they were originally effected, and with the rate of premiums appropriate to that age. It is difficult to see how the transaction can be regarded as one of the issue of new policies. But, assuming that the transaction is to be so regarded, which is looking at the case in the most

favourable aspect to the defendant society, we have then to consider the effect of the findings of the jury.

The learned judge left certain questions to the jury. These questions, with their answers, were as follows :

"(1) Were the insurances in 1910 effected by Mrs. Hughes or Mr. Hughes?—Answer: Mrs. Hughes. (2) Was the effecting or transfer of the policies induced by any fraudulent representation of fact or law?—Answer: Yes. If so, what was the representation and who made it?—Answer: Assurances to Mrs. Hughes that by paying arrears due and keeping up the premiums everything would be all right. Made by Lloyd. (3) Was the paying of the premiums after the handing over of the duplicate policies induced by any fraudulent representation of fact or law?—Answer: Yes. If so, what was the representation and who made it?—Answer: Assurances to Mrs. Hughes, when she knew that they were duplicate policies, that everything would be all right. Made by Evans."

He then reserved the case for further consideration. Upon further consideration he entered judgment for the defendant society. Hence this appeal.

There are two cases which have a special bearing upon the present case—*British Workman's and General Assurance Co., Ltd. v. Cunliffe* (1) and *Harse v. Pearl Life Assurance Co., Ltd.* (2). The only other case which I think is necessary to mention in this connection is *Howarth v. Pioneer Life Assurance Co., Ltd.* (4). In the first of these three cases, which arose on appeal from a Case stated by justices, there was, in the view of LORD ALVERSTONE, C.J., at any rate no suggestion of fraud. He apparently decided on the view that, though the contract was illegal and void, neither the agent nor the assured knew it, but that, nevertheless, the agent of the assurance company was not in the same position as the assured, he being a man who was, or might be believed to be, skilled in insurance matters. I am not sure that CHANNELL, J., did not take the view that there was direct misrepresentation by the agent. DARLING, J., is only reported as generally concurring. In the Court of Appeal it is again a little difficult to ascertain upon what grounds the decision of the court below was affirmed and the assured held entitled to recover his premiums back. It is unfortunate that we have only the necessarily condensed newspaper report to guide us. It is, however, possible to infer from the brief report of the judgments of VAUGHAN WILLIAMS and ROMER, L.J.J., with whom MATHEW, L.J., is said to have concurred, that the view taken was that there was fraud on the part of the agent of the assurance company. SCRUTTON, J., in his judgment in the present case, observes that this could hardly be, inasmuch as both the Divisional Court and the Court of Appeal were bound as to the facts by the findings of the justices, and the justices had not found fraud. As to this it may be remarked that no doubt the justices had not used the word "fraud," but they had found facts from which it might have seemed to the lords justices right to draw an inference of fraud. For the purposes of the case before us the decision in *Cunliffe's Case* (1) is an authority that, at any rate where an illegal contract of insurance is entered into and the assured is ignorant of the law and is induced to enter into it by the fraudulent misrepresentation of the law by the agent of the assurance company, the parties are not in *pari delicto*, and the assured may recover premiums paid.

In *Harse's Case* (2), which was an appeal from a county court, the Divisional Court held that the premiums could be recovered, but the Court of Appeal reversed that decision. In that case, which was of a son insuring against funeral expenses on the death of his mother, there had been some doubt as to the law—that is, whether a son had not to this extent an insurable interest in the life of his mother. It was ultimately decided that he had not. Later legislation—the Assurance Companies Act, 1909, s. 36—has provided that a son shall have such an interest. There was, therefore, no improbability in the agent having made a bona fide mistake as to the law, and this in fact was found by the jury. The Divisional

A Court thought that the assured was entitled to expect that the agent would know the law. The judges in that court held that fraud was not essential, saying that they had so held (and two of the members of the court were the same) in *Cunliffe's Case* (1). In the Court of Appeal it was definitely decided that, seeing that the statement by the agent was not a statement of fact, but a statement of law, and was innocently made, the plaintiff could not recover. COLLINS, M.R., said ([1904] 1 K.B. at p. 563):

B “Unless there can be introduced the element of fraud, duress, or oppression, or difference in the position of the parties which created a fiduciary relationship to the plaintiff so as to make it inequitable for the defendants to insist on the bargain that they had made with the plaintiff, he is in the position of a person who has made an illegal contract and has sustained a loss in consequence of a mis-statement of law, and must submit to that loss.”

C But, at the same time, the court affirmed the view that if the element of fraud, or any of the other elements mentioned in the passage which I have just read, exist, the delictum is not par, and the premiums can be recovered back. In part support of his judgment the Master of the Rolls relies on *Cunliffe's Case* (1), which in his view was decided in the Court of Appeal on the ground of fraud. Again I refer to SCRUTTON, J.'s criticism only to say that, when one looks at a previous decision as an authority, one has to accept the view of the facts which was taken by the tribunal. A court is not bound by a previous decision as to the facts, but only by a previous decision so far as it lays down a principle of law. And after full consideration of these two authorities, I think there is no difficulty in ascertaining the rule of law, whatever may be the difficulties in the way of understanding how the conclusion came to be arrived at in *Cunliffe's Case* (1), according to the brief reports of it which we have.

E *Howarth v. Pioneer Life Assurance Co.* (4) seems to me to be a decision to the same effect. SCRUTTON, J., appears to have thought that, nevertheless, the plaintiff could not recover, and to have considered that at any rate the Assurance Companies Act, 1909, s. 23 and s. 36 (3) making the offender liable to a serious penalty, outweighed all previous considerations. But if an act is illegal—that is, prohibited by law—it makes no difference whether it is prohibited under a penalty or left as an indictable misdemeanour at common law. There is as plain a prohibition in the Life Assurance Act, 1774, on which the cases of *Cunliffe* (1) and of *Harse* (2) were decided. It remains, I think, that the principles enunciated by COLLINS, M.R., and agreed to by the lords justices in *Harse's Case* (2) carry the plaintiff home on the second view of the transaction.

G Lastly, it was contended that the acts of the collector and superintendent were beyond the scope of their authority, and could not bind the defendant society. But if the society repudiates the bargain it cannot keep the premiums. This was settled in the House of Lords in *Refuge Assurance Co., Ltd. v. Kettlewell* (5). H SCRUTTON, J., pointed this out. Whichever view, therefore, may be taken of the transaction by which the plaintiff obtained these duplicate policies, I am of opinion that she is entitled to succeed, and that this appeal should be allowed.

I BANKES, L.J.—It is not necessary that I should deal with the facts of the case, as they have already been set out fully. It is sufficient for the purpose of my judgment to say that, having regard to the summing-up of the learned judge, the answers of the jury must be read as a finding that the representation made by the defendants' agents was a representation that, if the plaintiff took over the policies and paid the premiums on them, they would be valid and binding policies in her hands, and capable of being enforced by her, and that the agents, at the time that they made these representations, knew them to be untrue, but that the plaintiff did not know them to be untrue, but, on the contrary, believed them to be true. On these findings the plaintiff was, in my opinion, entitled to judgment.

SCRUTTON, J., took the opposite view. It is clear from his judgment that, though the defendants' counsel submitted that the statements by the company's agents were only expressions of their opinion, and that the plaintiff was herself well aware of the true position, he refused to accept either contention in face of the findings of the jury; and, though he expressed an opinion with regard to one of the findings, he did deal with the case on the footing that the findings of the jury meant what I have interpreted them to mean. There is no cross-appeal asking the court to set aside the findings, and this court must, therefore, dispose of this appeal on the findings as they stand. The ground on which the learned judge decided in favour of the defendants was that the entire transaction was illegal, and, that being so, the plaintiff was not entitled to any relief. The learned judge appears to have relied on the Assurance Companies Act, 1909, in support of his view that the transaction was now penalised by statute. In my opinion, this statute cannot be invoked to defeat the claim of the plaintiff. The statute applies to assurance companies, and lays down rules as to what they may do and what they may not do, and provides for penalties in cases of default, but it does not, so far as the present case is concerned, put the plaintiff in a worse position than she was in under the Life Assurance Act, 1774. This statute certainly applied to these policies if the transaction as between the plaintiff and the defendant company is to be treated as a reissue, or a fresh issue, of the policies to her; and the effect of the illegality of the transaction as a result of that statute has been considered in several cases.

In *Evanson v. Crooks* (3) HAMILTON, J., held that a plea of the statute was a complete answer to a claim for the return of premiums in the absence of fraud. In a case where fraud is proved, the authorities are, in my opinion, clear that the case cannot be considered as one of *par delictum*, and that an innocent plaintiff is entitled to recover. SCRUTTON, J., commented on the difficulty of understanding *British Workman's Assurance Co., Ltd. v. Cunliffe* (1) and *Harse v. Pearl Life Insurance Co., Ltd.* (2). As reported, it is impossible to understand them, except on the assumption that different views were taken of the justices' findings in *Cunliffe's Case* (1); and this is only one of the many instances which occur of the confusion which is created by the reporting of decisions which turn only upon the particular facts of the particular case, and involve no general rule of law. It appears to me, when the judgment of VAUGHAN WILLIAMS, L.J., in *Cunliffe's Case* (1) is carefully looked at, that he read the findings of the justices in that case as amounting to a finding of fraud, for he says that the agent knew the law and knew that the respondent had no insurable interest, and yet he assured the respondent that the policy would be all right, which the justices interpreted as meaning "that the policy would be valid and effective in law." This, I think, must have been the view of COLLINS, M.R., in *Harse v. Pearl Life Assurance Co., Ltd.* (2) where he says ([1904] 1 K.B. at p. 563) that the court affirmed the decision that the money could be recovered expressly on the ground that the statement on which the assured acted was fraudulently made. Whether any reasonable explanation of the conflicting views of the justices' findings in *Cunliffe's Case* (1) can be given seems to me to be immaterial in the present case. Given fraud, the authorities seem to me to be all one way—namely, that an innocent plaintiff is entitled to say that he is not in *pari delicto* with the defendant, whose agent by a false and fraudulent representation induced him to believe that the transaction was an innocent transaction, and one which was enforceable in law. On these grounds, in my opinion, the appellant is entitled to succeed.

Another ground was mentioned during the argument which seems open to the plaintiff, though not referred to by the learned judge in his judgment. The policies were all dropped policies at the time the plaintiff was induced to take them, as the defendants' agent must have known. Even if still in force, they could not by the conditions embodied in them have been validly transferred to the plaintiff so as to give her a title to them—this also the defendants' agent must have known. The

A defendant company did not seek to justify the action of one of these agents, and, indeed, it was impossible to do so, but I cannot part with this case without expressing the hope that the defendant company will in future exercise more care in the issuing of duplicate policies than they appear to have exercised in the present case.

Appeal allowed.

B Solicitors: *Smith, Rundell & Dods*, for *J. R. Snape*, Maesteg, Glamorgan; *J. Tickle & Co.*

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

C

H. O. BRANDT & CO. v. H. N. MORRIS & CO., LTD.

[COURT OF APPEAL (Viscount Reading, C.J., Scrutton, L.J., and Neville, J.), July 20, 1917]

D

[*Reported* [1917] 2 K.B. 784; 87 L.J.K.B. 101; 117 L.T. 196]

Agent—Personal liability—Purchase of goods—"To A from B for and on behalf of C. We have this day bought . . ."—*Signature by B—Liability of B—Evidence to explain circumstances of contract—Admissibility.*

Sale of Goods—Export licence—F.o.b. contract—Duty of buyers to obtain licence.

E

A bought note addressed to the sellers, H.N.M. & Co., was in the following terms: "From Messrs. H.O.B. & Co. [the buyers] for and on behalf of Messrs. S.B., Rhode Island, United States. We have this day bought from you 60 tons pure aniline oil." The note was signed: "H.O.B. & Co." The dates agreed for deliveries were all after the outbreak of war between England and Germany in 1914 and there was evidence that during war-time the destination of goods must be made known to the authorities and that export licences must be obtained. The sellers having failed to deliver some of the oil, the buyers claimed damages for breach of contract.

F

Held: (NEVILLE, J., dissenting) (i) the words in the bought note "for and on behalf of Messrs. S.B., etc." were not sufficient to displace the strong *prima facie* presumption that a person who signs in his own name a statement that he has bought goods is personally liable to carry out the purchase; evidence of the circumstances surrounding the contract was admissible, and in view of that evidence the words were to be treated as if they were a memorandum to the effect that the destination of the goods was the United States: (ii) (by the whole court) the contract being *f.o.b.*, the obligation to get an export licence was on the buyers and not on the sellers.

G

H

Notes. Explained: *Brightman v. Tate*, [1919] 1 K.B. 463. Distinguished: *M. & W. Hardy & Co., Inc. v. A. W. Pound & Co.*, [1955] 1 All E.R. 666. Considered: *Rusholme and Bolton and Roberts Hadfield, Ltd v. S. G. Read & Co. (London), Ltd.*, [1955] 1 All E.R. 180. Referred to: *Ariadne Steamship Co. v. McKelvie*, [1922] 1 K.B. 518.

I

As to the liability of an agent on a contract, and his right of enforcement, see 1 HALSBURY'S LAWS (3rd Edn.) 228-231, 236, 237, and as to *f.o.b.* contracts, see *ibid.*, vol. 34, pp. 175-178. For cases see 1 DIGEST (Repl.) 717 et seq., and 39 DIGEST 558, 559.

Cases referred to:

- (1) *Gadd v. Houghton* (1876), 1 Ex.D. 357; 46 L.J.Q.B. 71; 35 L.T. 222; 24 W.R. 975, C.A.; 1 Digest (Repl.) 730, 2746.
- (2) *Thomson v. Davenport*, *Fynney v. Pontigny*, *Davenport v. Thomson* (1829), 9 B. & C. 78; Dan. & Ll. 278; 4 Man. & Ry.K.B. 110; 7 L.J.O.S.K.B. 134; 109 E.R. 30; 1 Digest (Repl.) 669, 2352.

- (3) *Cooke v. Wilson* (1856), 1 C.B.N.S. 153; 26 L.J.C.P. 15; 28 L.T.O.S. 103; 2 Jur.N.S. 1094; 5 W.R. 24; 140 E.R. 65; 1 Digest (Repl.) 729, 2737.
- (4) *Re Anglo-Russian Merchant Traders, Ltd., and John Batt & Co. (London), Ltd.*, [1917] 2 K.B. 679; 86 L.J.K.B. 1360; 116 L.T. 805; 61 Sol. Jo. 591, C.A.; 12 Digest (Repl.) 451, 3395.
- (5) *Paice v. Walker* (1870), L.R. 5 Exch. 173; 39 L.J.Ex. 109; 22 L.T. 547; 18 W.R. 789; 1 Digest (Repl.) 730, 2745.

Appeal by the defendants from a decision of A. T. LAWRENCE, J., in an action for damages for breach of contract.

Cyril Atkinson, K.C., and *J. D. Crawford* for the defendants.

Langdon, K.C., and *Acton* for the plaintiffs.

VISCOUNT READING, C.J.—The plaintiffs brought this action for breach of contract by the defendants to deliver the balance of a quantity of 60 tons of aniline oil. The action was tried before A. T. LAWRENCE, J., who gave judgment for the plaintiffs for £3,118 damages. The defendants ask that judgment be entered for them, and specially on three grounds: (i) that the plaintiffs were not contracting parties and cannot maintain this action; (ii) that there is no breach of the contract by the defendants, because the government prohibition of the export of aniline oil has had the effect of suspending the operation of the contract; and (iii) that the damages were assessed at the wrong period. The defendants, with two other firms, appear to be the sole manufacturers of aniline oil in this country. When the war broke out there was an undoubted desire to manufacture aniline oil for the requirements of this country to a larger extent than before, it having been found that Germany was supplying many of the requirements of British consumers for manufacturing and other purposes. There was also a demand for aniline oil from Great Britain for the United States, and a correspondence ensued between the plaintiffs, who are merchants, and the defendants, who are chemical manufacturers, and also, I understand, merchants.

The contract is contained in the documents, and the first question that arises upon it is: Who are the contracting parties? Counsel for the defendants contended, both in the court below and here, that the plaintiffs were the declared agents under the contract for Sayles Bleacheries of the United States, who became the purchasers and the contracting parties with the defendants. If that contention is right, this action fails. In my opinion, the question is by no means free from difficulty, but, on the whole, I have arrived at the conclusion that this ground of appeal fails. I think we are only entitled to look at the documents of contract and what are called the surrounding circumstances. The contract was made after war had broken out and at a period when, according to the evidence, it was required of a person entering into a contract to state the destination of the goods in order to show where the goods were to be sent. Accordingly, the plaintiffs had to declare where the goods had to go. That is the evidence on behalf of the plaintiffs. The documents consist of a sale note and a bought note and a letter correcting one exception to a printed clause, inserted by Messrs. Brandt, which I discard as immaterial for this purpose. The bought note contains the statement: "H. N. Morris & Co., Ltd., Gorton Brook Chemical Works, Manchester. From Messrs. H. O. Brandt & Co., Manchester, for and on behalf of Messrs. Sayles Bleacheries, Rhode Island, United States." Then in the body of the document: "We have this day bought from you 60 tons pure aniline oil," and it is signed "Brandt & Co." The sale note is in the same form *mutatis mutandis*.

The argument is that Brandt & Co. must be regarded there as if they had signed this contract for and on behalf of Sayles Bleacheries of the United States. Reliance was placed by the defendants upon *Gadd v. Houghton* (1) to support his view. He pressed us with this decision, and argued with great ability and force that we must conclude that this case was within the decision of *Gadd v. Houghton* (1). In *Gadd v. Houghton* (1) the words in question were: "We have this day sold to you on

account of James Morand & Co., Valencia." Then there was the signature without addition. The court held that the words "on account of James Morand & Co." showed intention to make the foreign principals and not the brokers liable, and that the brokers were not liable upon the contract. In the present case there is a difference, because the body of the contract does not contain the words. It does not follow for that reason that it must not be read as if Brandt & Co. were contracting for and on behalf of Sayles, but I think one must have regard to the principle of law which is stated by MELLISH, L.J., in *Gadd v. Houghton* (1). He says (1 Ex.D. at p. 360):

"The language used must be interpreted according to its plain and natural meaning. As is said in the note to *Thomson v. Davenport* (2), when a man signs a contract in his own name he is *primâ facie* a contracting party and liable, and there must be something very strong on the face of the instrument to show that the liability does not attach to him. But if there are plain words to show that he is contracting on behalf of somebody else, why are we not to give effect to them?"

MELLISH, L.J., goes on to say that they must give effect to them.

I base my decision in this case, and on this point, upon the language there used by MELLISH, L.J. *Primâ facie* when a man signs a document in his own name and states in the document: "I have this day bought of you," he is the person liable under the contract. If he is in fact making the contract on behalf of a foreign principal and that is known to the other contracting party, it is an element to be taken into consideration, but I think nothing more than that, in determining whether or not the signatory to the contract intended to bind himself or his foreign principal. I come to the conclusion that the words which are contained in the contract from Messrs. Brandt, "for and on behalf of Sayles Bleacheries of the United States," are to be treated as if they were a memorandum to the effect that this contract is for the destination of Sayles Bleacheries, of the United States. Counsel for the defendants pressed us, and at one time I was much impressed with his argument, that these are not very apt words to describe the destination of the goods, but I am not convinced. At this time what the contracting merchants had in mind was the purchaser of the goods—that they had to show to whom and to what country, and, it may be, the place, where the goods were destined. That is the evidence, and I think it is a circumstance which I am entitled to take into account, and although again and again it may be said that the statement that they are acting "for and on behalf of" shows that they are acting as agents for the American principal, it does not, to my mind, get rid of the *primâ facie* presumption, and, they having signed the contract in their own name, they have not taken sufficient precaution, if they did not intend to bind themselves, to exclude themselves from liability as contracting parties, and to make plain that the foreign principal was the contracting party. For this reason I come to the conclusion that the first point fails.

As to the second and third points, it is necessary to look a little more closely into the contract. [His LORDSHIP reviewed the evidence relating to the deliveries, and continued:] Upon the facts I feel bound to agree with the learned judge. I do not think that we ought to dissent from his findings of fact. I am, however, not able to agree with the learned judge's view that the duty was upon the defendants to apply for a licence. They had contracted to sell and put on board the vessel—not the vessel selected by them, but the vessel selected by the buyers. It was the duty of the buyers to find the ship and to give all the information which was necessary in order to get the licence. It is very noteworthy that, apart from the present case, or it may be the special circumstances such as the war and the export of oil of this character, when there is a prohibition and a licence has to be obtained, the material facts are in the possession of the buyer, not in the possession of the seller. All that the seller knows is that he has sold the goods to his buyer. What his buyer is going to do with them is immaterial to him. If he has

undertaken to put them f.o.b. that has no reference to any particular vessel, and it may even be not a vessel going to any particular destination. But I have come to the conclusion that there was no such duty upon the defendants as the learned judge found, with the result, therefore, that there is no breach by them in not delivering in December and January.

The only default, therefore, is the non-delivery of the 10 tons in October and November. The time for assessing the damages according to the law would be at the date of delivery of each monthly quantity, but there is sufficient upon the documents and correspondence to warrant the inference, in my opinion, that the defendants were asking the plaintiffs for further time to make their delivery and that they were in default. That being so, I do not think it is open to them, when they are sued for damages and have been allowed a considerable period in order to make good their default, to say the damages must be assessed at the end of October or the end of November, 1914, notwithstanding that they have been allowed a very considerable time for delivery, and with the market rising very considerably against the buyer. I think the learned judge's view in regard to this was right. I cannot, however, accept the date of March, 1916, because on the correspondence I am satisfied that for several months before that the defendants had made it quite plain that they could not do anything further, and, although they were quite willing, they were not able, and would not be able, because the government would not grant licences. [His LORDSHIP said that the plaintiffs were only entitled to recover in respect of ten tons, and the appeal must be allowed by reducing the damages.] The plaintiffs were entitled to succeed in the court below, and I think that they must have their costs in the court below, but in this court the result must be that, as neither has been completely successful, there will be no costs of the appeal.

SCRUTTON, L.J.—This is one of the class of case which I think most judges, and which certainly I, always approach with considerable apprehension. It is a case of a complicated instalment contract which has not worked as the parties intended it to work when it was put on paper. Such a case can only be determined by a very careful following month by month, date by date, and delivery by delivery under the contract, and in considering the effects at each point of such principles of law as have been laid down for the consideration of such cases.

The first point taken can be dealt with shortly, but it is of importance to the case, for, if it is right, there is an end to the case. The defendants say that this action is brought by Messrs. Brandt & Co., and it should have been brought by Messrs. Sayles Bleacheries of the United States. They say that the wrong party has brought the action and there must be judgment for the defendants. The contract in question runs in this way: "We have this day bought from you . . . aniline oil, H. O. Brandt & Co.," with a heading from or to, as the case may be, on the bought or sold note, "for and on behalf of Sayles Bleacheries, Rhode Island, United States." The cases in which it has been discussed whether or not an agent is personally liable on a contract are innumerable, but there appears to me to be one careful principle to bear in mind, which has been stated for the last fifty years at least in approaching such cases. In *Cooke v. Wilson* (3), in 1856, CRESSWELL, J., said this (1 C.B.N.S. at p. 162):

"Primâ facie when a man signs a contract in his own name he is a contracting party, and there must be something very strong on the face of the contract to prevent that liability from attaching to him."

CROWDER, J., in the same case says (*ibid.* at p. 164):

"I have always understood the law to be that if a man signs a written contract he is to be considered as the contracting party unless it clearly appears that he executes it as agent only."

When one comes to what I dare say is the leading case of *Gadd v. Houghton* (1), one finds MELLISH, L.J., stating the same principle (1 Ex.D. at p. 360):

"As is said in the note to *Thomson v. Davenport* (2), when a man signs a contract in his own name he is *prima facie* a contracting party and liable, and there must be something very strong on the face of the instrument to show that the liability does not attach to him."

When I find in this contract the words "We have this day bought from you," and the signature "H. O. Brandt," in my view, something very strong is wanted to show that "we, H. O. Brandt," have not personally contracted. In *Gadd v. Houghton* (1) there was in the body of the document the statement: "We have this day sold to you on account of James Moran & Co., Valencia," and the Court of Appeal held that a contract worded in that form was enough to show that the person who signed in his own name, but said in the body of the contract that he sold on account of Moran & Co., was not making himself personally liable. In the present case there is no such statement in the body of the document. One note is addressed to Brandt & Co. for and on behalf of Sayles, and the bought note is said to come from H. O. Brandt for and on behalf of Sayles, but in the body of the document, "We have this day bought" or "sold" contains no qualification whatever. In my view, the fact that there is this heading to the effective part of the contract is not sufficient to displace the strong *prima facie* presumption that a man who says he has bought, and signs in his own name, is personally contracting. In coming to that conclusion I am aided by two facts—the one that it was important in time of war that it should be known what the destination of the goods was, and, if it appeared on the face of the document that the person who was ultimately going to get the goods was Sayles Bleacheries, Rhode Island, that was a fact which was important to the transactions being carried out, and explains why "for and on behalf of" a person in America should be put in the contract. The other fact which I take into account is that Sayles Bleacheries are foreigners, and, while I think that one cannot attach at the present day the importance that used to be attached forty or fifty years ago to the fact that the supposed principal was a foreigner, I think it is still a matter to be taken into account in deciding whether the person said to be an English agent has or has not made himself personally liable. For these reasons I have come to the conclusion that there is nothing in this contract to displace the strong *prima facie* presumption that a man who signs in his own name a statement that he has bought is personally liable to carry out the purchase, and I, therefore, think that the first point taken should be decided against the defendants.

One next comes to the less attractive question of working out the instalment contract. There is one question of general importance which I desire to deal with first. The contract is: "We have this day bought from you 60 tons pure aniline oil, f.o.b. Manchester." At the time that contract was made there was no prohibition on the export of aniline oil. That is some distinction from the case which has already been decided in this court (*Anglo-Russian Merchant Traders, Ltd. v. John Batt & Co. (London), Ltd.* (4)), in which a contract was made at the time when there was an existing prohibition, and a question arose whose duty it was to provide the licences, exportation not being possible without a licence. In that case, which was a c.i.f. contract, BAILHACHE, J., had held that a man who contracted to sell at a time when there was a prohibition of export except by licence undertook to get the licence or pay damages. This court held that, as there was a finding of fact that the seller had done all in his power to get a licence, at any rate his obligation was not higher than that, and he was not liable. In the present case I think it becomes necessary to go further, and to decide whether in this f.o.b. contract the obligation to get a licence in case there should, after the making of the contract, be a prohibition against export except with a licence, lies upon the seller or the buyer. In my view it lies upon the buyer. The buyer must provide an effective ship—that is to say, a ship that can legally, and as it is bound to by contract, carry the goods. When the buyer has done that, the seller may ship the goods he has contracted to ship. If that is so, the licence to export is a buyer's matter. It is the sending of a ship out of the country after the goods are put on

board, and it is not made a seller's matter by a statutory prohibition of the goods being put on the quay if their export is prohibited. Putting on the quay is only subsidiary to the exporting, which is the real matter of the licence. In my view, therefore, on the general question in a contract of this description, it is for the buyer to get the licence. It is said that in this case on the correspondence (though, as I must now assume, the buyer should by law and by contract get the licence) the seller has taken upon himself the burden of doing so. I have come to the conclusion that there is nothing in the correspondence which supports any legal way of putting such a burden upon the seller.

[HIS LORDSHIP then dealt with the evidence relating to the delivery of the various instalments, and concluded:] In the result, therefore, it appears to me that, just as the September quantities did, the December and January quantities drop out of the case, and the claim is left for October and November at the figure per pound fixed by A. T. LAWRENCE, J.

NEVILLE, J.—I have had the misfortune to differ from the other members of the court on the first point—namely, whether the plaintiffs are entitled to sue on the contract. I admit that where a man signs in his own name a document he is *primâ facie* liable. It is conceded, I understand, here that if the words used, "For and on behalf of Messrs. Sayles," had followed the signature there would be no question that there was not a contract with the plaintiffs as principals. As I understand *Gadd v. Houghton* (1), what it lays down is that the statement of the character in which a contracting party is contracting may be expressed with equal efficacy in words to be found in the body of the document as in words attached to the signature. The words in the present case, in my opinion, form part of the contract. I have considered that point as carefully as I can, and, having regard to the documents themselves, I confess I can come to no other conclusion but that they do form part of the contract. If they form part of the contract, then, in my opinion, they are to be found in the body of the contract in the sense in which these words are used in *Gadd v. Houghton* (1). In my opinion, there is no distinction in this regard to be made in the case of a foreign principal and a home principal. In *Gadd v. Houghton* (1) the alleged principal was a foreign trader. I rather gather that I should not have found myself in isolation in this case were it not for the fact that during the present war there is an obligation to disclose the destination of goods. With regard to that it seems to me that, although I agree that evidence of the fact is admissible as a surrounding circumstance in which the contract was made, there is nothing in it which entitles me to read plain words in other than their plain meaning. In my opinion, here the words used are perfectly plain. It may well be that they may serve a double purpose, both to give the required information and to show the character in which one of the parties is contracting. In my opinion, that would not justify me in depriving the words of the plain meaning which to my mind they undoubtedly bear. Before I leave the case I wish to express my surprise at finding in the books such a subtle discrimination attributed to the commercial mind as to draw distinctions between the words "as agents for," "on account of," and "on behalf of." To my less sophisticated intelligence in regard to contracts each of those phrases bears precisely the same meaning. With regard to the note in *BENJAMIN ON SALES* (5th Edn.) p. 257n., in which it is said that *Paice v. Walker* (5) is now a very doubtful authority—no doubt after the dictum of JAMES, L.J., in *Gadd v. Houghton* (1)—I wish to express my opinion that at the present time, in view of *Gadd v. Houghton* (1), it is of no authority at all. With regard to the rest of the case, I have nothing to add to what the other members of the court have said, and I agree with them.

Appeal allowed in part.

Solicitors: Pritchard, Englefield & Co., for Boote, Edgar & Co., Manchester; Grundy, Kershaw & Co.

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

Re FIREPROOF DOORS, LTD. UMNEY v. FIREPROOF DOORS, LTD.

[CHANCERY DIVISION (Astbury, J.), March 28, 29, 1916]

[Reported [1916] 2 Ch. 142; 85 L.J.Ch. 444; 114 L.T. 994;
60 Sol. Jo. 513]

Company—Debenture—Stamping—Irregular stamping—Attempted ratification by shareholders—Agreement to issue debenture—Equitable debenture.

By an article of a company: "The seal of the company shall not be affixed to any instrument except by the authority of a resolution of the board of directors, and in the presence of at least two directors and of the secretary. . . ." In breach of this article debentures were sealed in the presence of only one director and the secretary. At a subsequent meeting the shareholders purported to ratify the debentures, and they were also signed by a second director and re-sealed in the presence of two directors and the secretary.

Held: while what was done could not amount to ratification of the sealing of the debentures, nor to their re-issue as new and valid debentures, it appeared that the company intended to create the debentures, as in proper circumstances they had power to do, and that the shareholders knew that they had received the debenture holder's money and had undertaken to give her security for it, and, therefore, the improperly sealed documents were evidence of an agreement to issue debentures to the debenture holder who, consequently, had equitable debentures as against the company.

Company—Directors—Quorum—Quorum of one director—Delegation of duties—Delegation to one director.

It may be that one director cannot form a quorum at a board meeting, but where a company has an article, such as reg. 102 of Table A (in Sched. I to the Companies Act, 1948) which provides that the directors may "delegate any of their powers to committees consisting of such member or members of their body as they think fit", that delegation may be to one director.

Notes. Referred to: *J. C. Houghton & Co. v. Northard, Lowe and Wills, Ltd.*, [1927] 1 K.B. 246.

As to quorum of and delegation by directors and to debentures, see 6 HALSBURY'S LAWS (3rd Edn.) 60, 61, 296, 297, 431, 432, 457 et seq. For cases see 9 DIGEST (Repl.) 505, 506, 544–547, and 10 DIGEST (Repl.) 763 et seq. For Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Cases referred to:

- (1) *York Tramways Co. v. Willows* (1882), 8 Q.B.D. 685; 51 L.J.Q.B. 257; 46 L.T. 296; 30 W.R. 624, C.A.; 9 Digest (Repl.) 453, 2973.
- (2) *County of Gloucester Bank v. Rudry Merthyr Steam and House Coal Colliery Co.*, [1895] 1 Ch. 629; 64 L.J.Ch. 451; 72 L.T. 375; 43 W.R. 486; 39 Sol. Jo. 331; 2 Mans. 223; 12 R. 183, C.A.; 9 Digest (Repl.) 545, 3589.
- (3) *Re Rotherham Alum and Chemical Co.* (1883), 25 Ch.D. 103; 53 L.J.Ch. 290; 50 L.T. 219; sub nom. *Re Rotherham Alum and Chemical Co., Ltd., Ex parte Peace & Co.*, 32 W.R. 181, C.A.; 9 Digest (Repl.) 680, 4490.
- (4) *Re North Hallenbeagle Mining Co., Knight's Case* (1867), 2 Ch. App. 321; 36 L.J.Ch. 317; 15 L.T. 546; 15 W.R. 294, L.J.J.; 9 Digest (Repl.) 544, 3581.
- (5) *Biggerstaff v. Rowatt's Wharf, Ltd., Howard v. Rowatt's Wharf, Ltd.*, [1896] 2 Ch. 93; 65 L.J.Ch. 536; 74 L.T. 473; 44 W.R. 536, C.A.; 9 Digest (Repl.) 675, 4458.
- (6) *Re Strand Music Hall Co.* (1865), 3 De G.J. & Sm. 147; 35 Beav. 153, 163; 18 L.T. 177; 14 W.R. 6; 46 E.R. 594, L.J.J.; 10 Digest (Repl.) 751, 4886.
- (7) *Ross v. Army and Navy Hotel Co.* (1886), 34 Ch.D. 43; 55 L.T. 472; 35 W.R. 40; 2 T.L.R. 907, C.A.; 10 Digest (Repl.) 785, 5106.

- (8) *Parker v. Taswell* (1858), 2 De G. & J. 559; 27 L.J.Ch. 812; 31 L.T.O.S. 226; 22 J.P. 432; 4 Jur.N.S. 1006; 6 W.R. 608; 44 E.R. 1106, L.C.; 80 Digest (Repl.) 437, 800.

Also referred to in argument:

- Re Queensland Land and Coal Co., Davis v. Martin*, [1894] 3 Ch. 181; 63 L.J.Ch. 810; 71 L.T. 115; 42 W.R. 600; 10 T.L.R. 550; 38 Sol. Jo. 579; 1 Mans. 355; 8 R. 476; 10 Digest (Repl.) 762, 4944.
- Pegge v. Neath District Tramways Co.*, [1898] 1 Ch. 183; 67 L.J.Ch. 17; 77 L.T. 550; 46 W.R. 243; 14 T.L.R. 62; 42 Sol. Jo. 66; 10 Digest (Repl.) 786, 5113.
- Re Tilbury Portland Cement Co., Ltd.* (1893), 62 L.J.Ch. 814; 69 L.T. 495; 37 Sol. Jo. 683; 3 R. 709; 10 Digest (Repl.) 751, 4890.
- Zimble v. Abrahams*, [1903] 1 K.B. 577; 72 L.J.K.B. 103; 88 L.T. 46; 51 W.R. 343; 19 T.L.R. 189, C.A.; 30 Digest (Repl.) 460, 1015.
- Rolland v. Hart* (1871), 6 Ch. App. 678; 40 L.J.Ch. 701; 25 L.T. 191; 19 W.R. 962, L.C.; 1 Digest (Repl.) 709, 2602.
- Sharp v. Dawes* (1876), 2 Q.B.D. 26; 46 L.J.Q.B. 104; 36 L.T. 188; 25 W.R. 66, C.A.; 10 Digest (Repl.) 1196, 8371.
- Boschoek Proprietary Co., Ltd. v. Fuke*, [1906] 1 Ch. 148; 75 L.J.Ch. 261; 94 L.T. 398; 54 W.R. 359; 22 T.L.R. 196; 50 Sol. Jo. 170; 13 Mans. 100; 9 Digest (Repl.) 465, 3042.
- Re Harrogate Estates, Ltd.*, [1903] 1 Ch. 498; 72 L.J.Ch. 313; 88 L.T. 82; 51 W.R. 334; 19 T.L.R. 246; 47 Sol. Jo. 298; 10 Mans. 113; 10 Digest (Repl.) 813, 5274.
- Re Tavistock Iron Works Co., Lyster's Case* (1867), L.R. 4 Eq. 233; 36 L.J.Ch. 616; 16 L.T. 824; 31 J.P. 726; 15 W.R. 1007; 9 Digest (Repl.) 545, 3586.

Debenture Holder's Action brought by the plaintiff, Mrs. Anna Marguerite Umney, on behalf of herself and all other debenture holders against the defendant company, which was in liquidation and appeared by the liquidator, for a declaration that the debentures might be enforced, by sale or otherwise, for payment of principal, interest, and costs, and for an account.

The defendant company, Fireproof Doors, Ltd., was incorporated on Feb. 3, 1908, for the purpose (inter alia) of acquiring and working the business of manufacturers of fireproof doors and of exploiting a patent belonging to one Paul Schwarze, and other businesses described in the memorandum of association. The memorandum of association gave power to borrow or raise money on mortgages, debentures, or debenture stock, and to charge all or any of the company's property or assets, present or future, including the company's uncalled capital. No articles of association were registered, and, therefore, the regulations of the company were the regulations contained in Table A in the first schedule to the Companies Act, 1862 [see now Companies Act, 1948, Sched. 1]. On Feb. 19, 1908, a meeting of the signatories to the memorandum of association of the company was held, and Herbert Williams Umney, the husband of the plaintiff, and Paul Schwarze were appointed to be directors of the company, and they were the only directors of the company from Feb. 19, 1908, until May 2, 1912, when Herbert C. Wright was appointed an additional director. This meeting of signatories determined that a quorum of directors should be one, as it was intended that H. W. Umney should act as managing director of the business in England, P. Schwarze being resident in Germany, and H. W. Umney was appointed managing director for one year. On April 30, 1908, H. W. Umney and Schwarze met in Germany, and resolutions were passed by them acting as a board with regard to altering previous arrangements as to the company's capital, but there was nothing in the minutes of such resolutions with reference to a quorum or as to H. W. Umney continuing to act as managing director of the business in London, though the evidence was that these matters were discussed and that Schwarze agreed to what had been done by H. W. Umney, and arranged with him that he should continue to be sole manager in future as in the past of the company's business in England. From that time until July, 1913,

when the number of directors was raised from three to seven, the business in England was carried on entirely by H. W. Umney.

The relevant articles of association were art. 76 [see now Table A, 1948, reg. 113] which provided that:

"The seal of the company shall not be affixed to any instrument except by the authority of a resolution of the board of directors, and in the presence of at least two directors and of the secretary or such other person as the directors may appoint for the purpose; and those two directors and secretary or other person as aforesaid shall sign every instrument to which the seal of the company is so affixed in their presence."

Article 88 [reg. 99 of 1948] :

"The quorum necessary for the transaction of the business of the directors may be fixed by the directors, and unless so fixed shall (when the number of directors exceeds three) be three."

Article 91 [reg. 102 of 1948] :

"The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit; any committee so formed shall in the exercise of the powers so delegated conform to any regulations that may be imposed on them by the directors."

Article 94 [reg. 105 of 1948] provided that:

"All acts done by any meeting of the directors or of a committee of directors, or by any person acting as a director, shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director."

At a general meeting held on Dec. 21, 1911, it was proposed to issue a series of debentures for £4,000. This meeting was adjourned from time to time till Feb. 19, 1912, when the shareholders in general meeting resolved:

"That the directors having reported the needs of raising money, the debentures put before the meeting be approved, but that the matter be left to the board to raise more capital on such terms as to the board might seem fitting."

Subsequently £4,000 was borrowed by the issue of a series of mortgage debentures, which were duly registered as a series in accordance with s. 93 (3) of the Companies (Consolidation) Act, 1908 [see Companies Act, 1948, s. 95 (8)]. H. W. Umney alone acting as a committee purported to authorise at various dates the issue and the sealing of the debentures Nos. 1-20 and Nos. 22-27, which included the five debentures held by the plaintiff, and the seal was affixed to such debentures in the presence of H. W. Umney and the secretary of the company only, and they were signed by H. W. Umney and the secretary only. These mortgage debentures were each for the sum of £100 and were all in the same form, and by each of such debentures the company agreed to pay the principal sum secured thereby on July 1, 1919, and in the meantime to pay interest thereon at the rate of 10 per cent. per annum by equal half-yearly payments on July 1 and Jan. 1 in every year. The company charged with the payment of such principal and interest its undertaking and goodwill and all its goods, chattels, effects, and property of every description, both present and future, including its uncalled capital. Each of such debentures was described as one of a series of forty debentures for securing the principal sum of £100, and was stated to be issued upon condition (inter alia) that the debentures should rank *pari passu* as a first charge without any preference or priority over one another, and that the charge so created should be a floating security, but so that the company should not be at liberty to create any mortgage or charge in priority to or *pari passu* with the debentures. There was the further

condition that if default were made in payment of interest for two months the holder of the debenture could call in the principal, and thereupon the charge should become immediately enforceable. The plaintiff was the registered holder of five of the said debentures, of which three were dated Mar. 30, 1912, and two were dated Apr. 19, 1912, for principal sums amounting to £500. In July, 1913, in pursuance of a special resolution of the company duly passed, the number of directors was raised from three to seven. On Jan. 19, 1914, a resolution was passed by the directors that two directors should form a quorum, and the remaining debentures, Nos. 28-35 and 36-41, were issued and sealed at different meetings of two or more directors, and were signed by and sealed in the presence of two directors and the secretary of the company. On Dec. 22, 1913, at a board meeting at which three directors were present, they forming a sufficient quorum, a resolution was passed that the interest which was then overdue on the debentures should be paid as soon as possible. On Jan. 27, 1914, the question having been raised in the meantime that the sealing of the debentures was insufficient and invalid by reason of one director only having been a witness thereto, at a general meeting of shareholders it was unanimously resolved that the affixing of the seal to such debentures attested by one director and the secretary only be ratified and approved, and the signature of P. Schwarze was obtained at this time to the debentures. Default was made in payment of the debenture interest due on July 1, 1914, and of every half-year's interest subsequently becoming due. The principal money was called in and payment demanded without success. On Oct. 15, 1915, a receiver and manager was appointed, and on Nov. 1, 1915, an extraordinary resolution was passed to wind-up the company.

The plaintiff alleged that at the meeting in Germany between H. W. Umney and P. Schwarze there was a proper resolution by them that at all future meetings of the board one director should constitute a quorum, and that, therefore, the issue and sealing of the twenty-six debentures were duly authorised by H. W. Umney alone, and, further, that the regulations of the company did not require that the debentures should be under seal. Alternatively, the plaintiff said that if the resolutions authorising such issue and sealing were invalid by reason of there being no proper quorum, the plaintiff and the other holders of such debentures had no knowledge or notice of the fact that no quorum was present at the meetings at which such resolutions were passed; that at the general meeting of the company duly convened on Jan. 27, 1914, a resolution was passed unanimously that the issue of all the debentures Nos. 1-20 and 22-27 should be ratified and confirmed, and that, to render such debentures regular upon the face of them the signature of an additional director should be affixed to each of them, and accordingly all such debentures were signed by P. Schwarze; and that the company agreed with the respective holders of the debentures in consideration of £100 paid by them to issue to them valid debentures and paid interest on such debentures to Jan. 1, 1914, and, therefore, was estopped from denying the validity of the same. By their defence the company pleaded that there had been no resolution of the board of directors authorising the issue of the twenty-six debentures ever passed, and that no resolution of the board of directors that the seal of the company should be affixed was ever passed. Further, that the seal of the company was not affixed to such debentures in the manner required by art. 76 of the articles of association. On Oct. 15, 1915, the plaintiff issued the writ in this action.

Frank Russell, K.C., and E. F. Spence for the plaintiff.

Cunliffe, K.C., and C. A. Bennett for the defendant company and the liquidator.

ASTBURY, J.—This is a debenture-holders' action brought by Mrs. Umney on behalf of herself and all other debenture-holders against the defendant company, which is in liquidation and appears by the liquidator. Shortly after the action was brought the plaintiff applied for the appointment of a receiver and manager, and Mr. John Baker was appointed in the presence and with the consent of the defendant company. By the defence the validity of the plaintiff's debentures is put in

A issue on a number of purely technical grounds. She holds five debentures of £100 each, for which she has paid £500. Three of these debentures are dated Mar. 30, 1912, and the remaining two bear date Apr. 19, 1912, and they were duly registered as being debentures of a series on Apr. 19, 1912. Put shortly, the defence is, first, that Mrs. Umney employed her husband as her agent in connection with the taking of her debentures, that he was managing director of the company, and, therefore, through him she had notice of all irregularities. These irregularities were: (i) that no quorum was constituted when it was determined that debentures should be issued; (ii) that no quorum was present when it was determined that the debentures should be sealed; and (iii) that the debentures were not properly sealed, as they were sealed in the presence only of one director and the secretary instead of in the presence of two directors and the secretary. A number of points were raised subsidiary to those I have mentioned.

C The signatories at the meeting of Feb. 19, 1908, purported to determine that a quorum of directors should consist of one although they had no power to do so. The evidence has satisfied me that at the meeting on April 30, 1908, at which Schwarze and Umney were present in Germany, Umney produced the minute book and the question of the quorum consisting of one was discussed, and the matters of the company's business were gone into, Schwarze agreeing to what had been done. Schwarze arranged with Umney that he (Umney) should continue to be sole manager in future as in the past of the company's business in England. From that time it was carried on in England entirely by Umney as either the delegate of the board or as constituting a quorum, the seal of the company being often affixed in his presence and that of the secretary only. The obligation of the issue of the debentures was recognised at the board meeting of Dec. 22, 1913, at which a sufficient quorum was present, when it was resolved that the interest which was then overdue on the debentures should be paid as soon as possible, and at the general meeting of shareholders on Jan. 27, 1914, it was resolved that the affixing of the seal to such debentures attested by one director and the secretary only be ratified and approved. As a matter of fact the signature of Schwarze was obtained at this time to the debentures, but that was obviously not sufficient to create a reissue or remedy the insufficient sealing and make the debentures valid.

F Under these circumstances the question is: Was there sufficient irregularity to prevent the debentures being valid, the cash for them having been paid bona fide? The articles of association which are relevant to this issue are art. 76, which is part of the constitution of this company, and was not complied with, with the result that the sealing of these debentures was ineffectual and void, arts. 88, 91 and 94. First, as to the defence that Umney acted as agent of his wife, the plaintiff, and that, therefore, she must be taken to have had notice of the irregularities in the issue of the debentures to her. The facts as to this are very simple. Mrs. Umney had no separate banking account, but banked by her husband, and as a shareholder in this company she received a notice asking for subscriptions to an issue of debentures. She told her husband about this, and arranged with him that he should draw out of his banking account sufficient of her money to pay £500 for the debentures which she had decided to subscribe for. He paid the money into the company's bank, and, therefore, the entry in the company's books was that this money came from Mr. Umney. I hold that his knowledge as a director did not come to her just because he acted as her banker.

I The next point is that a quorum of one was not validly fixed as it was only authorised at a meeting of the signatories and not by the directors; and it is said that a resolution by the signatories is not enough. For that *York Tramways Co., Ltd. v. Willows* (1) was relied on as an authority. But I think that the effect of what took place at the meeting at Quelle in Germany on April 30, 1908, was that a quorum of one was sufficiently fixed by the directors, Schwarze and Umney. Umney informed Schwarze of what had been done, and there was a recognition by them both, and they assented to it as directors that in future one should act alone.

This amounted to a delegation by the two to Umney of the sole managing directorship so far as London was concerned. If I am right in that, then there was no irregularity in the authorisation of the issue of these debentures nor in the authorisation that they should be sealed. The only irregularity was the sealing in the presence of one director and the secretary, instead of two directors and the secretary. If I am wrong in this, then as far as Mrs. Umney is concerned, who had no notice of these irregularities, the point is immaterial, having regard to the decision in *County of Gloucester Bank v. Rudry Merthyr Steam and House Coal Colliery Co.* (2).

Next it is said that a quorum of one anyhow is illegal and invalid as it is not possible for a quorum to be constituted by one. Before dealing with that I should say that it was argued that all minutes of resolutions must be entered, and that the minutes alone are exclusive evidence of what is done or decided by a board of directors. From the decisions in *Re Rotherham Alum and Chemical Co.* (3) and *Knight's Case* (4) it is clear that a decision of directors need not necessarily appear in the minute book if the court is satisfied that the resolution was passed. Then it is said a quorum of one is impossible, and it is quite true that one shareholder cannot form a meeting of shareholders, but it is not clear that one director cannot form a quorum. However that may be, it is clear on the authorities that under art. 91 directors may delegate their powers to one of their number, and I think this power was sufficiently delegated to Umney.

Up to this point then we have debentures purporting to be issued under seal for value which are not affected by any irregularities except that they are not properly sealed. It is argued that, this company having no real estate, it is not necessary for these debentures to be sealed. But I think Umney had power as managing director or power was delegated to him to borrow money on debentures, the company having power to do so, and, as far as the plaintiff is concerned, she is not affected with notice of any irregularity. I think that a sealing was not necessary to give effect to these debentures, and under the decision in *Biggerstaff v. Rowatt's Wharf, Ltd., Howard v. Rowatt's Wharf* (5), a document purporting to be a debenture which is only signed by a director and not sealed by the company would have been sufficient. Further, having issued such debentures, a proper board meeting in December, 1913, recognised the debentures so issued, and on Jan. 27, 1914, a shareholders' meeting purported to ratify them and make good the insufficient sealing, which, however, they had no power to do, but I think that the conduct of the proceedings at the meeting amounted to showing that the shareholders had knowledge that they had received the plaintiff's money and had undertaken to give her security, and knowing of one irregularity tried to put it right. I think that amounts to a ratification in her favour of the fact that she was the holder of a valid security as against the company. Therefore the plaintiff has a valid unsealed debenture. But it is also contended that the debentures so issued to her, if irregular and insufficient, are, in any case, sufficient evidence of an agreement to issue to her five valid debentures, part of the series authorised, in which case she would have an equitable debenture on the authority of the rule laid down in *Re Strand Music Hall Co.* (6) and the money decisions which have followed that case. In that case TURNER, L.J., said (3 De G.J. & Sm. at p. 158):

"I apprehend, however, that where this court is satisfied that it was intended to create a charge, and that the parties who intended to create it had the power to do so, it will give effect to the intention, notwithstanding any mistake which may have occurred in the attempt to effect it."

In *Ross v. Army and Navy Hotel Co.* (7) that passage by TURNER, L.J., was cited and followed. In all those cases, however, the holder of the charge was really in possession of two documents, an agreement for a charge and the charge itself, and it was the charge itself which in each of those cases was bad; still the principle can be applied in this case. Again, a lease void under the Real Property Act, 1845,

s. 3, may be good as an agreement: see *Parker v. Taswell* (8), 2 De G. & J. at p. 570; and I see no reason why debentures should not be similarly treated.

Lastly, it is contended that the debentures are not validly registered under s. 93 (1) of the Companies (Consolidation) Act, 1908, which provided that every mortgage or charge created after July 1, 1908, and being a mortgage or charge for the purpose of securing any issue of debentures,

"shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the mortgage or charge, together with the instrument (if any) by which the mortgage or charge is created or evidenced, are delivered to or received by the registrar of companies for registration in manner required by this Act within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a mortgage or charge becomes void under this section the money secured thereby shall immediately become payable."

By sub-s. (3), on a series of debentures being issued by a company, certain particulars were required to be delivered to the registrar within twenty-one days after the execution of the deed containing the charge, or, if there be no such deed, after the execution of any debentures of the series, the particulars to be accompanied by the deed, or, if none, one of the debentures of the series. The file contained the particulars thus required by sub-s. (3), and the registrar, in accordance with sub-s. (5), issued a certificate as required that sub-s. (3) had been complied with, and a copy of such certificate was indorsed on each debenture. By sub-s. (2) of s. 93 it is provided that:

"The registrar shall keep, with respect to each company, a register in the prescribed form of all the mortgages and charges created by the company after July 1, 1908, and requiring registration under this section, and shall, on payment of the prescribed fee, enter in the register, with respect to every such mortgage or charge, the date of creation, the amount secured by it, short particulars of the property mortgaged or charged, and the names of the mortgagees or persons entitled to the charge."

The particulars required by this subsection are different from those required by sub-s. (3). Here there was no issue raised on the pleadings that these charges were insufficiently registered, but by a letter of Mar. 21, 1916, last the defendants' solicitors informed the plaintiff that they intended on the trial of the action, if the necessity arose, to ask for leave to deliver a rejoinder alleging that any agreement by the company to issue debentures to the plaintiff was invalid because the provisions of s. 93 of the Companies (Consolidation) Act, 1908, had not been complied with with respect to any such agreement. The defendants do not put this in evidence or on the file which contained the particulars required by sub-s. (3) of s. 93, and that the registrar's certificate stated that sub-s. (3) had been complied with. I assume, without deciding it, that the defendants are entitled to go on and say because the file shows that the particulars required by sub-s. (3) were delivered, therefore, particulars required by sub-s. (2) must be assumed not to have been delivered. In the view which I take of this case, this point does not help the defendants. This sub-s. (2) was not complied with because the issue was treated as an issue of a series of debentures, and, therefore, the particulars required by sub-s. (3) were delivered.

I think, therefore, the plaintiff did become the holder of five unsealed debentures, part of a series, and, therefore, registration of these under sub-s. (3) was sufficient. If I am wrong in that, I think that each holder of debentures became the holder of documents which were evidence of an agreement to issue a series of debentures, and particulars given of them in accordance with the requirements of sub-s. (3) of

s. 93 were sufficient. The plaintiff's debentures are, therefore, valid against the liquidator. I should mention that the debts due at the present time have been only recently contracted and have all been incurred since the issue of these debentures.

Solicitors: *Edwin E. Clark; Langford & Redfern.*

[Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.]

BOOTH STEAMSHIP CO., LTD. v. CARGO FLEET IRON CO., LTD.

[COURT OF APPEAL (Lord Reading, C.J., Warrington, L.J., and Scrutton, J.),
March 15, 16, May 23, 1916]

[Reported [1916] 2 K.B. 570; 85 L.J.K.B. 1577; 115 L.T. 199; 32 T.L.R. 535;
13 Asp. M.L.C. 451; 22 Com. Cas. 9]

Shipping—Carriage by sea—Stoppage in transitu—Liability of vendor of goods for unpaid freight—Right of vendor to delivery to him of goods before end of voyage.

Where the unpaid vendor of goods exercises his right to stop them in transitu while they are being carried to the buyer he brings himself under a personal obligation to the shipowner to take, or give directions for, the delivery of the goods, and that involves the discharge of the shipowner's lien for unpaid freight. If he repudiates the obligation and so conducts himself as to prevent the shipowner completing his voyage and earning his freight, the shipowner can maintain an action against him for damages for the breach of the obligation. The damages may be the equivalent of the freight.

Per SCRUTTON, L.J.: An unpaid vendor, exercising his right of stoppage in transitu cannot demand actual possession during the transit against the will of the shipowner or direct the shipowner to deliver to him except at the contractual place of destination. The goods may be under other goods in the hold; the ship may have contractual engagements to carry other goods to other parts; policies of insurance may be affected by detention or delay. The shipowner may, and it is frequently convenient he should, re-deliver before the contract place of delivery to the unpaid vendor on an indemnity, but he cannot be forced to do so. It is clear that, to get the goods from the shipowner, the vendor must discharge any lien the shipowner has for particular charges or freight on the goods in question, but not any general lien by contract or usage for other sums due from the consignee, not due in respect of the particular goods. The unpaid vendor cannot prolong the shipowner's obligation to hold the goods after he [the shipowner] is ready to make delivery at the end of the voyage. It is not necessary to hold that the vendor became a party to the original contract of carriage; his obligation follows from his interfering with that contract.

Notes. As to stoppage in transitu, see 34 HALSBURY'S LAWS (3rd Edn.) 127 et seq., and for cases see 39 DIGEST 612 et seq. For Sale of Goods Act, 1893, see 22 HALSBURY'S STATUTES (2nd Edn.) 985.

Cases referred to:

- (1) *The Tigress (or Tigris)* (1863), Brown & Lush 38; 1 New Rep. 449; 32 L.J.P.M. & A. 97; 8 L.T. 117; 9 Jur. N.S. 361; 11 W.R. 538; 1 Mar. L.C. 323; 167 E.R. 286; 39 Digest 637, 2337.
- (2) *Wiseman v. Vandeputt* (1690), 2 Vern. 203; 23 E.R. 732; 39 Digest 613, 2112.

- (3) *Snee v. Prescott* (1743), 1 Atk. 745; 26 E.R. 157, L.C.; 39 Digest 629, 2261.
- (4) *Gibson v. Carruthers* (1841), 8 M. & W. 321; 11 L.J.Ex. 138; 151 E.R. 1061; 39 Digest 638, 2349.
- (5) *D'Aquila v. Lambert* (1761), Amb. 399; 2 Eden, 75; 27 E.R. 266, L.C.; 39 Digest 614, 2114.
- (6) *United States Steel Products Co. v. Great Western Rail. Co.*, [1916] 1 A.C. 189; 85 L.J.K.B. 1; 113 L.T. 886; 31 T.L.R. 561; 59 Sol. Jo. 648; 21 Com. Cas. 105, H.L.; 39 Digest 613, 2108.
- (7) *Kemp v. Falk* (1882), 7 App. Cas. 573; 52 L.J.Ch. 167; 47 L.T. 454; 5 Asp. M.L.C. 1; sub nom. *Re Kiell, Kemp v. Falk*, 31 W.R. 125, H.L.; 39 Digest 635, 2308.
- (8) *Oppenheim v. Russell* (1802), 3 Bos. & P. 42; 127 E.R. 24; 39 Digest 613, 2105.
- (9) *Lickbarrow v. Mason* (1787), 2 Term Rep. 63; 100 E.R. 35; on appeal sub nom. *Mason v. Lickbarrow* (1790), 1 Hy. Bl. 357, Ex.Ch.; on appeal sub nom. *Lickbarrow v. Mason* (1793), 4 Bro. Parl. Cas. 57; 6 East, 22, n., H.L.; 39 Digest 614, 2115.
- (10) *Northey and Lewis, Ass. of Leyland and Cragg v. Field* (1797), 2 Esp. 613; 170 E.R. 472, N.P.; 39 Digest 615, 2145.
- (11) *Litt v. Cowley* (1816), Holt, N.P. 338; 2 Marsh. 457; 7 Taunt. 169; 129 E.R. 68; 39 Digest 637, 2330.
- (12) *Stewart v. Rogerson* (1871), L.R. 6 C.P. 424; 41 Digest 526, 3550.
- (13) *Pontifax v. Midland Rail. Co.* (1877), 3 Q.B.D. 23; 47 L.J.Q.B. 28; 37 L.T. 403; 26 W.R. 209, D.C.; 39 Digest 638, 2341.
- (14) *Taylor v. Manchester, Sheffield and Lincolnshire Rail. Co.*, [1895] 1 Q.B. 134; 64 L.J.Q.B. 6; 71 L.T. 596; 59 J.P. 100; 43 W.R. 120; 11 T.L.R. 27; 39 Sol. Jo. 42; 14 R. 34, C.A.; 42 Digest 970, 21.
- (15) *Gibson v. Carruthers* (1841), 8 M. & W. 321; 11 L.J.Ex. 138; 151 E.R. 1061; 39 Digest 638, 2349.
- (16) *Wentworth v. Outhwaite* (1842), 10 M. & W. 436; 12 L.J.Ex. 172; 152 E.R. 541; 39 Digest 620, 2181.
- (17) *Phelps, Stokes & Co. v. Comber* (1885), 29 Ch.D. 813; 54 L.J.Ch. 1017; 52 L.T. 873; 33 W.R. 829; 5 Asp. M.L.C. 428, C.A.; 39 Digest 631, 2289.
- (18) *Whitehead v. Anderson* (1842), 9 M. & W. 518; 11 L.J.Ex. 157; 152 E.R. 219; 39 Digest 622, 2200.
- (19) *Somes v. British Empire Shipping Co.* (1860), 8 H.L. Cas. 338; 30 L.J.Q.B. 229; 2 L.T. 547; 6 Jur. N.S. 761; 8 W.R. 707; 11 E.R. 459, H.L.; 32 Digest 253, 390.

Appeal by plaintiffs from a decision of BAILHACHE, J., in an action by ship-owners to recover freight or damages from the defendants, unpaid vendors of goods, who had stopped the goods in transitu. BAILHACHE, J., held that the plaintiffs had failed to prove that the defendants had prevented them carrying the goods to their destination and tendering them there. He, accordingly, gave judgment for the defendants, and the plaintiffs appealed.

Maurice Hill, K.C., and *M. Macnaghten* for the plaintiffs.

Leck, K.C., and *Raeburn* for the defendants.

Cur. adv. vult.

May 23, 1916. The following judgments were read.

LORD READING, C.J.—This case raises a novel and interesting point of law, of some importance to carriers and merchants—namely, whether an unpaid vendor who has stopped goods in transitu can be made liable for the freight on the goods, or for damages for having prevented the carrier earning the freight. The plaintiffs claim to recover freight or damages from the defendants, the unpaid

vendors of certain goods carried by the plaintiffs and consigned to the purchasers. The defendants were not parties to the contract of carriage, but gave notice of stoppage in transitu whilst the goods were being carried by the plaintiffs. The plaintiffs acted on this notice, and claim that in the circumstances the defendants are liable to them for the amount of the freight on the goods. The defendants deny that they have incurred any liability to the plaintiffs for freight or damages by the giving of this notice or otherwise. BAILHACHE, J., came to the conclusion that the plaintiffs had not completed the voyage, and that they had failed to prove that the defendants had prevented them carrying the goods to their destination and tendering them there, and for these reasons he gave judgment for the defendants. The learned judge did not decide whether the defendants would have been liable to the plaintiffs if he had found in their favour on the facts, but expressed the view that he should have been disposed to grant the relief claimed. From that judgment the plaintiffs appeal.

The plaintiffs are shipowners trading from the United Kingdom to ports in Brazil. The defendants are manufacturers of steel rails and other material used in the construction of railways. They sold certain steel rails and fish-plates to the South American Railway Construction Co., Ltd., which was constructing a railway in Brazil under a concession from the Brazilian government. In the autumn of 1913 the defendants, acting under the instructions of the British Maritime Trust, Ltd., given on behalf of the Construction Co., delivered certain parcels of steel rails and fish-plates to be carried by the plaintiffs' steamships to Paranyhyba in Brazil. The defendants were under obligations to deliver the goods "f.o.b. Middlesbrough" or on certain terms "f.o.b. Liverpool," payment to be made in exchange for shipping documents. Six hundred tons of rails and fifty-five tons of fish-plates were shipped at Middlesbrough in the *Napo* and 400 tons were shipped in the *Ravonia* for transshipment at Liverpool into the *Crispin*. The *Napo* and the *Crispin* were steamships owned by the plaintiffs. Although the defendants were the actual shippers of the rails and plates on these vessels for carriage to Paranyhyba, they were not parties to the contract of affreightment with the plaintiffs. Under arrangement made between the British Maritime Trust, Ltd., on behalf of the Construction Co., and the plaintiffs, the Construction Co. were the consignees of the goods, and were also treated as the shippers, and the freight was payable by them before the departure of the ship. The mates' receipts for the goods as shipped were received by the defendants and forwarded by them to the plaintiffs, who, after making out the bills of lading, cancelled the mates' receipts and returned them to the defendants. The bills of lading for the goods on the *Napo* and the *Crispin*, dated Oct. 6 and 8, 1913, respectively, were held by the plaintiffs until payment of the freight. The freight has not been paid and the bills of lading have never been issued. The rails and plates were never carried to Paranyhyba, their destination under the contract, but were landed at Cajueiro, a small island owned by the plaintiffs in the Bay of Tutoya, in Brazil, Paranyhyba being situate at a distance of sixty miles from Tutoya up the river. On a voyage to Paranyhyba the ocean transport ends at Tutoya, and the carriage up the river to Paranyhyba is made by means of lighters. This river is navigable for the lighters only when the tides serve, which occurs twice or thrice in a month. In the ordinary course and if the tide is serving, the goods are taken from the ship at Tutoya and immediately placed in the lighters for carriage to Paranyhyba. If the tide does not serve, the goods are landed by the plaintiffs at Cajueiro and are left there until the lighters can carry them to Paranyhyba. There is a bonded warehouse at Paranyhyba capable of receiving 300 or 400 tons of cargo, but steel rails and fish-plates are never placed in the warehouse. The practice is that Custom House guards accompany the lighters to Paranyhyba, and, in the case of heavy goods, such as steel rails and fish-plates, the duty is assessed and paid in the lighters, and the goods are thus "dispatched". This term is used to denote the passing of the goods through the customs and the payment of the duty leviable upon them.

A If the rails are not sent forward at once for use, they must lie at Paranahyba in the open, as there is no warehouse accommodation for them. They cannot, however, be landed at Paranahyba unless the duty has been paid upon them.

B On Oct. 14, 1913, the defendants became aware that the purchasers were in financial difficulties, and on that date wrote to the plaintiffs' agents requesting them to refrain from handing over the bills of lading until further notice from the defendants. On Oct. 27, 1913, the defendants gave notice to the plaintiffs in the following terms:

"Please arrange to prevent any rails and fish-plates shipped per *Napo* and *Crispin* being handed over to South American Construction Co. at Paranahyba without bill of lading or our authority to release."

C On the same day the plaintiffs' agents wrote to the defendants:

D "We may say that we have declined to part with the bills of lading for the cargo shipped by you per steamship *Napo* and steamship *Crispin* to the shippers, the South American Railway Construction Co., pending payment by them of the freight due, and we now take note that you desire us not to part with them irrespective of this condition. We are forwarding to Messrs. the Booth Steamship Co., Ltd., Liverpool, a copy of your message. They may perhaps address you direct on the subject, as we understand the steamship *Napo* is getting due at her destination, but, failing this, we will advise you as soon as we receive their reply. The question of lien in a Brazilian port is a difficult one. Would it simplify matters if you paid the freight and took up the bills of lading under a guarantee of indemnity to the ship-owners?"

E On the next day the defendants refused to fall in with this suggestion as to the payment by them of the freight. On Oct. 29, 1913, the defendants gave the following notice to the plaintiffs:

F "We beg to inclose copies of letters which we have exchanged with your agents, Messrs. Moxon, Salt & Co. Please note that we look to you not to hand over the material shipped per steamship *Napo* and steamship *Crispin* to the South American Railway Construction Co. or anyone else without authority from us. We give you this notice as we understand you are holding our bills of lading for freight."

G It is not in dispute that these letters constituted an effective notice of stoppage in transitu, that the defendants, as unpaid vendors, had the right to give it, and that the plaintiffs accepted it and promised to act upon it. The plaintiffs had no alternative in the matter; they were, indeed, bound to act upon the notice, and, if they disregarded it and delivered the goods to the consignees, they would be liable to the defendants for damages for wrongful conversion: *The Tigress* (1).

H On Oct. 29 the *Napo* arrived at Tutoya; the *Crispin* did not arrive until Nov. 25. On Oct. 30 the plaintiffs' agents at Middlesbrough advised the defendants of the arrival of the *Napo* at Tutoya, and informed them that it was necessary to take some prompt action to deal with the rails on board the vessel. They added that the plaintiffs were willing to take the defendants' instructions regarding the disposal of the rails, and in this connection would act as agents for the defendants to hold the rails under their orders, subject to the payment of any charges which might be incurred. On Oct. 31, the plaintiffs wrote to the defendants:

"We beg to confirm our telegram of today as follows: 'Acting on your instructions we shall not surrender bills of lading to the South American Railway Co. without your authority. We shall commence landing rails forthwith for your account, holding bills of lading at your disposal.' We shall be glad to have your specific instructions without delay."

On the same day the defendants replied:

"Telegram received. Note you will not surrender bills of lading without our authority, which is in order. For the rest we cannot accept responsibility for your landing rails at Tutoya."

On Nov. 1, the plaintiffs telegraphed to defendants:

"You have instructed us not to deliver the cargo ex *Napo* to the bill of lading consignees, thus stopping the goods on the basis of your lien in transit. We are carrying out your instructions, and must land cargo at Paranahyba for your account, and look to you for all consequent charges."

On Nov. 1, the defendants wrote to plaintiffs:

"While we have nothing to do with the decision you have apparently arrived at for your protection to land the material at Tutoya instead of Paranahyba . . . we look to you to hold the bills of lading at our disposal, so far as they relate to the goods supplied by us, until further notice."

The plaintiffs then advised the defendants to appeal to the judicial tribunal at Paranahyba for restraint of delivery. On Nov. 4 the defendants requested the plaintiffs to make this appeal in respect of the shipment per *Napo* and *Crispin*, but later, and before effective steps had been taken, withdrew the request (Nov. 26), stating that

"our friends the South American Railway Construction Co. have given us their undertaking that they will not deal with the goods or take any steps to our detriment until our account had been paid."

A number of letters and telegrams passed thereafter between the parties and their agents which did not change the situation. The plaintiffs continued to insist that, as the defendants had given instructions to stop the goods and also not to deliver them, the plaintiffs looked to them for all attendant charges, including freight. The defendants, on the other hand, persisted in repudiating all responsibility for freight or other expenses payable by the shippers for the landing of the goods or otherwise. They would only admit responsibility for expenses incurred on their behalf by the plaintiffs after the goods had been landed. The shipowners had carried the goods to Tutoya, and were ready and willing to forward them by lighter to Paranahyba, but it was useless to send them to Paranahyba unless it was intended to pay the duty upon them, as they could not be landed at Paranahyba until the duty had been paid, and, if not paid, the goods must either be brought back to Tutoya or left indefinitely in the lighters. Who was to pay the duty? The unpaid vendors repudiated all responsibility. The consignees were insolvent and could, or in any event would not, pay the duty. They could not pay the purchase money, and had agreed with the defendants that they would not deal with the goods until it was paid. In these circumstances what were the shipowners to do? Clearly they were under no obligation to pay the duty. But the goods must be discharged; they could not remain in the ship or the lighters, and the ship could not remain indefinitely at Tutoya—neither could the lighters remain indefinitely at Paranahyba or Tutoya. The course taken by the plaintiffs was to deposit them at Cajueiro, where they lie to this day. By the freight contract the plaintiffs have a lien upon the goods for unpaid freight, and the goods are held by the plaintiffs subject to their lien. At the date of the trial the duty had not been paid upon the goods, delivery had not been made at Paranahyba, the plaintiffs had not received their freight, and the defendants had not obtained their purchase money.

Upon these facts the question arises whether the plaintiffs can recover the freight or damages from the defendants. BAILHACHE, J., thought not. In order to determine whether the learned judge's conclusion was right, it is, in my judgment, necessary to ascertain the legal position of the carrier and the vendor when a valid notice of stoppage in transitu has been given. When goods are

A stopped, there is usually no difficulty as to the payment of the freight to the shipowner; the vendor pays it in order to discharge the shipowner's lien and to regain actual possession of the goods. The present case is exceptional in that the vendors insist upon the stoppage, but refuse to pay the freight. They say to the shipowners: "The goods must not be handed to the consignee because of our notice of stoppage, and we will not take actual possession of the goods as we should have to pay the freight. You must continue to hold the goods subject to our notice of stoppage." The plaintiffs say: "You, the vendors, are the only persons to whom the actual possession of the goods can be given, and you are under obligation to take actual possession, which will involve the payment by you of the freight." In those circumstances, what are the rights and obligations of the parties? The right of stoppage in transitu was introduced into English law in the seventeenth century, and the first reported case on the subject is in the year 1690: *Wiseman v. Vandepuut* (2). As the right arises only in the case of insolvency, it came to be recognised in our courts in the first instance through the medium of the bankruptcy jurisdiction of the Lord Chancellor, which was of statutory creation. The right is not peculiar to the law of England; it was part of the law merchant existing in most of the commercial States of Europe before it was recognised as part of our law. In 1743 LORD HARDWICKE received evidence of the custom of merchants as to stoppage in transitu and then applied the rule. He based his decree both upon the custom proved before him and upon the justice of the case: *Snee v. Prescott* (3). In 1841 LORD ABINGER in *Gibson v. Carruthers* (4) gave a full and interesting account of the history of the introduction of stoppage in transitu into our law and reviewed the authorities. He referred to the opinions expressed by courts of equity that the right was founded upon some principle of the common law and of the practice in courts of law to call the right a principle of equity which the common law had adopted. He pointed out the difficulty, owing, perhaps, to its foreign parentage, of reducing this right to some analogy with the principles which govern the law of contract as it prevails in this country between vendor and purchaser. This difficulty, in spite of decisions and legislation, has not been entirely solved. LORD ABINGER came to the conclusion that the right had been adopted as part of the law merchant and formed part of the common law of England.

What is the right? It is the right of the unpaid vendor, on discovery of the insolvency of the buyer, and notwithstanding that he has made constructive delivery of the goods to the buyer, to re-take them if he can before they reach the buyer's possession. It is a right founded upon the plain reason that one man's goods shall not be applied to the payment of another man's debt: *D'Aquila v. Lambert* (5); BENJAMIN ON SALES (5th Edn.) p. 870. It is the right not only to countermand delivery to the purchaser, but to order delivery to the vendor: *The Tigress* (1); *United States Steel Products Co. v. Great Western Rail. Co.* (6) ([1916] A.C. at p. 202, per LORD ATKINSON). DR. LUSHINGTON adds, in *The Tigress* (1) (32 L.J.P.M. & A. at p. 102): "Were it otherwise, the right to stop would be useless and trade would be impeded." That the vendor has the right to order delivery to himself cannot be disputed; but does the notice to the carrier place the vendor under obligation to the carrier to take delivery or to give directions for delivery of the goods? I think it does. The goods have been received by the carrier to be delivered to the purchaser. When the vendor has placed the goods in the actual possession of the carrier he has performed his contract of sale and has made delivery to the purchaser. The property in the goods and the right to possession have passed to the purchaser, but the notice of stoppage operates to defeat the purchaser's right to the possession of the goods and transfers it to the vendor. Although doubts existed in the past whether or not the contract of sale was rescinded by the exercise of the vendor's right of stoppage in transitu, they have long since been dispelled: *Kemp v. Falk* (7), 7 App. Cas. 581, per LORD BLACKBURN; and the law is now to be found in the Sale of Goods Act, 1893.

Stoppage in transitu is dealt with in the statute by ss. 44 to 48. By s. 61 (2), the rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of the Act, continue to be applicable to contracts for the sale of goods. By s. 48 (1) it is provided that the mere exercise by an unpaid vendor of his right to stop in transitu does not rescind the contract of sale: see also *United States Steel Product's Co. v. Great Western Rail. Co.* (6), [1916] A.C. at p. 203, per LORD ATKINSON. The vendor may re-sell the goods, provided he has complied with certain conditions, and recover damages from his original buyer for loss occasioned by the breach of the contract: s. 48 (3). But after the notice is given by the vendor to the carrier the right to possession of the goods is resumed by the vendor; that is the effect of the notice, and the carrier is under obligation to give actual possession to the vendor only or according to his directions. To use the words of the codifying statute, the carrier "must deliver the goods to or according to the directions of the seller": s. 46 (2). The carrier cannot be under obligation to deliver the goods upon arrival to the purchaser, his consignee, and also to the vendor who has given notice of stoppage. From the giving of the notice, and so long as the notice is operative, his obligation is to deliver, not to the consignee, but to the vendor. It was argued in this case that the vendor obtained all the benefits of the notice without incurring any liabilities. As I have already said, I cannot accept this argument. The vendor by the act of giving notice of stoppage, has prevented the shipowner making delivery to his consignee, and the vendor, in my judgment, is under the correlative obligation to the shipowner to take delivery or give directions for delivery. If there is a lien for freight due in respect of the goods, the vendor's obligation to take delivery involves the further obligation upon him to pay the freight, for he cannot get actual possession until he has discharged the shipowner's lien for freight due in respect of the carriage of the goods in question, but not in respect of freight due by the consignee to the shipowner on other goods; *Oppenheim v. Russell* (8); *United States Steel Products Co. v. Great Western Rail. Co.* (6) ([1916] A.C. at p. 203). Although there is no decision to be found in the books making the vendor liable in the circumstances for the freight upon the goods stopped by him, I think the earlier cases point in the direction of such an obligation upon him.

The history of the recognition of this right of stoppage in transitu in English law is that, at first, it was thought that actual possession of the goods was necessary to constitute a valid stoppage in transitu. LORD HARDWICKE was at one time of this opinion: see *Snee v. Prescott* (3); but later it was held that actual possession by the vendor was not necessary. In 1787 it was held by GROSE, J., in *Lickbarrow v. Mason* (9) (2 Term Rep. at p. 76) that:

"it is now the clear, known, and established law that the consignor may seize the goods in transitu, if the consignee become insolvent before the delivery of them."

In 1798 LORD KENYON said in *Northey and Lewis v. Field* (10) (2 Esp. at p. 614):

"The courts had of late years leaned much in favour of the power of the consignor to stop his goods in transitu; it was a leaning to the furtherance of justice. LORD HARDWICKE had been of opinion, that in order to stop goods in transitu, there must be an actual possession of them obtained by the consignor before they come to the hands of the consignee; but that rule has since been relaxed; and it was now held that an actual possession was not necessary; that a claim was sufficient; and to that rule he subscribed."

In 1802 LORD ALVANLEY expressed the same view in *Oppenheim v. Russell* (8). He said (3 Bos. & P. at p. 46):

"This was an action brought by the plaintiff as consignor against a carrier for the recovery of goods, and it is stated upon the case that the goods were demanded by the plaintiffs, before they either actually or constructively reached the hands of the consignee. According to the general rule the

carrier under these circumstances was bound to delivery them and was liable, as LORD KENYON very properly determined, to an action of trover if he did not deliver them. Though no act of seizure ensue, yet, if tender be made of the sum due for the carriage, the person sending the goods has the right to resume them, and that was done in this case."

In *Litt v. Cowley* (11) GIBBS, C.J., referring to past cases, said (7 Taunt. at p. 170):

"It was formerly held that the only way of stoppage in transitu was by actual corporal touch of the goods. It has since been held that after notice to a carrier not to deliver, he is liable for the goods in trover against himself if he does deliver them."

By s. 44 of the statute, when the buyer becomes insolvent, the unpaid vendor has the right to resume possession of the goods so long as they are in course of transit, and he has rights of sale under s. 48. The method of effecting the right of stoppage is by taking actual possession of the goods, or by giving notice of the claim to the carrier or other bailee in whose possession the goods are: s. 46 (1). The statute thus gives two ways of effecting stoppage. The first is by taking actual possession, and the second by notice of claim, the latter, as LORD KENYON observed, being a relaxation of the old rule that required actual possession to be taken. To get actual possession of goods carried the vendor must discharge the shipowner's lien (if any) for freight. Therefore satisfaction of the lien for freight must have been and still is an integral part of the stoppage of goods in transitu by the method of taking actual possession. Actual possession can only be taken of goods in transit when the goods arrive; by s. 45 (1), they are deemed to be in transit until the buyer takes delivery—until that time there is a right in the unpaid vendor to resume the possession on arrival if he can. If the stoppage is by means of notice given, the vendor, upon arrival of the goods, is in the same position as if he had taken actual possession of the goods—that is to say, he is the sole person entitled, and, as I think, obliged, to take or order delivery of the goods. He cannot get actual possession unless he is ready and willing to discharge the lien for freight. I am, therefore, of opinion that a notice of stoppage given during the transit, and persisted in upon arrival of the goods, involves an obligation upon the vendor to discharge the shipowner's lien for freight—that is, to pay the freight due in respect of the goods carried. To get the goods he must free them from the lien.

There being, then, an obligation upon the vendor to take delivery and discharge the lien by paying the freight, it follows that, if he repudiates the obligation and so conducts himself as to prevent the shipowner completing his voyage and earning his freight, an action can be maintained by the shipowner against the vendor for damages for the breach of the obligation created by the notice to take actual possession of the goods upon arrival, and to discharge the shipowner's lien for the freight in respect of the goods. The damages may be the equivalent of the freight.

Having arrived at this conclusion, it must now be considered whether in the present case the plaintiffs' right of action is defeated by their failure to complete the voyage to Paranahyba. BAILHACHE, J., decided, without determining whether or not there would otherwise have been a right of action in the plaintiffs, that they could not recover because they had not proved that the defendants had prevented the completion of the voyage. With all respect to the learned judge I cannot arrive at the same conclusion, having regard to my view of the legal position of the defendants. In my judgment, when the goods arrived at Tutoya, the plaintiffs were ready and willing, then and at all material times, to complete the voyage and carry the goods to Paranahyba. The obstacle to the continuance of the voyage was the non-payment of the duty and the repudiation by the defendants of all responsibility for freight, charges, or expenses. For the reasons already given, I think this was a repudiation of their obligation to take delivery, and that they were bound to provide the duty, or to make arrangements for its

payment, so as to enable the voyage to be completed. As they refused, the goods were landed and are still at Cajueiro. In my opinion, the plaintiffs are entitled in these circumstances to treat the voyage as completed, and to recover, as damages for the breach of obligation, the full amount of freight which they would have earned had the voyage been completed: see *Stewart v. Rogerson* (12). They claim, and I think rightly, to be placed in the same position as if the vendors had discharged their obligation and enabled the voyage to be continued to Paranahyba. It is immaterial that, after the repudiation by the defendants, the plaintiffs acted in their own interests and for their own protection as regards the freight.

The defendants strenuously contended that *Pontifex v. Midland Rail. Co.* (13) was a decision which supported their view, but upon examination of that case I do not think it has any bearing upon the problem now before the court. There the vendor had given to the defendants, a railway company, notice of stoppage in transitu of goods consigned to the purchaser, but the railway company refused to act on the notice and delivered the goods to the consignee. The vendor thereupon brought an action for damages for the wrongful conversion of the goods, and the sole question in dispute in the case was whether the plaintiff, having recovered a sum exceeding £10, was or was not to be deprived of costs. The decision turned upon the meaning of certain words in s. 5 of the County Courts Act, 1867, and the question was whether the action was "founded on tort", and not on contract, within the meaning of that section. The court held that it was founded on tort, and COCKBURN, C.J., in delivering the judgment, said (3 Q.B.D. at pp. 26, 28):

"The difficulty arises in a case like the present, where there is undoubtedly an unauthorised intermeddling with property, but the act is connected with a contract originally entered into, and there is ground for regarding it as founded on that contract, or some new contract implied from the circumstances . . . The contract of the defendants was to carry and deliver. But under the circumstances which arose, the law gave the plaintiff the right to put an end to that contract and to demand back the possession of the goods, and he did so. From that time the retention of the goods and the dealing with them by the defendants became tortious."

This agrees with the view which was always taken of such a case when the action for trover existed, for such a misdelivery after notice was always treated as a wrongful conversion. The defendants argued that this case established that the refusal of the carrier to act upon the notice, and the delivery by him of the goods to the purchaser notwithstanding the notice, was a tortious act and not the breach of a contractual obligation. The decision was that an action for wrongful conversion of the goods was an action "founded on tort" within the meaning of the section, notwithstanding that there might be ground for regarding it as an action founded on "some new contract implied from the circumstances", just as an action by a passenger against a railway company for damages for personal injuries caused by the negligence of the defendants in the conveyance of passengers has been held under similar statutes to be founded on tort notwithstanding that it might also be founded upon contract: *Taylor v. Manchester, Sheffield, and Lincolnshire Rail. Co.* (14). In the present case the plaintiffs had not refused to act upon the notice, but, on the contrary, had expressly agreed with the vendors, upon receipt of the notice, that they would act upon it. I am of opinion, for the reason expressed, that this appeal should be allowed and judgment entered for the plaintiffs for £2,743 14s. 7d. with costs here and below.

WARRINGTON, L.J., stated the facts and continued: I have come to the conclusion on the facts that, as between the plaintiffs and the defendants at all events, the plaintiffs have, in the peculiar circumstances of this case, done all that was reasonably necessary to entitle them to require the defendants to take

A delivery of the goods if the latter are in law bound to do so. At Tutoya there is no Custom House or bonded warehouse of any kind. All goods have to be conveyed to Paranahyba in lighters. The bonded warehouse at Paranahyba is unsuited for the accommodation of a cargo such as that in question. Inasmuch as the defendants refused to pay the duties and thus enable the goods to be dispatched at Paranahyba, the only practical course, in my opinion, was that adopted by the plaintiffs, namely, to deposit the goods on their own island at Tutoya.

I think, therefore, the question of law avoided by the learned judge arises, and I proceed to deal with it. The question is: Does the unpaid vendor of goods, by exercising his right to stop them in transitu, bring himself under a personal obligation to the carrier to take, or give directions for, delivery of the goods, involving, of course, the discharge of the carrier's lien for unpaid freight? I think it must be answered in the affirmative. The question seems to be an entirely novel one. It can only arise in a very rare case such as the present, where, owing to the nature of the goods and the circumstances surrounding them at the end of the transit, it is not worth the vendor's while to take actual possession. There is no direct authority to be found in support of or against the plaintiff's claim, and I think a solution of the question must be found in an examination of the nature of the right of stoppage in transitu. It is a right to resume possession of the goods. The vendor, by the contract of sale, has transferred the property therein to the purchaser, and by delivery to the carrier has also transferred the possession thereof. If the vendor is unpaid and the purchaser is insolvent, the former may resume possession. He may do so either physically—in which case, of course, the lien for freight has ex hypothesi been discharged or released—or he may do so by giving notice to the carrier of his claim, and the latter must then deliver the goods to or according to the directions of the vendor. This is, in my opinion, merely an alternative mode of resuming possession, and appears to have been introduced as a relaxation of the previous stricter rule, which required physical possession in order to the effective exercise of the right of stoppage: see LORD KENYON, C.J., in *Northey and Lewis v. Field* (10) (2 Esp. at p. 614). Are we to say that the vendor is at liberty to give notice to the carrier of his claim and yet to refuse to take delivery himself or to give directions therefor, leaving the carrier with no person to whom the goods can be delivered? So to hold would be to impose a very serious burden on the carrier. Under the contract of carriage his obligation is to deliver to the consignee. The vendor's notice prevents him from so doing, and, if the vendor is entitled to refuse to take delivery himself, or to give directions for delivery to someone else, it is difficult to see how the carrier is to rid himself of the goods. The whole doctrine of stoppage in transitu appears to have originated in the law merchant and to have been founded on the custom of traders, and I cannot believe that it can have been part of such custom to leave the carrier in such a position that he has goods of which he can require nobody to relieve him at the end of his transit.

On the whole, seeing that the power of stopping in transitu is one of two forms of resuming possession, I think it may fairly be held that the right thereby confirmed of obtaining possession by notice is accompanied by the correlative duty of actually obtaining it, with the necessity, if freight is unpaid, of paying the freight and thus discharging the carrier's lien. The vendor's obligation seems to me to arise, not because he becomes directly liable to perform the particular part of the contract of carriage, including the payment of freight—this, in my opinion, he does not—but from the relation into which he enters with the carrier by placing him in such a position that he cannot deliver to the consignee or to anyone else but the vendor or according to his directions. I think, therefore, that the appeal ought to be allowed, and that the defendants ought to be ordered to pay to the plaintiffs the sum claimed, being that which they would have had to pay in order to obtain delivery of the goods.

SCRUTTON, J., stated the facts and continued: There the matter stops—with the rails at Cajuero, because no one will pay the duty on them and receive them at Parahyba, where the shipowners are quite ready to send them, subject to the lien for freight. The purchasers refuse to receive them or pay for them; the vendors, who have stopped them in transitu, will not give any instructions what to do with them; and the question now is whether in any way the vendors are liable to the shipowners for the freight on them. The rest of the history is that, the purchasers having gone into liquidation on Feb. 23, 1914, the vendors wrote to the receiver that they had stopped delivery in transitu and claimed ownership of the goods. They could not at this time have had more than possession of the goods through the shipowners, if they had that. Two days later they told the liquidator they proposed to sell the goods. The receiver would have nothing to do with the goods. The vendors persisted in their refusal to pay freight, and have by this time probably lost the goods.

The shipowners alleged in their statement of claim that in stopping in transitu it became the duty of the vendors to give directions for the delivery of the cargo, and to pay freight and expenses, and they claimed either the freight or the same amount in damages. The defendants, the vendors, denied their liability, and raised the question whether the shipowners had any right to stop the transit at Tutoya. BAILHACHE, J., states the question to be whether the completion of the voyage was prevented by the vendors' action in giving the stop notice, and finds that the plaintiffs have failed to satisfy him that they were prevented by the stop notice given by the defendants "from performing their freight contract, carrying these rails to Parahyba, and making a tender of them there." I do not understand to whom the learned judge suggested they should be tendered. The vendors had forbidden the shipowners to tender them to the purchasers, and had refused to take them themselves. To land them at Parahyba would risk their seizure by the government or their coming into possession of the purchasers, neither of which the vendors desired, and would involve the payment of duties which the vendors would not, and the shipowners were not bound to, pay. I do not think either the vendors or the purchasers could complain of the goods not going forward from Tutoya to Parahyba, or, if otherwise liable, use it as an excuse for not paying freight. The judge thinks the landing at Tutoya was to protect the shipowners' lien for freight. I think he has overlooked that on Nov. 28 the shipowners were only putting an embargo for freight on the goods not stopped in transitu, and were looking to the vendors for their freight. I should, therefore, on the evidence come to a different conclusion from BAILHACHE, J., and find that in the circumstances the shipowners had done all that was necessary to claim freight from whomsoever was liable. If the judge below had found that, he states, without giving reasons, that the inclination of his opinion is that the plaintiffs would succeed in their claim. Whether this is right raises very difficult questions of great general importance on the nature and consequences of the right of stoppage in transitu, which I now proceed to consider.

The right of stoppage in transitu came into the English law in the seventeenth century from the custom of merchants, both English and foreign—a custom, therefore, which had grown up with no special reference or congruity to the English law. As it enabled an unpaid vendor whose purchaser was insolvent to exercise some control over goods in which he had no property and of which he had no possession, while in the hands of a shipowner with whom he had no contract, and to prevent that shipowner from performing a contract to which the unpaid vendor was no party, it was obvious there would be considerable difficulty in fitting in this international usage and the national law. As LORD ABINGER says, in the well-known judgment in *Gibson v. Carruthers* (15) (8 M. & W. at pp. 338, 339, 340):

"In courts of equity it has been a received opinion that it was founded on some principle of common law. In courts of law it is just as much the practice

A to call it a principle of equity, which the common law has adopted . . . Many unsatisfactory and inconsistent attempts have been made to reduce it to some analogy with the principles which govern the law of contract, as it prevails in this country between vendor and vendee . . .”

Again, he refers to

B “the reasoning and dicta by which it has been attempted, not very successfully, to develop the principle, and make it conformable in appearance and dress . . . with the family of English law into which it has been adopted.”

Great difference of opinion has existed as to the nature of the right, whether or not stoppage in transitu re-vested the property and cancelled the contract. In 1761, in *D'Aquila v. Lambert* (5) (Amb. at p. 400), it was said that the goods of one man (i.e., the unpaid vendor) should not be applied in payment of another man's (i.e. the purchaser's) debts, and as late as 1877 *COCKBURN, C.J.*, in *Pontifex v. Midland Rail. Co.* (13) (3 Q.B.D. at p. 27), said that the effect of the stoppage in transitu was “to re-vest the property” in the unpaid vendor. Yet it is clear now that it does not, but only enables him to resume possession. In 1842 it was quite an open question whether stoppage in transitu entirely rescinded the contract, or only replaced the vendor in the same position as if he had not parted with possession: *Wentworth v. Outhwaite* (16) (10 M. & W. at p. 452). As late as 1885 *COTTON, L.J.*, in *Phelps, Stokes & Co. v. Comber* (17) (29 Ch.D. at p. 821), treated it as still an open question, though he preferred the latter alternative. Fortunately, in 1893, the Sale of Goods Act, purporting to codify the common law, and (see s. 61 (2)) preserving “the rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act,” finally settled some of the doubtful points. The right of stoppage in transitu does not by its mere exercise rescind the contract of sale: (s. 48 (1)). It is a resumption of possession, made while the goods are in course of transit, entitling the unpaid vendor to retain the goods until payment or tender of the price: s. 44. But it is more than a mere lien, for the unpaid vendor may, if the goods are perishable, or if, after notice to the buyer of intention to re-sell, the buyer does not within a reasonable time tender the price, re-sell the goods, and claim damages from the buyer for any loss occasioned by breach of contract: (s. 48 (2)). The unpaid vendor may re-take actual possession if he can get it. If the unpaid vendor

G “had got the goods back again by any means, provided he did not steal them, I would not blame him,”

said LORD HARDWICKE in *Snee v. Prescott* (3) (1 Atk. at p. 250); or he may exercise his right

“by giving notice to the carrier . . . in whose possession the goods are”

H at such a time that by reasonable diligence the carrier may stop delivery to the buyer, which he ought to make according to his contract with the buyer: (s. 46 (1)). LORD HARDWICKE says (*ibid.* at p. 248), that if goods

I “are actually delivered to a carrier to be delivered to A. and while the carrier is upon the road, and before actual delivery to A. by the carrier, the consignor hears A. his consignee is likely to become bankrupt, or is actually one, and countermands the delivery, and gets them back into his own possession again, I am of opinion that no action of trover would lie for the assignees of A. because the goods, while they were in transitu, might be so countermanded.”

And if such notice is given to the carrier “he must re-deliver the goods to or according to the directions of the seller. The expenses of such re-delivery must be borne by the seller”: s. 46 (2).

In general practice the unpaid vendor is only too ready to get back the goods which he has sold to an insolvent consignee. It is clear that, to get them from the carrier, he must discharge any lien the carrier has for particular charges or freight

on the goods in question, but not any general lien by contract or usage for other sums due from the consignee, but not due in respect of the particular goods. This has recently been authoritatively re-stated by the House of Lords in *United States Steel Products Co. v. Great Western Rail. Co.* (6) ([1916] 1 A.C. at p. 196). I notice, to show I have not overlooked it, that the shipowners' lien for freight in the case now before us is not a common law lien for freight on delivery, but a contractual lien for advance freight, but it is, in my view, "charges payable on the carriage of the particular goods" within the decision of the House of Lords. The unpaid vendor is usually quite ready to do this to get the goods; and it is not till, in this case, an unpaid vendor contents himself with the negative attitude "do not deliver bills of lading or goods to the consignees under your contract," and declines to give any further instructions as to what is to be done with the goods at the end of the transit, that the question arises: What are the duties to the carrier of the unpaid vendor who stops in transitu, the Sale of Goods Acts having only stated some of his rights against the carrier. It will be noted that the unpaid vendor goes further in this case. He not only says, "Do not deliver to the consignee," and abstains from giving instructions to whom the carrier is to deliver, but he actually gets an undertaking from the consignee that he will not take delivery under his contract: see letter of Nov. 26.

This raises the question what the unpaid vendor is bound or entitled to do when he "stops in transitu." May he during the transit, as of right, direct the carrier to deliver to him before the contractual place of destination? Must he at the end of the transit take delivery if he prevents delivery to the contractual consignee? Or can he say, as in this case: "Don't deliver to the consignee; I won't take the goods or tell you what to do with them; you must provide for the goods, but I shall sue you if you deliver to the consignee under your contract"? First, what is the effect on the transit or voyage under the contract of affreightment? The unpaid vendor may "stop"; that is, re-take possession by the carriers holding for him in transitu—that is, during the transit; but he cannot, in my view, demand actual possession during the transit against the will of the carrier, or direct the shipowner to deliver to him except at the contractual place of destination. The goods may be under other goods in the hold; the ship may have contractual engagements to carry other goods to other parts; policies of insurance may be affected by detention or delay. The contract of sale is not cancelled by stoppage in transitu; neither, in my view, is the contract of affreightment, except in so far as delivery at the port of destination to the consignee is stopped by the unpaid vendor, and other delivery there is ordered by him. It is true that in *Whitehead v. Anderson* (18) (9 M. & W. at p. 534) PARKE, B., uses language like this:

"The law is clearly settled that the unpaid vendor has a right to re-take the goods before they have arrived at the destination originally contemplated by the purchaser."

But the same learned judge, in *Wentworth v. Outhwaite* (16) in the same year, says (10 M. & W. at p. 452):

"The vendor is entitled to retain the part actually stopped in transitu till he is paid the price of the whole, but has no right to re-take that which has arrived at its journey's end."

He is either using "retain" and "re-take" as equivalent words meaning "holding adverse possession", or is confining "re-taking" to the journey's end. In the same way, when Dr. LUSHINGTON says in *The Tigress* (1) (32 L.J.P.M. & A. at p. 102):

"The right to stop means the right not only to countermand delivery to the vendee, but to order delivery to the vendor,"

he is, I think, speaking of the place where the carrier by contract has to deliver. The carrier may, and it is frequently convenient he should, re-deliver, before

A the contract place of delivery, to the unpaid vendor on an indemnity; but he cannot, in my view, be forced to do it. The delivery of the goods may be stopped, but not their transit to the place of delivery.

The goods, then, arrive at the contract place of delivery where, if there had been no stop, they would have been delivered to the consignee, subject to the shipowner's lien for freight. If the shipowner exercises that lien against a demand
B by the consignee, he will have to bear the cost of exercising the lien: *Somes v. British Empire Shipping Co., Ltd.* (19); and provide for the safe custody of the goods while he keeps his hand on them, and he cannot sell the goods. But supposing he is told not to deliver to the consignee by an unpaid vendor who has the right to order delivery to himself and does not, on what principle can he be compelled to retain and provide for the custody of the goods after he has arrived
C at the contract place of destination, or is ready to go there, if anyone will take delivery? What is he to do with the goods? Is his ship to go sailing round the world, like the "Flying Dutchman", on an endless, hopeless voyage for ever carrying goods that no one will take? Is his ship to stay at the port of destination till it is convenient to someone to take the goods from her? Why, if he discharges the goods, must he pay duties which by the contract should be paid by the person
D taking delivery, and provide for the custody of the goods, as here, for an uncertain time, on the chance that someone will some day recoup him? And does it make any difference, when he is stopped by the unpaid vendor from tendering the goods to the consignee, that, if he had been permitted to tender them, he might have been in similar difficulties if he chose to assert his lien for freight? He is prevented from having the chance of offering the goods to the consignee. It is said that both
E the shipowner for his freight and the unpaid vendor for his price have to look to the goods and must take their chance. This is not quite exact, as the unpaid vendor can sell the goods, and the shipowner cannot; but, further, the unpaid vendor is claiming to exercise his lien through the shipowner, and, if he must bear the expense of exercising his own lien, cannot make the shipowner bear the expense of exercising the vendor's lien for the benefit of the vendor. It is also
F suggested that the shipowner makes his contract subject to the possibility of an unpaid vendor stopping in transitu, and must put up with the consequences. But if I am right that the unpaid vendor cannot stop the transit, but only the delivery to the vendee, it follows that he cannot prolong the transit or the shipowner's obligation to hold the goods after the shipowner is ready to make delivery at the end of the transit. This question must be considered, not only from the point of
G view of the shipowner's claim for freight for the transit, but from the point of view of his claim for demurrage or damages for detention at the end of the transit. Freight is now frequently paid in advance; but when the shipowner arrives at the end of the transit, and is forbidden by the unpaid vendor to deliver to the consignee, what is his position as to custody of the goods if the unpaid vendor refuses to give positive instructions as to their delivery? What is the
H shipowner to do? If he keeps the goods in his ship, ought not the person who compels him to do so to pay the demurrage? If he lands the goods in a warehouse to keep the unpaid vendor's lien, ought not the person for whom the lien is exercised to bear the expense of using the lien? And why is the shipowner to be compelled to take any responsibility for the goods after his contract voyage is over? Surely it is for the person who stops the transit and desires to exercise his lien to take the
I goods and exercise his lien for himself. And must he not, before he does so, satisfy any liens already existing? Further, in my view, the shipowner has fulfilled his contract when he has reached a point where the consignee or person taking delivery is bound to do something, and is not bound himself to incur further expense when no one will take delivery. He is not bound to go into a dock and incur dock dues if he is told that the consignee will not take delivery even if he goes in. He was not in this case bound to send the goods up from Tutoya, when no one would pay the duties without which the goods could not be landed, and he was not allowed by the vendor to deliver the goods to the contractual consignees.

On these events happening the shipowners had, in my view, no further obligation to provide for the goods. The unpaid vendors had the right to stop delivery to the consignee and the right to require delivery at the port of destination to themselves. In my view, this imposed on them a corresponding duty to take delivery from the shipowners, if they continued to prevent them from delivering to the consignees. The vendors are not obliged to perform this duty, for they may release the goods and withdraw the stop before the end of the transit, but if they do not withdraw the stop, but insist on it, in my opinion, they substitute themselves for the original consignees and must take delivery. They can only do so on the terms of discharging the shipowners' lien for freight, and, as these vendors are quite solvent, the damages for their failing to take delivery will be at least the amount of freight the shipowners would have received if the vendors had fulfilled their obligation and taken delivery. The question is not what the shipowners have lost by being stopped from tendering to the consignees; it is quite possible in this case that they have lost nothing, as the consignees would not or could not pay, and expenses might be incurred in asserting the lien. The question is what the shipowners have lost by the vendors refusing to take delivery at the end of the transit when they have stopped the contractual delivery. And if, as I have held, they were bound to take delivery in such a case, the shipowners have lost at least the amount of the freight which the vendors must have paid before they took delivery. It is not necessary to hold that the vendors become a party to the original contract; their obligation follows, in my view, from their interfering with that contract and persisting in their interference at the end of the transit. It is true that this point has never been determined before, but the fact that unpaid vendors have in fact always acted in accordance with the obligation that I think is imposed on them shows that is in accordance with commercial usage and in favour of commerce. On this part of the case the conclusion I have arrived at is apparently the same as that reached by BAILHACHE, J., though, as he does not state his reasons, I do not know that we have travelled by the same road. But as I differ from him in the view I take of the documents and see nothing in those documents to destroy the vendors' obligation to take delivery at the end of the transit of the goods which they have stopped from going to their contractual destinations, I am of opinion that the appeal should succeed and that judgment should be entered for the plaintiffs for £2,743 14s. 7d. with costs here and below.

Appeal allowed.

Solicitors: *Armitage, Chapple, Macnaghten; Downing, Handcock, Middleton & Lewis, for Bolam, Middleton & Co., Sunderland.*

[*Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.*]

POWELL v. GELSTON

[KING'S BENCH DIVISION (Bray, J.), July 27, 1916]

[Reported [1916] 2 K.B. 615; 85 L.J.K.B. 1783; 115 L.T. 379;
32 T.L.R. 703; 60 Sol. Jo. 696]**Libel**—**Publication**—*Letter read by person whom writer did not intend or expect to read it.*

A. wrote to the defendant making certain inquiries regarding the plaintiff. The defendant addressed and sent a letter to A. which contained matter defamatory of the plaintiff. The defendant did not know or expect that the letter would be opened or seen by a third person other than A., but in fact, it was opened and read by B.

Held: there was no publication of the libel by the defendant as A. asked for an answer which he would treat as confidential and only he would see and the defendant's letter was intended for A. alone.

Notes. As to publication of a libel, see 24 HALSBURY'S LAWS (3rd Edn.) 33-43, and for cases see 32 DIGEST 76 et seq.

Cases referred to:

- (1) *Delacroix v. Thevenot* (1817), 2 Stark. 63, N.P.; 32 Digest, 77, 1078.
- (2) *Gomersall v. Davies* (1898), 14 T.L.R. 430, C.A.; 32 Digest 77, 1079.
- (3) *Sharp v. Skues* (1909), 25 T.L.R. 336, C.A.; 32 Digest 78, 1080.

Also referred to in argument:

R. v. Burdett (1821), 1 State Tr. N.S. 1; 3 B. & Ald. 717; 4 B. & Ald. 95, 314; 106 E.R. 823, 873, 953; 32 Digest 79, 1097.

Thorley v. Lord Kerry (1812), 4 Taunt. 355; 3 Camp. 214, n.; 128 E.R. 367; 32 Digest 29, 202.

Clutterbuck v. Chaffers (1816), 1 Starke. 471, N.P.; 32 Digest 77, 1077.

R. v. Amphlit (1825), 4 B. & C. 35; 6 Dow. & Ry. K.B. 125; 3 Dow. & Ry. M.C. 182; 107 E.R. 972; 32 Digest 79, 1099.

Pullman v. Hill & Co., [1891] 1 Q.B. 524; 60 L.J.Q.B. 299; 64 L.T. 691; 39 W.R. 263; 7 T.L.R. 173, C.A.; 32 Digest 76, 1069.

Huth v. Huth, [1915] 3 K.B. 32; 84 L.J.K.B. 1307; 113 L.T. 145; 31 T.L.R. 350, C.A.; 32 Digest 76, 1063.

R. v. Lord Abingdon (1794), 1 Esp. 226, N.P.; 32 Digest 109, 1414.

Warren v. Warren (1834), 1 Cr. M. & R. 250; 4 Tyr. 850; 3 L.J.Ex. 294; 149 E.R. 1073; 32 Digest 84, 1150.

Emmens v. Potile (1885), 16 Q.B.D. 354; 55 L.J.Q.B. 51; 53 L.T. 808; 50 J.P. 228; 34 W.R. 116; 2 T.L.R. 115, C.A.; 32 Digest 81, 1120.

Boxsius v. Goblet Frères, [1894] 1 Q.B. 842; 63 L.J.Q.B. 401; 70 L.T. 368; 58 J.P. 670; 42 W.R. 392; 10 T.L.R. 324; 38 Sol. 311; 9 R. 224, C.A.; 32 Digest 116, 1485.

Hebditch v. MacIlwaine, [1894] 2 Q.B. 54; 63 L.J.Q.B. 587; 70 L.T. 826; 58 J.P. 620; 42 W.R. 422; 10 T.L.R. 387; 9 R. 452, C.A.; 32 Digest 114, 1460.

R. v. Munslow, [1895] 1 Q.B. 758; 64 L.J.M.C. 138; 72 L.T. 301; 43 W.R. 495; 11 T.L.R. 213; 39 Sol. Jo. 264; 18 Cox, C.C. 112; 15 R. 192, C.C.R.; 32 Digest 198, 2464.

Edmundson v. Bird & Co., Ltd., and Horner, [1907] 1 K.B. 371; 76 L.J.K.B. 346; 96 L.T. 415; 23 T.L.R. 234; 51 Sol. Jo. 207, C.A.; 32 Digest 117, 1486.

Further Consideration of an action tried by BRAY, J., with a jury at Reading Assizes.

The facts are set out in the judgment of BRAY, J. The jury found that: (i) the defendant did not know or expect that the letter mentioned in the headnote might

probably be opened or seen by a third person other than the person to whom it was addressed; (ii) the defendant did not bonâ fide believe that what he wrote was true; (iii) the defendant was actuated by malice in writing the letter; (iv) the plaintiff did not instigate A. to write the letter of Oct. 9; (v) the damages, if any, should be £75.

J. B. Matthews, K.C., and *Ernest Walsh* for the plaintiff.

F. W. Sherwood for the defendant.

Cur. adv. vult.

July 27, 1916.—**BRAY, J.**, read the following judgment.—This action was brought to recover damages in respect of four slanders and one libel. The jury found for the plaintiff on three of the slanders, and assessed the damages in respect of these slanders at £15, £20, and £5, making in all £40. They found for the defendant on the fourth slander. No question arises now as to the slanders. It was admitted for the purpose of the argument before me that the plaintiff was entitled to judgment for £40 in respect of the slanders. Upon the libel the jury found for the plaintiff, damages £75, subject to one finding. The defendant contended that there had been no publication of the libel, and, to enable me to decide that point, I put this question to the jury: Did the defendant know or expect that the letter of Oct. 11 might probably be opened or seen by a third person other than the person to whom it was addressed? The jury answered "No." The facts relating to publication were not in dispute. Some time in June or July the plaintiff advertised his house, called Beech House, for sale. H. W. Pollard, the father of F. W. Pollard, answered the advertisement. In the month of October, F. W. Pollard, the son, wrote the letter of Oct. 9. That letter was written by him on the request of his father, who happened to be staying with him for the week-end. It was signed by the son in the son's own name. In answer to this the defendant wrote the letter of Oct. 11, being the alleged libel. He directed it to F. W. Pollard, Nursery Cottage, North Warnborough, which was the son's address. The letter duly arrived. It was opened by the father in his son's absence. It never was seen by the son at all. F. W. Pollard is a carpenter at North Warnborough, and his father keeps a fish shop at Farnborough. Neither father nor son was known to the defendant. The son kept no clerk, and no evidence was given to show that the defendant, when he wrote the letter of Oct. 11, knew anything about the father having requested his son to write the letter, or to show in any way that the defendant knew that the letter would be likely to be opened by the father or by anyone other than the son.

On these facts the defendant submitted that there had been no publication of the libel. It was admitted that there was no publication to the son, and it was said that the defendant was not responsible for the publication to the father. Such a publication, it was argued, was not authorised by him expressly or impliedly nor intended by him. This was the question I had to decide. I left the question to the jury, which they answered in the negative, but in fact I think there was no evidence which would have justified the answer "Yes." There is no doubt that to give a cause of action there must be a publication by the defendant. That is the foundation of the action, and publication to the plaintiff is no publication. For the plaintiff it was contended that the defendant intended that the letter should be published to someone, and it was immaterial whether it was to the father or the son. I do not think it is immaterial. The consequences and the damages may be very different. If published to A. it may cause very little damage to the plaintiff. If published to B., the consequences may be much more serious.

Several cases were cited: *Delacroix v. Thevenot* (1), *Gomersall v. Davies* (2), and *Sharp v. Skues* (3). They show that where, to the defendant's knowledge a letter is likely to be opened by a clerk of the person to whom it is addressed, the defendant is responsible for the publication to that clerk. As LORD ELLENBOROUGH said in *Delacroix v. Thevenot* (1), it must be taken that such a

A publication was intended by the defendant. On the other hand, in *Sharp v. Skues* (3) COZENS-HARDY, M.R., said (25 T.L.R. at p. 337):

B “It would be a publication if the defendant intended the letter to be opened by a clerk or some third person not the plaintiff, or if to the defendant’s knowledge it would be opened by a clerk; but the jury had negatived this in the clearest terms, and under these circumstances it was impossible to hold that some act done by a partner or a clerk of the plaintiff by his direction and for his own convenience when absent from the office could be a publication.”

C Some cases of criminal libel were cited, but in my opinion they have no application. In the present case the defendant was asked by the son to answer the questions in confidence, and the son promised that he would not let the plaintiff know that the defendant had written. The son was asking for an answer that he and he alone would see. The answer of the defendant was intended for the son alone.

D Under these circumstances I cannot hold that the defendant was responsible for the publication to the father. There was, therefore, no publication of the libel and the verdict and judgment on this part of the claim must be entered for the defendant. Of course the costs will follow the several events, and the argument before me will be part of the costs relating to the libel.

Judgment for defendant in respect of the libel.

Solicitors: *Andrew Walsh & Gray*, Reading; *Lamb, Brooks & Co.*

E [Reported by W. VALENTINE BALL, Esq., Barrister-at-Law.]

R. v. WEST RIDING OF YORKSHIRE JUSTICES

G [KING’S BENCH DIVISION (Earl of Reading, C.J., A. T. Lawrence and Shearman, J.J.), December 14, 1917]

[Reported [1918] 1 K.B. 362; 87 L.J.K.B. 443; 118 L.T. 307;
82 J.P. 102; 16 L.G.R. 125]

Licensing—Appeal to quarter sessions—Costs—Order to indemnify justices—Special fee for leading counsel.

H The same principle applies to a taxation of costs under s. 31 (1) of the Licensing (Consolidation) Act, 1910 [now s. 36 (1) (2) of the Licensing Act, 1953] where an appeal to quarter sessions against an order of licensing justices is dismissed as under s. 32 (1) of the Act [now s. 37 (1) (2) of the Act of 1953], the question in both cases being whether the costs were properly incurred.

I **Semble:** there may be circumstances which would entitle the licensing justices to some costs under s. 32 (1) [s. 37 (1) (2) of the Act of 1953] which they would not be entitled to under s. 31 (1) [s. 36 (1) (2) of the Act of 1953].

Notes. The Licensing (Consolidation) Act, 1910, was repealed and replaced by the Licensing Act, 1953.

As to the costs on appeal from licensing justices, see 22 HALSBURY’S LAWS (3rd Edn.) 610–612; and for cases see 30 DIGEST (Repl.) 70–73. For the Licensing Act, 1953, see 33 HALSBURY’S STATUTES (2nd Edn.) 142.

Cases referred to:

- (1) *R. v. Salford Hundred Justices*, [1912] 2 K.B. 567; sub nom. *R. v. Salford Hundred Justices, Ex parte Bolton Justices*, 81 L.J.K.B. 952; 107 L.T. 174; 76 J.P. 395; 23 Cox, C.C. 110, D.C.; 30 Digest (Repl.) 71, 530.
- (2) *R. v. Staffordshire Justices*, [1898] 2 Q.B. 231; 67 L.J.Q.B. 931; 79 L.T. 142; 62 J.P. 741; sub nom. *R. v. Staffordshire Justices, Ex parte Field*, 14 T.L.R. 450; 42 Sol. Jo. 540, D.C.; 30 Digest (Repl.) 70, 524.

Also referred to in argument:

- R. v. Winder*, [1900] 2 Q.B. 666; 69 L.J.Q.B. 729; 64 J.P. 741; 48 W.R. 605; 44 Sol. Jo. 486; sub nom. *R. v. Winder, Ex parte Bolton Corpn.*, 83 L.T. 171; 16 T.L.R. 400, D.C.; 30 Digest (Repl.) 72, 540.
- R. v. London and Strand Division Justices and Dalton, Ex parte L.C.C.* (1898), 78 L.T. 559; 62 J.P. 17; 46 W.R. 558; 42 Sol. Jo. 556, D.C.; 30 Digest (Repl.) 70, 523.

Rule Nisi for a writ of mandamus directed to the justices for the West Riding of Yorkshire sitting in quarter sessions to make an order under s. 32 of the Licensing (Consolidation) Act, 1910, for the payment by the treasurer of the city of Sheffield to the licensing justices of Sheffield of the sum of £10 15s. The facts are set out in the judgment of LORD READING, C.J.

C. F. Lowenthal for the quarter sessions.

G. C. Whiteley, for the licensing justices.

EARL OF READING, C.J.—This is an application by the chairman of the licensing justices for the city of Sheffield for a mandamus to the quarter sessions for the West Riding of Yorkshire to make an order under s. 32 of the Licensing (Consolidation) Act, 1910, for the payment by the treasurer of the city of Sheffield to the licensing justices of the sum of £10 15s., and the point which is involved is whether the licensing justices are entitled to recover an amount which was paid by them for counsel on an appeal against a decision which had been given by them. The facts are simple. An appeal against the licensing justices' decision to refuse the renewal of a licence was dismissed by quarter sessions, and an order was made in the terms of s. 31 (1) of the Act that the appellants should pay to the licensing justices such sum by way of costs as was in the opinion of the court sufficient to indemnify the licensing justices from all costs and charges whatsoever to which they had been put in consequence of the appellants' having served notice of intention to appeal. Thereupon the costs were taxed by agreement out of sessions by the clerk of the peace, and a question arose with regard to a special fee paid to a leading counsel. That special fee was 25 guineas, and the taxing officer thought that the proper allowance for a special fee should not exceed 15 guineas, and the result is that, if the order of quarter sessions stands, the licensing justices will be £10 15s. out of pocket in respect of a matter which they were carrying out gratuitously from a sense of public duty.

The question is one of considerable importance, as we must decide whether the view of the licensing justices is right or wrong, and whether they are right in saying that, although they cannot recover the £10 15s. under s. 31 (1), they can get it under s. 32. I understand their contention to amount to this—and it is important to bear it in mind in deciding this case—that the amount awarded by the taxing officer for the costs of an appeal may differ, although in each case the order is in exactly the same terms, according to whether the money is to be paid by the appellant or by the city fund. In this case the appellants were ordered to pay the costs under s. 31 (1), and that is the widest order known to the law for the payment of costs. It is sometimes termed an order for the payment of costs as between solicitor and own client, which is more extensive than as between solicitor and client, and it means, therefore, that under s. 31 (1), the court ordered the costs to be taxed upon the basis that the amount was to be

A paid by the appellants to the licensing justices, which the solicitor for the licensing justices, could have recovered from the licensing justices as between solicitor and own client. That means costs properly incurred by the justices in defending the appeal. It is not for this court to say whether we should have arrived at the same conclusion as the clerk of the peace under s. 31 (1). I desire to make it clear that I am expressing no opinion on that point, and certainly

B I am not saying that I should have come to the same conclusion as the clerk of the peace. An application was made by the licensing justices to quarter sessions under s. 32 on the ground that, as it was said, quarter sessions had power to order payment of the £10 15s. to the licensing justices by the city treasurer as being costs which the licensing justices could not recover from any other person.

C Under s. 32 (1) the order which quarter sessions can make is, so far as material, in exactly the same terms as the order under s. 31 (1), and, therefore, it is an order that such costs should be paid to the licensing justices as would on a taxation between solicitor and own client be allowed as having been properly incurred. That means that the same order would have to be made under s. 32 (1) as under s. 31 (1), and the same principle would have to be applied to the taxation, and the only possible distinction that can be drawn is that under s. 32 (1) the amount would come out of the city fund, whereas under s. 31 (1) it would come out of the appellants' pockets. I cannot agree that the fact that the money is to come out of a public fund is any justification for allowing the payment when under exactly the same order it would not have been allowed as against a private individual. I agree that s. 32 (1) was passed for the purpose

E of giving licensing justices a very full indemnity out of a public fund. But the test under both sections is the same. The costs must be properly incurred, and s. 32 (1) contains nothing which would justify the allowance of costs not properly incurred. It is said that the costs may be allowed out of a public fund, though not out of the pocket of a private individual, because the licensing justices are performing a public duty. But the fact that the licensing justices are performing

F a public duty is the very reason why an order is authorised in the terms of s. 31 (1). The ordinary individual never gets such an order except by agreement, but otherwise, in the absence of a special statutory enactment, no court ever orders costs as between solicitor and own client. Here, by reason of the statute, the justices, having taken upon themselves a public duty, are entitled to be recouped the whole of the money which they have properly expended. But, as I

G understand, the clerk of the peace has held that it was unreasonable to incur the full amount of this special fee, and, if we directed the quarter sessions to make an order under s. 32 (1) it would again be an order for costs as between solicitor and own client, and it would again be for the clerk of the peace to say whether this item was properly incurred, and I cannot see that he should come to a different conclusion merely because the money would come out of a public fund.

H For these reasons I have come to the conclusion that the rule must be discharged. It is quite clear to me that no other decision would be proper in view of the facts and circumstances to which I have called attention. I do not decide that there may not be circumstances in which the licensing justices might be entitled to recover from the public fund some costs which they could not recover on an order that the appellant should pay the costs of the appeal. LORD ALVERSTONE, C.J., did express an opinion on that in *R. v. Salford Hundred Justices* (1), but I do not think that that matter arises for decision in the present case, and I propose to leave it open, merely saying that, as at present advised, I can conceive circumstances which would entitle the licensing justices to some costs under s. 32 which they could not get under s. 31, but they would not be such costs as are in question in the present case.

I A. T. LAWRENCE, J.—I have come very reluctantly to the same conclusion because I cannot see any difference, in the circumstances, between a taxation

under s. 31 and under sect. 32 in this particular case. If this rule were made absolute, it would be a direction to quarter sessions to apply, through their officer, a different principle as against public money from that to be applied as against an appellant. I do not feel it to be possible to say that that would be a proper decision for this court to give. I am not at all satisfied with the taxation that did take place, but that has nothing to do with this court. The rule must be discharged.

SHEARMAN, J.—I am of the same opinion. Before the Act of 1910 the justices' right to costs, when they became parties to licensing disputes, rested on s. 29 of the Alehouse Act, 1828, and s. 20 of the Licensing Act, 1902. Sections 31 and 32 of the Licensing (Consolidation) Act, 1910 extended the provisions of the earlier Acts and now form a code showing the extent to which the justices should be protected. That code is short and clear. When the court makes an order for costs under s. 31, it should obviously be guided by the principle that as the justices give their time without payment they ought to have an indemnity—i.e., the appellant is to pay a proper indemnity and prevent the justices from being out of pocket. But such an order is not without a limit. No one is entitled to be extravagant either against a litigant or against a public fund, but, subject to that, the costs should be taxed so that the justices are not out of pocket, and so that they are to have anything expended within the limits of reason and prudence. That is the highest scale known to the law. But when the justices cannot recover those costs—and this applies mainly to cases where the credit of the appellant fails—then under s. 32, which is practically in the same words as s. 31, there is power to have recourse to a public fund. Taxation under s. 31 ought to be on the highest possible scale; and the taxing officer cannot go higher under s. 32. But when certain items are taxed off under s. 31, it would be mischievous to allow the matter to be reconsidered as against the public fund.

Whiteley applied for an order that the justices should have the costs of the present proceedings paid out of the city fund, and he cited *R. v. Staffordshire Justices* (2), where such an order was made.

EARL OF READING, C.J.—We do not think that we have any power to make such an order.

Rule discharged.

Solicitors: *Warwick, Williams & Co.*, for *W. Vibart Dixon*, Wakefield; *Church, Rendell & Co.*, for *F. B. Dingle*, Sheffield.

[Reported by J. F. WALKER, Esq., Barrister-at-Law.]

HAIGH v. AERATED BREAD CO.

[KING'S BENCH DIVISION (Ridley, Bray and Avory, JJ.), April 5, 1916]

[Reported [1916] 1 K.B. 878; 85 L.J.K.B. 880; 114 L.T. 1000;

80 J.P. 284; 32 T.L.R. 427; 14 L.G.R. 665; 25 Cox, C.C. 378]

Food—Food injurious to health—Harmful ingredient mixed with article of food—Mixture constituting well-known commodity—Preserved cream, comprising cream mixed with boric acid—Food and Drugs Act, 1875 (38 & 39 Vict., c. 63), s. 3.

The appellant asked for and was supplied by the respondents with a shillingsworth of "preserved cream" which on analysis was found to contain boric acid. Cream containing boric acid in any quantity was injurious to health; "preserved cream", which was a mixture of cream and boric acid used as a preservative, was sold as a well-known commodity. The appellant charged the respondents with selling an article of food, viz., cream, mixed with another ingredient, boric acid, so as to render the article injurious to health, contrary to s. 3 of the Food and Drugs Act, 1875.

Held: an offence was committed against s. 3 even where the article sold was a mixed article of food, and, as such, a well-known commodity; to bring the case within the section it was unnecessary to prove that some further ingredient had been added to the mixed article; accordingly, the respondents were guilty of an offence under s. 3.

Observations of DARLING, J., in *Cullen v. McNair* (1) (1908), 99 L.T. at p. 361, not applied.

Notes. A similar provision to that in s. 3 of the Sale of Food and Drugs Act, 1875, is contained in s. 1 (1) of the Food and Drugs Act, 1955, which provides: "No person shall add any substance to food, use any substance as an ingredient in the preparation of food . . . so as . . . to render the food injurious to health, with intent that the food shall be sold for human consumption."

As to the sale of injurious foods, see 17 HALSBURY'S LAWS (3rd Edn.) 482 et seq; and for cases see 25 DIGEST 79 et seq. For the Food and Drugs Act, 1955, s. 1 (1) see 35 HALSBURY'S STATUTES (2nd Edn.) 95.

Case referred to:

(1) *Cullen v. McNair* (1908), 99 L.T. 358; 72 J.P. 376; 24 T.L.R. 692; 6 L.G.R. 753; 21 Cox, C.C. 682, D.C.; 25 Digest 79, 82.

Also referred to in argument:

Dyke v. Gower, [1892] 1 Q.B. 220; 61 L.J.M.C. 70; 65 L.T. 760; 56 J.P. 168; 8 T.L.R. 117; 17 Cox, C.C. 421, D.C.; 25 Digest 92, 174.

Case Stated by a metropolitan magistrate.

The appellant, Haigh, an inspector appointed under the Sale of Food and Drugs Acts, 1875 to 1907, preferred an information against the respondents, well-known refreshment providers, alleging that on June 28, 1915, at 216, Piccadilly, the respondents unlawfully and wilfully sold to the appellant an article of food, to wit, cream which was mixed with .34 per cent. by weight of boric acid so as to render it injurious to health, contrary to the provisions of s. 3 of the Sale of Food and Drugs Act, 1875.

Upon the hearing of the information the following facts were proved or admitted. On June 28, 1915, the appellant visited the respondents' depot at 216, Piccadilly, and demanded one shillingsworth of preserved cream, which was supplied to him. The appellant informed the respondents' assistance from whom he made the purchase that the preserved cream was bought for the purpose of analysis. On analysis the cream was found to contain boric acid to the extent of .34 per cent. Cream containing boric acid in any quantity is injurious to health, especially in the case of children, adults who are invalids and persons

suffering from kidney disease. Preserved cream—that is, a mixture of cream and boric acid used as a preservative—is sold as a well-known commodity.

The appellant contended that the respondents had committed an offence under s. 3 of the Sale of Food and Drugs Act, 1875, having sold an article of food mixed with an ingredient which made the whole injurious to health, in spite of the fact that the cream was actually sold as preserved cream. For the respondents it was contended that the appellant had received what he had asked for—namely, preserved cream—and that as preserved cream was a mixed article of food and a well-known commodity there had been no mixing so as to contravene the provisions of s. 3 of the Act.

The magistrate was of the opinion that no offence had been committed, and, having regard to the decision in *Cullen v. McNair* (1) dismissed the information.

Section 3 of the Sale of Food and Drugs Act, 1875, provided:

“No person shall mix . . . or order or permit any other person to mix . . . any article of food with any ingredient or material so as to render the article injurious to health, with intent that the same may be sold in that state, and no person shall sell any such article so mixed . . . under a penalty in each case . . .”

McCall, K.C., and *Bartley*, for the appellant.

W. E. Bousfield for the respondents.

RIDLEY, J.—In my opinion, the learned magistrate arrived at an erroneous decision. He appears to have been influenced by certain observations made by *DARLING, J.*, in *Cullen v. McNair* (1) (99 L.T. at p. 361) and to have acted upon them. But in reality those observations had nothing to do with the decision there arrived at. The facts here are quite simple. The appellant purchased a shillingworth of preserved cream at one of the depots of the respondents, and upon analysis the preserved cream was found to contain ‘34 per cent. by weight of boric acid. It is not denied that cream containing boric acid in any quantity is injurious to health, but it has been argued before us that, as the article demanded and purchased by the appellant was preserved cream, and as preserved cream has become a well-known commodity, the thing sold was no longer a mixed, but was an unmixed article of food, and that, therefore, the respondents could not be guilty of an offence under s. 3 of the Sale of Food and Drugs Act, 1875, unless it was found that something fresh had been mixed with the preserved cream. I cannot see that there is any foundation for that argument. The section is perfectly clear, and if it is shown that an article of food has been mixed with any ingredient which renders it injurious to health, a conviction must follow. Here is a case of cream mixed with boric acid. Cream is an article of food, and the mixture with boric acid makes it injurious health. In my view, there is but one defence open in a case like the present, and that is under s. 5 of the Act of 1875, where a person who sells an article mixed with a substance which renders the whole injurious to health is protected if he can establish that he did not know or that he could not have discovered with reasonable diligence that the article was so mixed. This defence does not arise in the present case, and nothing further need be said as to it. I should like to add that I do not think that the learned magistrate kept in mind the distinction made between sales under s. 3 and sales under s. 6 of the Act. The two things are quite different. The former prohibits the mixing of food with injurious ingredients and selling the same, while the latter prohibits the sale of food and drugs not of the nature, substance, and quality of the article demanded by the purchaser. I am of opinion, therefore, that the present appeal should be allowed and the Case remitted to the learned magistrate with a direction to convict.

BRAY, J.—I agree. To my mind s. 3 of the Act of 1875 is perfectly plain. It says, first, that no person shall mix any article of food with any ingredient so as to render the article injurious to health with the intent that the same may

A be sold in that state, and, secondly, that no person shall sell such article so mixed. Cream is an article of food, and the learned magistrate has found, as he could not help finding, that cream mixed with boric acid is injurious to health. The only defence which the respondents could have had would have been a plea of innocence under the provisions of s. 5 of the Act. That does not arise here, and the appeal must, therefore, be allowed.

B AVORY, J.—I am of the same opinion, and I only desire to add that I think that the learned magistrate treated the judgment of DARLING, J., in *Cullen v. McNair* (1) as though it had been the judgment of the court. That case is either a decision distinctly against the present respondents or it has no application to the present case at all. In one sense it is a decision against them, because it decided that a person who mixed cream with an injurious substance committed an offence under s. 3. As the appellant in *Cullen's Case* (1) had sold cream and not preserved cream, the observation of DARLING, J., were entirely obiter, and I may add that I do not agree with them.

Appeal allowed.

Solicitors: *Allen & Son; Bristows, Cooke & Carpmael.*

[Reported by J. A. SLATER, ESQ., Barrister-at-Law.]

ELDER v. BISHOP AUCKLAND CO-OPERATIVE SOCIETY, LTD.

[KING'S BENCH DIVISION (Viscount Reading, C.J., Avory and Shearman, JJ.), May 22, 1917]

[Reported 86 L.J.K.B. 1412; 117 L.T. 281; 81 J.P. 202; 33 T.L.R. 401; 61 Sol. Jo. 593; 15 L.G.R. 579; 26 Cox, C.C. 1]

Food—Milk—Deficiency in fat—Purchase with written warranty as to quality—Delivery at railway station by producer—Subsequent collection by servant of retailer—No evidence that milk not interfered with between delivery and collection—Liability of retailer—Sale of Food and Drugs Act, 1875 (38 & 39 Vict., c. 63), s. 6, s. 25.

Master and Servant—Liability of master for act of servant—Misuse of authority by servant—Sale of milk—Servant authorised to sell to limited class—Sale to person outside class—Sale involving statutory offence.

The respondents were a co-operative society who retailed to their members milk which they purchased from T., under a written contract by which T. agreed to supply a particular branch of the society with milk for a specified period on certain terms, carriage paid and warranted as to quality, but no particular railway station was mentioned as the place of delivery. A consignment of milk arrived at F. railway station at 5.13 a.m. and remained there until 8 a.m. on the same day when it was collected by S., a servant of the society. His duty was to distribute the milk to members of the society. He had no authority to sell it to any person who was not a member and had not previously ordered a supply. While on his rounds S. sold a pint of milk to an inspector and it was found to be defective in milk fat. No evidence was produced by the society to show that the milk had not been tampered with while at the railway station before it was collected by S.

Held: (i) S. had a limited authority to sell and the sale to the inspector was a misuse of his limited authority and not completely outside the scope of his authority, and, consequently, the respondents were liable for the

act of their servant; (ii) as, on construction of the contract, the place of delivery was the F. railway station, and the milk had remained there for several hours, the respondents had not discharged the burden of showing that the milk when sold was in the same state as when purchased, and consequently they could not claim the protection of the written warranty under s. 25 of the Sale of Food and Drugs Act, 1875.

Notes. Section 6 and s. 25 of the Sale of Food and Drugs Act, 1875, have been substantially replaced by s. 2 and s. 115, respectively, of the Food and Drugs Act, 1955; see 35 HALSBURY'S STATUTES (2nd Edn.) 97, 197.

Referred to: *Buckingham v. Duck* (1918), 120 L.T. 84.

As to the sale of food and drugs not of the proper nature, substance, quality; and as to a written warranty as a defence, see 17 HALSBURY'S LAWS (3rd Edn.) 484, 598; and for cases see 25 DIGEST 88 et seq., 98 et seq. As to liability of master for statutory offences, see 10 HALSBURY'S LAWS (3rd Edn.) 277; and for cases see 14 DIGEST (Repl.) 46 et seq.

Cases referred to:

- (1) *Lindsay v. Dempster*, 1912 S.C. (J.) 110; 49 Sc.L.R. 999; 2 S.L.T. 177; 6 Adam, 707; 25 Digest 82, 108*ii*.
- (2) *Boyle v. Smith*, [1906] 1 K.B. 432; 75 L.J.K.B. 282; 94 L.T. 30; 70 J.P. 115; 54 W.R. 519; 22 T.L.R. 200; 21 Cox, C.C. 84, D.C.; 30 Digest (Repl.) 88, 670.
- (3) *Pugh v. Williams*, [1917] W.N. 174; 86 L.J.K.B. 1407; 117 L.T. 191; 81 J.P. 159; 15 L.G.R. 573; 25 Cox, C.C. 768, D.C.; 25 Digest 99, 226.
- (4) *Sanders v. Sadler* (1906), 95 L.T. 872; 71 J.P. 3; 23 T.L.R. 11; 5 L.G.R. 240; 21 Cox, C.C. 316, D.C.; 25 Digest 99, 225.

Also referred to in argument:

- Houghton v. Munday* (1910), 103 L.T. 60; 74 J.P. 377; 8 L.G.R. 838, D.C., 25 Digest 82, 106.
- Heilbutt v. Hickson* (1872), L.R. 7 C.P. 438; 41 L.J.C.P. 228; 27 L.T. 336; 20 W.R. 1005; 39 Digest 456, 828.
- Wilson v. Playle* (1903), 88 L.T. 554; 67 J.P. 263; 1 L.G.R. 870; 20 Cox, C.C. 433, D.C.; 25 Digest 97, 214.

Case Stated by justices of Ferryhill, in the county of Durham.

An information was preferred by the appellant, chief inspector of weights and measures for the county of Durham, against the respondents, the Bishop Auckland Co-operative Society, Ltd., for that they, on Nov. 17, 1916, at the township of Ferryhill, by their servant and agent, Ernest Stevenson, did unlawfully sell to the prejudice of the purchaser, Francis William Benson, the assistant of the appellant, a pint of new milk which was deficient in non-fatty solids as therein specified, and was not of the nature, substance, and quality demanded by the purchaser, contrary to s. 6 of the Sale of Food and Drugs Act, 1875. Upon the hearing of the information the following facts were proved or admitted:

On Nov. 17, 1916, at 8.30 a.m., at Ferryhill Station, a sample of new milk was purchased by Francis William Benson, from Ernest Stevenson, which was deficient to the extent set out in the information, and was served from a tin which contained other milk. The milk from which the sample was taken was purchased by the respondents from Richard Thwaytes, of Brampton Mill, Appleby, under a contract in writing, dated Sept. 30, 1916, by which he agreed

“to supply to the Bishop Auckland Co-operative Society (Shildon Branch) for twelve months from the date of the agreement thirty to forty gallons of fresh milk twice daily [at specified prices] the carriage paid. . . and . . . warranted . . . to be pure and of the nature, substance, and quality herein described within the meaning of the Sale of Food and Drugs Acts, 1875 and 1879, and all Acts amending the same. . .”

A In pursuance of the contract Thwaytes caused a can containing fifteen gallons of milk to be put on the railway at Appleby. The can was dispatched therefrom at 7.57 p.m. on Nov. 16, 1916, viâ Darlington, and arrived at Ferryhill at 5.13 a.m. on Nov. 17, 1916. By the requirements of the railway company the can was not locked and sealed. Thwaytes paid the carriage for the can, which was his property. Stevenson received the can into his possession from a servant of the railway company at 8 a.m. on Nov. 17, 1916, and on such receipt poured the milk contained in the can into two smaller tins, out of one of which Benson purchased the sample, and the can was thereupon returned to Appleby. The respondents purchased the milk as the same in nature, substance, and quality as that demanded by Benson, and Stevenson sold the milk to Benson in the same state as when he received it from the railway company, and neither the respondents nor Stevenson had any reason to believe at the time of such sale that the milk was otherwise than of the nature, substance, and quality demanded. Stevenson had no authority from the respondents to sell any of the milk to any person who was not a member of the respondent society and who had not previously ordered a supply. On Dec. 1, 1916, within seven days after the service of the summons, the respondents sent the appellant, Benson, and Thwaytes, each a copy of the warranty, with a written notice under s. 20 (1) of the Sale of Food and Drugs Act, 1899, that they intended to rely on the warranty under s. 25 of the Sale of Food and Drugs Act, 1875, and specifying the name and address of Thwaytes.

The justices were of the opinion that the liability of the respondents only commenced when the milk came into the possession of Stevenson at Ferryhill, and that they had discharged the onus cast upon them when they proved that they sold the milk in the same state in which it was purchased by them; and that Stevenson acted outside the scope of his authority in selling to Benson, and that there was no sale by the respondents to Benson. The justices dismissed the summons but stated this Case.

The Sale of Food and Drugs Act, 1875, provided:

“Section 6. No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality demanded by such purchaser under a penalty not exceeding £20 . . . Section 25. If the defendant in any prosecution under this Act proves to the satisfaction of the justices or court that he had purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect, that he had no reason to believe at the time when he sold it that the article was otherwise, and that he sold it in the same state as when he purchased it, he shall be discharged from the prosecution, but shall be liable to pay the costs incurred by the prosecutor, unless he shall have given due notice to him that he will rely on the above defence.”

Maddocks for the appellant.

Mortimer for the respondents.

VISCOUNT READING, C.J.—In my opinion, this appeal must be allowed. The respondents were charged with an offence under s. 6 of the Sale of Food and Drugs Act, 1875, namely, with selling an article, milk, to the prejudice of the purchaser, which was not of the nature, substance and quality demanded. The respondents put in a twofold defence. In the first place they contended that the sale was not made on their behalf, inasmuch as the person who actually sold the milk had no authority on their behalf to sell it, and in the second place they contended that there had not been delivery to them as purchasers of the milk from their vendors at the time that is material for the purposes of the present case.

First, as to the authority of the servant to sell the milk. According to the finding of fact on the part of the justices, the servant Stevenson had no authority from the co-operative society to sell milk to any person who was not a member of the respondents' society and had not previously ordered a supply. That is not a finding that Stevenson had no authority at all to sell. It is nothing more than a finding that the authority to sell which was given to him was of a limited nature; that is the only implication that I am able to draw from the case as it is stated. Counsel for the respondents argued that we ought to read it in a different manner, namely, as a finding of fact that there was no authority to sell. I quite admit that if we were to do so we should be bound to come to the conclusion that the justices would have been right in dismissing the information, because no offence would have been committed by the respondents. If a servant sells an article which he is strictly forbidden to sell, he is acting altogether outside the scope of his authority, and his principal cannot be held responsible for his action. But when this case is examined carefully I cannot agree that that is the real meaning of the finding.

The attention of the justices was called to *Lindsay v. Dempster* (1), and they appear to have taken too wide a view of it. In my opinion that case does not assist the respondents in the least, for all that that case decided was that where a servant had acted outside the scope of his authority, he did not bind his principal by a sale which he himself had carried out. There the court came to the conclusion that the servant had no authority to sell at all. His duties were clearly defined, and his sole task was to deliver milk to customers who had previously bought it and to receive payment for the same. He did, in fact, sell milk while he was on his rounds to certain persons, but he had no right or authority to do so. Absolute prohibition is quite a different thing from limited authority and in the present case the servant had a limited authority to sell, and it was not his business simply to deliver. Under the circumstances, therefore, *Lindeay v. Dempster* (1) has no bearing upon the present case.

There is another case which has been cited, *Boyle v. Smith* (2), which is worthy of notice, because, although the decision is not altogether in point, there are certain observations in the judgments of LORD ALVERSTONE, C.J., and LAWRENCE, J., which do affect the matter which is now under discussion. *Boyle v. Smith* (2) was a licensing case, and there a drayman had been sent out with beer by his master, who was licensed to sell beer by retail at his brewery for consumption off the premises, with strict orders only to deliver the same to persons who had previously ordered it, and not to sell or to deliver any whatever to other persons. If there was any beer undelivered it was his duty to bring it back to the brewery. The drayman sold some beer to persons in the street who had not previously ordered the same. This was held not to be a sale by the master. LORD ALVERSTONE, C.J., said in the course of his judgment ([1906] 1 K.B. at p. 436): "This is not a case of delegated authority," and he evidently intimated by his language that, if it had been a case of delegated authority, his decision would have been different. Again, LAWRENCE, J., in the course of his judgment, said (ibid.):

"It is quite true that, if the drayman was acting within the general scope of his employment in selling beer, it would be no answer for the master to say that he had expressly forbidden him to do so. In the present case, however, the drayman was employed only to deliver beer and not to sell beer, and therefore the respondent cannot be made liable for what his servant did."

These observations are, in my opinion, very pertinent to the case which is now before us, and their effect is that, if there is any authority at all given to a servant, a misuse of that authority does not enable the principal, his master, to escape upon the well-known principles of law affecting principal and agent. In my opinion, the present case falls within that principle. It is a case of the

A misuse of authority, and not of acting outside the scope of the authority, and, therefore, the respondents are liable for the act of their servant Stevenson, even though express instructions had been given to him not to sell milk to persons other than customers of the society.

The second point taken on behalf of the respondents depends entirely, in my opinion, upon the interpretation of the written contract. Where, according to

B the terms of the contract, was the delivery of the milk to be made? If the meaning of the contract is that delivery was to be made to the purchaser at the railway station, and from that moment the risk as to the goods was to attach to the purchaser, then *Pugh v. Williams* (3) is a direct authority upon the question which is now under discussion. The defence which is set up by the respondents is a statutory defence, and s. 25 of the Sale of Food and Drugs

C Act, 1875, imposes a burden upon the person who calls it in aid. What such a person has to do is to satisfy the court, when relying upon a written warranty given by his vendor, that he has performed all the conditions imposed by the section of the statute so as to make the defence provided applicable. I need not go through the whole of the section; it is sufficient to mention that one of the conditions imposed, and the one which more particularly applies to this

D case, is that the article in question—namely, the milk—was sold in the same state as when it was purchased. Here the respondents rely upon the written warranty given by Thwaytes, and, in order that it may avail them, they must show that the milk when it was sold by Stevenson, their servant, was sold in the same state as it was when they purchased it. In *Pugh v. Williams* (3) the court held that where the milk then in question had been for a substantial

E period of time at a railway station where it had been delivered and become the property of the purchaser, and no evidence had been given as to what had been done to it during that period, it could not be established that the defendant had sold the milk in the same state as that in which he purchased it. The court allowed the appeal—the justices had there found as in the present case that

F the respondent was protected by the written warranty—upon the ground that the respondent had failed to satisfy the burden which was imposed upon him. Now, subject to one point which has been taken and argued on behalf of the respondents, to which I will refer directly, the position here is precisely the same as in *Pugh v. Williams* (3). Taking the more favourable view for the respondents

G—namely, that the place of delivery was at Ferryhill Station, and not at Appleby—the milk arrived there at 5.13 a.m. and delivery was not taken by Stevenson until after 8 a.m. No evidence whatever was given as to what happened to the milk after it was taken off the train and before it was taken possession of by Stevenson. But, say the respondents, the milk was indeed sold in the same state

in which they received it, because the delivery was not complete until the milk actually passed into their physical possession. Is that so? Looking at the contract

H—and I have already stated that this point rests upon the interpretation of the written warranty—I cannot agree with that contention. The contract does not mention any place of delivery, but I think that the true view to be taken of it is that the milk was to be supplied to the Shildon branch of the co-operative society, carriage paid, on certain terms, and subject to a guarantee which I

I agree continues only until actual delivery, whenever that may be. If it had been stated in the contract that the milk was to be delivered carriage paid at Ferryhill Station, then this case would have been exactly similar to *Pugh v. Williams* (3). But as no station is mentioned, I think that the proper inference to be drawn is that the Shildon branch of the co-operative society directed the vendor of the milk, Thwaytes, to deliver to the account of the branch at a particular station.

There is no finding in the case which is in opposition to this view, and that is, in my opinion, the proper inference which one should draw from the document. If that is so, it is just as though the words "To be delivered at Ferryhill Station"

were inserted in the contract. The strength of the argument of counsel, on behalf of the respondents, rests upon the words, "I, Richard Thwaytes . . . agree to supply to the Bishop Auckland Co-operative Society (Shildon Branch)," and the absence of any mention as to the place of delivery. But I think that such a contention is placing too great a burden upon the words "agree to supply", which do not mean, as I think, to deliver into the actual physical possession of the Shildon branch, but to deliver wherever ordered by the respondents for the account of the Shildon branch of the co-operative society. As I have arrived at that conclusion as to the meaning of the contract, it seems to me that *Pugh v. Williams* (3) is an authority directly in point, and I do not think that it is necessary for me to add anything to what I said in that case. For the reasons which I have stated I am of opinion that this appeal must be allowed, and that the Case must be remitted to the justices with a direction to convict.

AVORY, J.—I am of the same opinion. As to the first point raised—namely, whether the man Stevenson had authority to sell—I am entirely in accord with what has been said by the Lord Chief Justice. The point is really of little practical importance, because it is clear that under s. 3 of the Sale of Food and Drugs Amendment Act, 1879, and the Milk and Dairies Act, 1914—a sample of the milk might have been taken at the place of delivery, and, if it had been so taken, it would not have been material, or even open, to consider whether Stevenson was authorised to sell or not. As to the second point, it is to be observed that the material part of s. 25 of the Act of 1875 for the consideration of the justices is in these words, "and that he sold it in the same state as when he purchased it." Now, taking the most favourable view for the respondents of this contract, it is clear that they purchased the milk at the time when it arrived at the railway station. If anyone had disputed their title to it after its arrival there, there can be no doubt that they would have alleged that the milk was their property, labelled and duly consigned to them. I think that the present case is entirely covered by *Pugh v. Williams* (3), and that the respondents have failed to discharge the burden cast upon them by s. 25 of the Act of 1875, so as to make their defence complete. The case must be sent back to the justices with a direction to convict.

SHEARMAN, J.—I agree. As to the first point argued on behalf of the respondents, I think that the servant of the co-operative society had a limited authority to sell, and that he misused it. That being so, the respondents are liable for the act of their servant unless they can bring themselves within the protection afforded by s. 25 of the Sale of Food and Drugs Act, 1875, which is their second point of defence. In order to do that, the respondents must show that the milk when sold by them was in the same state as when they purchased it. Speaking for myself, I must confess that I have some difficulty in seeing how one can construe this commercial contract differently from any other commercial contract. It seems to me that the place of purchase was Appleby Station, notwithstanding the fact that the terms of the contract obliged the vendor to add to it that he would pay the cost of carriage to some other station. Of course, as the statute is of a quasi-criminal character, it must be construed strictly. In many of these contracts—each case speaking for itself—there has been a finding that the place of purchase was the place of delivery, and the court has extended the protection. A good illustration of this is afforded by *Sanders v. Sadler* (4), but the protection has never extended beyond the place of delivery—that is, the railway station; and, if that is so, this case in my opinion is entirely covered by the decision in *Pugh v. Williams* (3). The respondents have not protected themselves by showing that the milk had not been tampered with in the interval between the time of its arrival at Ferryhill Station and the time when it was taken possession of by their servant Stevenson, and therefore the protection

A afforded by s. 25 of the Act of 1875 does not apply in this case. As the respondents have failed upon both points raised by them, I agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, for *Harold Jevons*, Durham; *Rider, Heaton, Meredith & Mills*, for *G. W. Jennings & Sons*, Bishop Auckland.

[Reported by J. A. SLATER, ESQ., Barrister-at-Law.]

Re SHAW. Ex parte SHAW v. OFFICIAL RECEIVER

D [COURT OF APPEAL (Swinfen Eady, Bankes, and Warrington, L.J.J.), July 6, 1917]

[Reported [1917] 2 K.B. 734; 86 L.J.K.B. 1395; 117 L.T. 425;
[1917] H.B.R. 214]

Bankruptcy—Discharge—Suspension—Impropriety of bankrupt's conduct—Agreement that trustee would not object to discharge if certain payments made and would influence creditors not to object—Purchase by bankrupt's relatives of debts without full disclosure of material facts.

E By an agreement dated April 20, 1916, and made between a bankrupt and the trustee in bankruptcy, in consideration of specified monthly payments being made by the bankrupt no application would be made to the Court in respect of any salary then being earned by the bankrupt or any property or assets owned by him, acquired or to be acquired out of his earnings. At that time the bankrupt was in receipt of a salary of £1,200 in respect of his employment by a company, in which he owned 833 fully paid £1 shares. It was further agreed that when the monthly instalments paid should have amounted to a sum sufficient to pay the creditors 5s. in the pound no objection would be raised by the trustee, and he would use his best endeavours to prevent any objections by any creditors, to an application by the bankrupt for his discharge under or for the annulment of his bankruptcy. It appeared that relatives of the bankrupt, with his consent and privity, had on his behalf bought up a number of the claims of creditors, who were unaware of the facts above stated, at rates varying from 2s. 6d. to 10s. in the pound. In view of these matters, among others, the registrar ordered that the bankrupt's discharge be suspended for two years. On appeal,

H **Held:** it was highly improper for the trustee to bind himself, whatever might be the facts at the material future time, not to object to the bankrupt's discharge and to do his best to prevent any creditor objecting; those provisions had been inserted in the agreement for the benefit of the bankrupt, and he must be held responsible for having stipulated for them; the purchase of debts from creditors at different prices without full disclosure of every material fact was also grossly improper; and, therefore, the registrar was entitled to take those matters into consideration when making the order for suspension.

I **Notes.** As to orders for discharge, see 2 HALSBURY'S LAWS (3rd Edn.) 515 et seq., and for cases see 4 DIGEST (Repl.) 586 et seq.

Appeal from an order made by Mr. Registrar Mellor suspending for two years the discharge of the bankrupt, Herbert William Shaw.

Patrick Hastings for the bankrupt.

The Solicitor-General (Sir Gordon Hewart, K.C.) and *E. W. Hansell* for the official receiver.

Kingham for the trustee in bankruptcy.

SWINFEN EADY, L.J.—This is an appeal by the bankrupt from an order made by the registrar upon the bankrupt's application for his discharge, suspending the discharge for two years. The order of adjudication in bankruptcy was made on May 15, 1914. The provable debts were then £3,513, and there were practically no assets. The only sum able to be collected by the trustee was £1 19s. 11d. The official receiver reported that the bankrupt's assets were not of a sufficient value to pay 10s. in the pound. He also reported that the bankrupt had omitted to keep such books of account as are usual and proper in the business carried on by him, and as would be sufficient to disclose the business transactions. He further reported that the bankrupt became aware of his insolvency in October, 1913, and thereafter continued to trade and contract debts, after knowing himself to be insolvent. Under those circumstances it is not disputed that it was open to the registrar in his discretion to suspend the discharge for a period of two years. It is said, however, that the registrar has exercised his discretion improperly and on some wrong principle, because he has taken matters into consideration to which he ought not to have had regard.

The first of those matters was this. It appears that at some date—we are not told when, and under some agreement which is not produced—the bankrupt entered into the employment of the Staines Projectile Co., Ltd., and was in receipt of a salary of £1,200 a year. It also appears that the bankrupt became possessed in some way—we are not told how, and at a time of which we are not informed—of 833 fully-paid shares of the nominal value of £1 each in the Staines Projectile Co., Ltd.

On April 20, 1916, he entered into an agreement with the trustee in bankruptcy, which provided as follows:

“In consideration of an arrangement having been made between the parties hereto that so long as the monthly payments hereinafter mentioned are duly paid no application shall be made to the court in respect of any salary now being earned or any property or assets owned or to be owned by [the bankrupt] acquired or to be acquired out of his earnings”

he agreed to pay £30 on the 21st of each calendar month until 20s. in the pound should have been paid to the creditors. In other words, the bankrupt agrees to pay £360 a year out of his salary of £1,200. We are told that he has a wife and two young children, aged about twelve and seven years. As security for the payments he deposited the certificate for the 833 fully-paid shares, and part of the arrangement was that he should be able to obtain a release of them by the trustee on paying the nominal value of the shares. Clause 8 of the agreement, to which the strongest objection is taken, is in these terms:

“It is further agreed and declared that if and then the monthly instalments to be paid by [the bankrupt] as aforesaid shall have been paid to an amount which shall, after providing for the payment of the costs, charges, remuneration fees and expenses of the trustee as aforesaid, amount to a sum sufficient to pay to the creditors who shall have proved their claims as aforesaid the sum of 5s. in the pound no objection will be raised by the trustee and that the trustee will use his best endeavours to prevent any objections by any creditors to any application by [the bankrupt] for his discharge under or for the annulment of his said bankruptcy.”

That agreement having been entered into, two brothers-in-law of the bankrupt, with his consent and with his privity, proceeded to buy up claims of the creditors. Those claims appear to have been the matter of negotiation. They were purchased at different rates. As little as 2s. 6d. in the pound was paid to some creditors,

A notwithstanding the arrangement provided by this agreement for the payment of the creditors in full. The creditors appear to have been very unequally dealt with, because 3s. 6d., 4s. 8d., 5s., and as much as 10s. in the pound were paid to certain creditors, so that at rates varying between 2s. 6d. and 10s. in the pound the claims of various creditors were brought up. According to the report of the official receiver, some of these creditors stated that they were unaware of the amount of the bankrupt's salary—namely, £1,200 a year—and were unaware of the agreement made by the trustee, to which I have referred, when they agreed to assign their debts to the brothers-in-law.

B In my opinion, the agreement entered into by the trustee was a most improper agreement, and the language used by the registrar was not in the least too severe with regard to such an agreement. It is to be observed that this is what the effect of the agreement is. The trustee, being a trustee in bankruptcy for all the creditors and having been chosen to protect the interests of the creditors, binds himself beforehand, at the instance of the bankrupt, to “use his best endeavours to prevent any objections by any creditors” to the bankrupt's application for discharge or annulment of his bankruptcy. It was pointed out with perfect propriety by the registrar (117 L.T. at p. 426) that it was not within the rights of the trustee

“to bargain away the right or the duty (for it may even be said to be the duty) of a creditor in certain circumstances to attend on an application by the debtor to get rid of his bankruptcy, whether it be by annulment or whether it be by discharge.”

E For the trustee, without knowing what the facts might be on the application for annulment or for discharge, to bind himself beforehand to use his best endeavours to prevent the creditors from opposing the annulment or the discharge is a highly improper thing, and something into which, in my judgment, no trustee should ever enter. The argument addressed to us on behalf of the trustee does not improve the position. It was urged on his behalf that he was obliged to assent to that stipulation because the bankrupt would not enter into the agreement without it. It will be observed that there was property belonging to the bankrupt consisting of 833 shares in this company acquired during the bankruptcy. The bankrupt was in receipt of a salary of £1,200, as to which it was open for application to be made under s. 51 of the Bankruptcy Act, 1883 [now Bankruptcy Act, 1914, s. 49]. Notwithstanding that, the trustee, in my judgment, most improperly executed this agreement with the bankrupt.

G This much may be said in favour of the trustee, that there is no suggestion that there was corruption on his part. He was not bribed to enter into the agreement. It is not suggested that he got any personal benefit for himself out of it. It is said that at the most it was an error of judgment on his part to do it. But, accepting that view, it was a very gross error of judgment. The agreement was one which a trustee in bankruptcy should never enter into, in any circumstances.

I Again, the circumstances under which these debts were bought up were extremely unsatisfactory. With that part of the case the trustee in bankruptcy is not concerned. He was not a party to the debts being paid off, but the bankrupt was. It was with his privy that these arrangements were made whereby the creditors assigned their debts for the different amounts I have mentioned, and then, of course, the official receiver has the complaint made to him that some of them were not aware when they did so of the salary of £1,200 a year, or of the agreement under which the bankrupt had agreed to pay the £30 a month to the trustee until the debts were paid in full. In my opinion, the circumstances of the case are such that there was ample material upon which the registrar, in the exercise of his discretion, should suspend the discharge of the bankrupt, and there is no ground for the point raised upon the appeal that he took into consideration matters which ought not to have been taken into consideration. This appeal

should be dismissed with costs, and the sum that has been deposited in court will be paid out to the official receiver on account of costs, and the balance of his costs will be paid out of the estate in the hands of the trustee in bankruptcy.

BANKES, L.J.—I agree. As I understand the complaint, it is that upon the facts before him the learned registrar ought not to have drawn any inference adverse to the bankrupt. Upon the argument before us it appears to me that there was really no attempt to maintain that position upon the facts as they appeared before the registrar. Take, first of all, the clause in the agreement as to the trustee not objecting to the bankrupt obtaining his discharge. It is not disputed that that is a clause which may be called an improper clause, and which under any ordinary circumstances a trustee ought not to enter into and a bankrupt ought not to enter into. It is said that the trustee was acting on advice. He was put in a difficult position because the bankrupt's solicitor said that the bankrupt would not sign the agreement unless the clause was agreed to. All I can say about that is that it seems to me that the trustee misconceived his position and his duty altogether in agreeing to any such clause, and, if he was acting on advice, he was acting on bad advice and he would be well advised to change his advisers. It is significant in this case that all the matters which have been relied upon as indicating that the registrar was wrong, or as justifying this appeal, are facts which are not upon evidence. I have dealt with the case of the trustee. It is not really before us, but his excuse depends upon a fact which is not in evidence—that he was acting upon advice which he thought he was justified in taking. So far as the bankrupt is concerned, his counsel really does not defend the clause in the agreement. But he says that under the circumstances the bankrupt ought not to be blamed for either allowing his solicitor to insist upon it or for his solicitor inserting it in the agreement. Again it is said that he was acting upon advice. Upon that, all that I can say is that there is no evidence of it. If I assume that he was acting upon advice and that his solicitor drafted the agreement, again it was bad advice. But from the point of view of the bankrupt, what seems to me much more serious is his conduct with regard to the buying up of the debts of these creditors, because the position, according to him, was that he had entered into an agreement with the trustee under which he was obliged to pay these creditors in full, and, having done that, he allows his brothers-in-law to purchase these debts at figures which, upon the face of them, would indicate that the creditors were wholly ignorant of the position which the bankrupt had placed himself by this agreement. On the other hand, it is said that that is a purely wrong inference, because a meeting of creditors was called and they were all fairly informed of the facts, and every one of them entered into these bargains with their eyes open, knowing what the position was and preferring to enter into this arrangement. If that were so, it would be quite easy to prove it, and if evidence were given of it, it would explain away that fact, which otherwise seems to me abundantly to justify the conclusion at which the learned registrar arrived. On these grounds I agree that this appeal fails.

WARRINGTON, L.J.—I am of the same opinion. I think that the matter was entirely in the discretion of the registrar. The official receiver's report disclosed facts which, under the statute, were sufficient to justify the suspension of the debtor's discharge. The ground put forward on behalf of the debtor in support of the appeal is that the registrar in dealing with that matter took into account circumstances which had no bearing on the question which he had to determine, and that he was thereby misled into exercising his discretion in the way he did.

The two points which he did take into account were, first, the agreement by the trustee, and, secondly, the purchase of the debts from individual creditors at different amounts. With regard to the first of these two circumstances, the

- A clause about which we have heard so much was obviously inserted in the agreement for the benefit of the debtor. He must, therefore, be held responsible for having stipulated for that particular provision. Let us see what that provision is. I pass over for the moment that part of it which provides that the trustee shall use his best endeavours to persuade the creditors not to object to the discharge. Looking at the position of the trustee himself, he bound himself, on the sole condition that the debtor shall have paid enough to give 5s. in the pound to the creditors, not to raise any objection to an application for discharge. Whatever circumstances may come to his knowledge, whatever he may know at the time that the application is made, he is not to disclose those facts or that knowledge to the court—facts and knowledge which it might be extremely material for the court to know in determining whether the discharge is to be granted or not.
- C How comes it that the trustee, who is appointed, not in the interests of the debtor, but in the interests of the general body of creditors, to look after the due administration of the estate, so binds himself that, whatever the circumstances may be, he is not to raise objection to the discharge of the debtor or the annulment of the bankruptcy? I need say no more about that.

- D With regard to the purchase of the debts, it was admitted by the debtor, or his counsel, before the registrar that he had been a party to the purchase of those debts. It is to be borne in mind that these creditors were negotiating with individuals, and it is obvious that the negotiations must have been so conducted (for it is impossible to suppose that one creditor would have been willing to accept 2s. 6d. in the pound while another creditor was willing to accept 10s. in the pound) that the creditors cannot have been put upon an equal footing in the negotiations resulting in the purchase of these debts. That is enough, to my mind, to show
- E that that also was a circumstance which the registrar was justified in taking into account in exercising his discretion. For these reasons I am of opinion that the discretion was exercised properly, and that the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Kenneth Brown, Baker & Baker; Solicitor to the Board of Trade; Henry Stewart-Moore.*

[*Reported by E. A. SCRATCHLEY, ESQ., Barrister-at-Law.*]

WATSON v. WINCH

[KING'S BENCH DIVISION (Lord Reading, C.J., Sankey and Low, J.J.), January 19, 1916]

[Reported [1916] 1 K.B. 688; 85 L.J.K.B. 537; 115 L.T. 1209;
80 J.P. 149; 32 T.L.R. 244; 14 L.G.R. 486]

*Local Government—Byelaw—Repeal of statute conferring power to make byelaw -
Byelaw becoming invalid unless expressly preserved by repealing statute.*
Byelaws made under a statute which is repealed cease to have effect and become invalid unless they are expressly preserved by the repealing statute.

Notes. Section 85 of the Local Government Act, 1888, except for the words therein "Bicycles, tricycles, velocipedes, and other similar machines are hereby declared to be carriages, within the meaning of the Highway Acts", was repealed by the Statute Law Revision Act, 1908, the Road Transport Lighting Act, 1927, s. 11 and Schedule, the Road Traffic Act, 1930, s. 122 and Sched. 5, and the Local Government Act, 1933, s. 307, Part III.

As to the validity of byelaws, see 24 HALSBURY'S LAWS (3rd Edn.) 515 et seq.; and for cases see 13 DIGEST (Repl.) 251.

Case referred to:

- (1) *Surtees v. Ellison* (1829), 9 B. & C. 750; 4 Man. & Ry. K.B. 586; 7 L.J.O.S. K.B. 335; 109 E.R. 278; 42 Digest 773, 2017.

Also referred to in argument:

- A.-G. v. Lamplough* (1878), 3 Ex.D. 214; 47 L.J.Q.B. 555; 38 L.T. 87; 42 J.P. 356; 26 W.R. 323, C.A.; 42 Digest 673, 846.

Case Stated by justices of Norwich.

On Aug. 9, 1915 the respondent, Edwin Francis Winch, the chief constable for the city of Norwich, preferred an information against the appellant, Ernest Ivens Watson, alleging that the appellant, upon a certain day in July, 1915, unlawfully offended against a certain byelaw made in 1879 by riding a bicycle upon the footway of Unthank Road, in the city of Norwich. By s. 45 of the Norwich Improvement Act, 1879, it is provided:

"The corporation may from time to time make byelaws for regulating the use in streets and public places within the city of bicycles, velocipedes, and other wheeled conveyances of a like nature."

The byelaw under which the information was laid was made in November, 1879, and was in the following terms:

"A person shall not ride or impel a machine upon any footway, pavement, or causeway made or set apart for the use or accommodation of foot passengers."

It was proved that the appellant rode a bicycle on the day referred to, at 1.25 p.m., along the side of Unthank Road, Norwich, the portion of the road so ridden on being raised from the carriageway and separated therefrom by a kerbstone and used as a footway. At the hearing of the information the appellant contended that the byelaw had been repealed, as far as bicycles were concerned, by s. 85 of the Local Government Act, 1888, which was as follows:

"(1) The provisions of s. 26 (5) of the Highways and Locomotive (Amendment) Act, 1878, and s. 23 (1) of the Municipal Corporations Act, 1882, in so far as it gives power to the council to make byelaws regulating the use of carriages herein referred to, and all other provisions of any public or private Acts, in so far as they give power to any local authority to make byelaws for regulating the use of bicycles, tricycles, velocipedes, and other similar

A machines, are hereby repealed, and bicycles, tricycles, velocipedes, and other similar machines are hereby declared to be carriages within the meaning of the Highway Acts."

The justices rejected the contention of the appellant and convicted him.

D. N. Pritt (*Cloughton Scott* with him) for the appellant.

B The respondent did not appear.

C LORD READING, C.J.—The appellant was convicted of an offence infringing a certain byelaw of the city of Norwich, which byelaw was validly made under the provisions of s. 45 of the Norwich Improvement Act, 1879, a section which gave the Norwich Corporation the power of making byelaws for the regulation of the use in streets of bicycles, velocipedes, and other wheeled conveyances of a like nature. But by s. 85 of the Local Government Act, 1888, all provisions of any public or private Acts, in so far as they give power to any local authority to make byelaws for regulating the use of bicycles, tricycles, velocipedes, and other similar machines, were repealed, and bicycles, tricycles, velocipedes, and other similar machines were declared to be carriages within the meaning of the Highway Acts. Of course, one of the Acts repealed by this section was the D Norwich Improvement Act, 1879, so far as the special provisions which I have named were concerned, and the effect of the new legislation was to apply to bicycles, tricycles, velocipedes, and the other like machines the code of law applicable to carriages as defined by the Highway Acts.

E A question has now arisen as to the effect of a repeal of this character, a question which apparently has never yet been decided by any court. The Act which enabled the corporation to make byelaws has been repealed. Obviously no further byelaws can be made under the former statute. I will assume that all the byelaws made prior to the date of the repeal were validly made. But what is their position after the repeal? Are the byelaws still in existence and enforceable, or do they come to an end? In other words, does the repeal of the statute which confers the power of making byelaws upon a subordinate body ipso facto repeal the byelaws also? F The question is undoubtedly one of general importance, and the able argument put forward on behalf of the appellant has made me regret that no one has appeared on behalf of the respondent. We are of opinion that the point raised on behalf of the appellant is a good one, and that his contention is well founded. In *Surtees v. Ellison* (1) LORD TENTERDEN, C.J., said (9 B. & C. at p. 752):

G "It has been long established, that, when an Act of Parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed. That is the general rule; and we must not destroy that by indulging in conjectures as to the intention of the legislature."

H To that passage it is only necessary to make one qualification, namely, that since that case was decided Lord Brougham's Act (13 & 14 Vict., c. 21) and the Interpretation Act, 1889, have been passed, and it is necessary to bear this later Act in mind, especially s. 11. It seems to follow, then, that any byelaw made under a statute which is repealed ceases to possess any validity unless the repealing statute contains some provision or makes some enactment preserving the validity of the byelaw notwithstanding the repeal of the statute. Now let me apply that I principle to the present case. Here we have byelaws made validly under the Norwich Improvement Act, 1879. So long as that Act was in force the byelaws were effective. But when that Act was repealed, so far as its provisions related to bicycles, &c., by the Local Government Act, 1888, the byelaws ceased to have any validity, and were to be treated as non-existent, I think, therefore, that the justices came to a wrong decision, and the conviction must be quashed.

In this particular case there is another point which arises, though it is not of the same general application and interest. The Local Government Act, 1888, the repealing statute, has made other provisions as to bicycles. It would be an

odd thing that a byelaw dealing with bicycles in streets should exist at the same time as another code possibly inconsistent with it. By the Local Government Act, 1888, bicycles are to be dealt with as "carriages" under the Highway Acts, and provisions enabling local authorities to make byelaws regulating the use of bicycles are repealed. It is quite clear then that the legislature intended to substitute the provisions of the Highway Acts for the byelaws which previously existed, and it follows that the former byelaws are repealed. This is in accordance with the well-established principle of law that when there are two statutes in existence, and the later statute contains provisions which are inconsistent with those of the earlier one, the earlier statute is repealed in so far as it is at variance with the later one. For the reasons which I have stated the appeal must be allowed.

SANKEY, J.—I am in entire agreement with my Lord's judgment. Stated quite shortly, the matters appears to stand thus, that where a statute under which byelaws are made is repealed, the byelaws cease to be effective unless they are expressly preserved by the repealing statute. If this were not so, there might easily be two codes in existence relating to the same matter altogether inconsistent with one another, and this would reduce the law to an absurdity. Moreover, it has been the usual practice whenever it has been desired by a repealing statute to preserve byelaws made under the previous statute to make special provision for keeping the byelaws alive. In the present instance this has not been done. I think, therefore, that we must take it that the Local Government Act, 1888, expressly repealed the Norwich Improvement Act, 1879, in certain particulars, and at the same time repealed all byelaws relating to bicycles, &c. which had been made under the powers conferred on the Norwich Corporation by the latter Act.

LOW, J.—I agree.

Appeal allowed.

Solicitors: *Hatchett-Jones, Bisgood & Marshall*, for *Watson & Everitt*, Norwich.

[*Reported by J. A. SLATER, Esq., Barrister-at-Law.*]

A

HURST v. EVANS

[KING'S BENCH DIVISION (Lush, J.), December 1, 4, 1916]

[Reported [1917] 1 K.B. 352; 86 L.J.K.B. 305; 116 L.T. 252; 33 T.L.R. 96.]

B

Insurance—Loss—Exception—Burden of proof—Exception of loss by dishonesty of servant—Evidence not amounting to proof of criminal charge—Exclusion in criminal proceedings.

C

By a policy of insurance the assured was insured against loss or damage or misfortune to his jewellery "arising from any cause whatsoever, whether arising on land or water, save and except . . . loss by theft or dishonesty committed by any servant in the exclusive employment of the assured . . ." During the currency of the policy jewellery was taken from a safe in the assured's shop during the night, and the assured claimed under the policy in respect of the loss.

D

Held: (i) in view of the wording of the policy the onus was on the plaintiff to prove, not only the fact of the loss, but also that the loss did not fall within one of the exceptions in the policy; (ii) evidence to prove that the loss was due to the theft or dishonesty of a servant of the assured, and so came within an exception, was admissible although it was not such as would justify a verdict of Guilty if the servant were tried on a criminal charge with respect to the loss.

E

Notes. The holding with regard to the onus of proof was criticised by BAILHACHE, J., in *Munro, Brice & Co. v. War Risks Association* (post p. 981) a case of a marine policy.

Referred to: *Lake v. Simmons* (1926), 95 L.J.K.B. 586.

As to insurance against loss, see 22 HALSBURY'S LAWS (3rd Edn.) 330, 331, and cases there cited.

Cases referred to:

F

(1) *Thurtell v. Beaumont* (1823), 1 Bing. 339; 29 Digest 322, 2643.

(2) *Gorman v. Hand in Hand Insurance Co.* (1877), I.R. 11 C.L. 224; 29 Digest 328, 2673iii.

(3) *Dawson v. Wrench* (1849), 3 Exch. 359; 18 L.J.Ex. 229; 12 L.T.O.S. 405; 154 W.R. 883; 29 Digest 244, 1972.

(4) *Wheeler v. Bavidge* (1854), 9 Exch. 668; 2 C.L.R. 1077; 23 L.J.Ex. 221; 156 E.R. 286; 41 Digest 328, 1851.

G

(5) *Crow v. Falk* (1846), 8 Q.B. 467; 15 L.J.Q.B. 183; 10 Jur. 374; 115 E.R. 952; 41 Digest 333, 1876.

(6) *The Glendarroch*, [1894] P. 226; 63 L.J.P. 89; 70 L.T. 344; 10 T.L.R. 269; 38 Sol. Jo. 362; 7 Asp. M.L.C. 420; 6 R. 686, C.A.; 41 Digest 414, 2580.

H

Action on a policy of insurance tried by LUSH, J., without a jury.

The facts appear in the judgment.

Heber Hart, K.C., and *Gerard Sanders* for the assured.

Patrick Hastings for the defendant, an underwriter.

I

LUSH, J.—This case raises questions of some difficulty and undoubtedly of considerable importance. The action is brought on a policy of insurance which was obviously intended mainly to cover the loss of jewellery by theft or burglary, but is not in the ordinary form of a burglary or theft policy. The policy provides that, in consideration of the premium, the assured should be insured against "loss or damage or misfortune" to the jewellery

"arising from any cause whatsoever, whether arising on land or water, save and except breakage of furniture, china, earthenware, glass, and brittle articles, and save and except loss by theft or dishonesty committed by any servant or traveller or messenger in the exclusive employment of the assured, unless when conveying goods to the post, and save and except loss by theft

or dishonesty committed by any broker or customer in respect of goods intrusted to them by the assured, his servants or agents, unless such loss arises when goods are deposited for safe custody by the assured, his servants or agents, with such broker or customer."

The policy covers not only jewellery, but a quantity of other goods. The assured was a jeweller, and entered into this contract with the underwriters, the defendants.

The assured alleges that on the night of May 3, 1915, there was a burglary, or, at all events, that there was a robbery, at his premises in the Fulham Road, and that somebody that night stole a quantity of jewels valued at something between £700 and £800, and he brings an action on the policy for the purpose of being indemnified against loss. The assured's statement of claim as it was originally drawn alleged that there had been a burglary, but alleged nothing else, and, if the statement of claim had continued to be in that form and I had had to decide the case strictly on the pleadings, I must, in my view of the facts, have given judgment for the defendant, because on the facts I am satisfied that there was no burglary, no breaking in or breaking out of the premises. But the statement of claim has been amended, and the assured says in substance that he has suffered a loss within the meaning of the policy, and that is how he now puts his case. Alternatively, he raises the claim of burglary. The defence consists of a traverse of all the material facts alleged by the plaintiff, and there is a further plea to the effect that a man named Mason, who was a servant of the assured, was implicated in the crime.

The assured had his shop in the Fulham Road, in which there was a safe containing a large quantity of jewels. He had two men in his employ, one a man named Brown, who was his manager, and a man named Mason, who was under Brown, and who had been with him, I think, about ten months at the time of the loss. On the evening of May 3 something had gone wrong with the electric light, and Brown and Mason stopped longer than usual on the premises. They had arranged somewhere about ten o'clock in the morning—it is not very clear who suggested it, but certainly Mason took some part in the suggestion—that they should spend the evening together. As I say, they were late in leaving the premises. Brown wanted to finish the work of repairing the electric light, but Mason for some reason was anxious that Brown should not do so, and he suggested that Brown could finish the work in the morning. Mason, according to Brown, was very insistent that they should leave when the time arrived at which Mason wished to go. He urged Brown to hurry, and they left together about nine o'clock. They went next door to buy some cigarettes; they had rarely done that before; the man in the shop said they had done it occasionally; they then left. They went to one or two houses of call, and then spent the evening playing billiards until a very late hour. About a quarter of an hour after they left there was a very violent explosion heard upon the premises. Both neighbours—that is to say, the proprietor of the tobacconist's shop, and Mrs. Brown, who lives on the other side next door to the assured's shop—came out and looked out of their doors, wondering what had caused the explosion. Mrs. Brown continued at her shop door, standing, therefore, close to the entrance to the assured's shop, and she has sworn—and I accept her evidence—that during the few minutes that elapsed before the firemen came up, about ten minutes, no human creature either left the place or went in. The firemen came; they found the place locked up—no apparent indication of anybody having broken in; the windows were safe and the door was secured, and one of them had to kick open the door with his foot. They went in and found the place full of smoke and that the safe had been blown open by explosive. The police followed soon afterwards, and they found a very remarkable state of things. The room was covered with dust; everything was in disorder; but they found that of the four wooden trays which had been inside the safe three were now in the room outside the safe, and one was left in the safe. Two of the three were on the floor not far from the

A safe; one stood on a table in a recess; the fourth, as I say, was in the safe. The safe-breaker had employed the method, so common in these cases, of putting a very large quantity of soap in the keyhole of the safe for the purpose of deadening the sound of the explosion, and when the police got there they found that this soap had been scattered by the explosion all over the room. The two trays that stood on the floor were covered with this soap, but there was no soap on the tray that had been left inside the safe, and the inference the experts drew, and asked me to draw—and I do draw it, because it is an irresistible one I think—is, that the trays had been taken out of the safe before the explosion ever occurred. Of course the jewels were all gone. It is quite inconceivable, it seems to me, that the thief blew the safe up in order to get at the inside, because the position of the trays outside the safe, and the fact that there were two of them covered with soap, whereas the one left in had no soap on it, leads one necessarily to the conclusion that the inference I have mentioned is the only possible one to draw. Therefore, whoever it was who stole the jewels did not get access to the safe by means of the explosion. The trays must have been taken out of the safe before the explosive was ever used. The explosion, as I have said, took place about a quarter of an hour after Brown and Mason had left. There were two keys of the door, and there were two keys of the safe. One key of the door and one of the safe was kept by the assured, and the others were kept by Brown. The place was thoroughly examined, and the result of the examination was that it was thought that nobody got in or got out by breaking and entering either at the front or at the rear. Everything was in perfect order, and the evidence was that it would be extremely difficult for anybody to get in from the rear at all. However that may be, I am quite clear that nobody got into that house and nobody broke out of it.

One must see what possible light is thrown on the occurrence by what one knows with regard to Brown and Mason. With regard to Brown, there is no suggestion that he had done anything to lead to the inference that he took any part in this robbery. With regard to Mason, evidence was tendered of his character, which I rejected. Character has no relevance at all in a civil action. Evidence of good character is admitted in a criminal proceeding, not in a civil action. I know nothing of these parties, nothing of either Brown or Mason's antecedents, but evidence was tendered that Mason was about this time an associate of two or three notorious and highly skilled safe-breakers. Counsel for the assured objected to the evidence. It is not necessary for me to say definitely whether evidence to that effect would be admitted in a criminal prosecution. I have very much doubt if it would, not because I think it is not relevant, but because in criminal proceedings evidence is often rejected which, although strictly relevant, might on the whole so tend to prejudice an accused person as to make it difficult for him to obtain that fair trial which, according to our jurisprudence, can only be secured if a jury tries him on the footing that he is an innocent person, and they are not allowed to know his previous misdeeds. That evidence, I think, probably would not be admitted in criminal proceedings, but in this action I admitted it, and I admitted it because I think that, although taken by itself, its weight is certainly slight, I cannot say it is not a relevant fact in a case like this, where the whole question depends upon whether Mason was acting dishonestly—that is the expression in the policy—or was acting in complicity with the persons who actually effected this theft, and I admitted it. The detective sergeant told me that two days before this occurrence Mason, to his surprise, was in a public-house, engaged in what the detective sergeant called heated or earnest conversation with three notorious safe-breakers. There is one other incident I must mention which came out in the cross-examination of Brown. On the Saturday night before the robbery Mason told Brown that he (Mason) had got a possible customer, either at Clapham Junction or somewhere near there, who was minded to buy some of these jewels, and he arranged that he should come on the Sunday morning at eleven o'clock, and that he and

Brown should go down to the premises together. Mason in fact called two hours before the appointed time, and Brown was in bed and, therefore, could not come at once. Mason, it is quite true, Brown said, waited a little, and ultimately asked Brown to lend him the key of the door and the key of the safe in order that he (Mason) might go to the premises with these keys, unlock the door, unlock the safe, and take these jewels to this customer, who had an appointment, he said, with him at ten o'clock. Brown gave him the keys. Mason returned and gave the keys back to Brown. No customer has been called, no person has been called in this action to depose to Mason's going to see him with any jewels. The assured has called no witness; he has not even called Mason. That is how the matter stands.

Upon that evidence counsel for the assured says that the onus is upon the defendant of proving that Mason was dishonest, that he was an accomplice or the actual perpetrator of this felony, and he asks me to hold that, although the circumstances give rise to grave suspicion, there is not sufficient evidence to warrant me in coming to the conclusion of fact that Mason was dishonest and was the thief. On the other hand, counsel for the defendant urges that the onus is upon the assured. If the onus is upon the assured, and if he has to negative the loss by the dishonesty of a servant, I can have no hesitation in holding that the assured has not discharged the onus. As I say, he has not called Mason to explain these circumstances, although Mason, I am told—and it was not demurred to—was available as a witness, and, indeed, was in court. He has not called this alleged customer. It is obvious that, if the burden is upon the assured, he has not proved that this loss occurred by some cause other than the dishonesty of Mason.

Is the onus upon the assured or is it upon the defendant? Counsel for the assured has cited two authorities upon which he asked me to say that the onus is upon the defendants. The first case was *Thurtell v. Beaumont* (1). That was a case brought against an insurance company to recover the value of goods alleged to have been destroyed by fire in the plaintiff's warehouse. The defence set up was that the assured had wilfully set fire to the premises, or had caused them to be set fire to. Positive testimony was adduced, and inconsistencies were pointed out in the assured's evidence tending to substantiate the charge. The learned judge directed the jury that, before they gave a verdict against the assured, it was their duty to be satisfied that the crime of wilfully setting fire to the premises was as clearly brought home to him in this action as would warrant their finding him guilty of the criminal offence if he had been tried before them on a criminal charge. It was held that the direction was right. There the burden was undoubtedly put upon the defendant, but I point out that in that case the policy was not similar to the terms of this policy. It was an ordinary fire policy, and the defence pleaded there was that the assured himself had committed a crime or a fraud, or had attempted to put upon the underwriters by claiming against them for fire when he himself had feloniously caused it. One can well understand in that case that the burden would be upon the defendant. It was not a policy against loss by any cause except a particular one; it was a policy against fire, and the person implicated was the contracting party himself, the assured. I cannot treat that case as any authority at all to guide me in the present case. The next case cited was nearer to this. That was the case in the Court of Exchequer in Ireland of *Gorman v. Hand in Hand Insurance Co.* (2). That was a fire policy, the terms of which were:

"The society agrees (subject to the conditions indorsed, which are to be taken as part of the policy) that if the property described shall be destroyed or damaged by fire . . . they will . . . pay or make good all such loss and damage."

It was there held that the burden was upon the insurers, and the Chief Baron in his judgment says this (I.R. 11 C.L. at p. 230):

A "When, therefore, it is once shown that the loss resulted from fire, the plaintiff has established a *prima facie* case, and the onus is thrown upon the defendants to prove that the act which caused the fire was within the proviso. The defence is not in any sense a traverse of an allegation included in the general averments of the plaint; it is a plea in confession and avoidance, and the proof of it is on the defendants."

B Again, I do not consider that that case is really in point. That was not a policy in terms like this policy. It was an absolute policy of insurance against loss by fire, subject, no doubt, to conditions in the policy, and the Chief Baron pointed out that what the defendant had done was not to traverse the allegation the assured had made, but to plead avoidance, and that, having undertaken the burden, he was bound to make it good. I do not think that that case is an authority.

C The general law on this subject in cases of actions upon policies of insurance can, I think, best be gathered by saying what it was that the assured would have to plead, according to the strict rule of pleading, before he could recover, and in *BULLEN AND LEAKE* (3rd Edn.) p. 182 the proposition is stated thus:

D "In declaring on marine policies, when the nature of the claim makes it necessary to refer to the whole contents of the policy, memoranda, &c., it will frequently be found convenient to set out the document verbatim, as the commercial form of these instruments and the blanks left in them make it difficult to recite them in a satisfactory manner . . . In other cases the shortest form, of course, is to give the legal aspect of the material parts of the contract as in other declarations. Care must be taken to state the contract accurately, with all the exceptions and qualifications of the defendant's liability (see *Dawson v. Wrench* (3)) and the declaration must negative that the defendant comes within the exceptions."

E Then the learned editor cites two cases [*Wheeler v. Bawidge* (4), and *Crow v. Falk* (5), 8 Q.B. at p. 471] which are not cases in which the claim is made upon a policy of insurance, but cases in which the court had to construe the meaning of a charterparty. I do not, however, treat those authorities, even if they negative the accuracy of what has been stated in *BULLEN AND LEAKE*, as authorities in a case like the present. I do not think that the substance of the cases is the same, nor do I think the question which the court had to decide really the same. There is a case which has been cited of *The Glendarroch* (6), in which I think, when LORD ESHER's judgment is considered, there is nothing which militates against the accuracy of that expression which I have referred to in *BULLEN AND LEAKE*. As far as the authorities go, I think that there is no case which precludes me from expressing my view upon the question, having regard to the terms of this policy.

F When one looks at this policy it is almost impossible to hold that the onus is upon the defendant. It leads to an impossible and absurd result if that view is right. The insurance is not against loss caused by a specified risk; it is not an insurance against loss by fire; it is not an insurance against loss by theft; it is an insurance against loss caused by any cause excepting those specified, and the first cause specified is breakage. If counsel for the assured is right when he says that when you are dealing with an exception with regard to causes as distinguished from an exception with regard to subject-matter the onus is on the defendant, the assured here need only allege "I have lost my jewellery," and the underwriter would be obliged to plead and to prove that the loss was caused by an exception, breakage, if those were the facts. The assured must, in my view, set out the facts so as to show that the losses were covered by the policy. It is not enough to say he has lost them; he must show that the loss was one against which the underwriter agreed to hold him indemnified, and in the case I put he must plead and prove, therefore, that the goods were not broken. The same reasoning must apply, it seems to me, to the second cause mentioned in the policy—namely, loss caused by the dishonesty of the servant—and,

therefore, I hold that upon this policy it was for the assured to show that the loss was one of those losses against which the underwriter had to indemnify him. He has not shown it. To put the matter in the most favourable way to the assured, he has no doubt proved a loss, and he has left it a matter of the gravest suspicion who caused it, whether it was his own servant or a stranger, and, therefore, in that view of the matter I decide in favour of the defendant.

I have been asked to deal with the case on the hypothesis that the burden was on the defendant. I have considered whether I ought to do that in this case. On the whole, I have come to the conclusion that I ought. This case may go further, and I think it would be most unfortunate if another court takes a different view from that which I take with regard to the onus, and the case had to be sent down for a new trial when the defendant might not be in a position to call the witnesses he has called before me. Counsel for the assured has relied upon what was said in *Thurtell v. Beaumont* (1) and contended that I cannot give judgment here for the defendant upon this hypothesis unless the evidence were such that, if Mason was upon his trial upon an indictment, I should treat the verdict of guilty as being the only proper one to be given on these materials. He also says that, inasmuch as the evidence in criminal cases is the same as he says it is in civil cases, I must not admit evidence with regard to Mason being an associate of notorious safe-breakers. I do not agree with that contention. I do not consider that the evidence in a criminal case is the same as the evidence in a civil case on the same subject-matter, nor do I agree that the court, in a civil case which raises the question of criminality on the part of a third person, is only justified in finding that there was that criminality if the court upon the same evidence would be prepared to hold that the person said to be implicated ought to be convicted upon an indictment. It is impossible, to my mind, first of all to say that the evidence is the same in the two cases. Take the very simple case of evidence as to character. Evidence of a man's good character is never relevant either in a criminal proceeding or in a civil proceeding, but evidence as to character is always admitted in a criminal proceeding. A man who is on trial is in peril. The court has not to adjust rights between two persons when a man is criminally prosecuted, and the object of the inquiry is altogether different from what it is in a civil action. A judge constantly tells a jury in a criminal proceeding that, although there is evidence before them, it would not be safe for them to convict; no judge could possibly tell a jury in a civil case that it would not be safe for them to find a verdict for the defendant. The mere fact that evidence is relevant is not sufficient to justify the court in allowing it to be admitted in a criminal proceeding, because, as I have already pointed out, the man in peril may be so prejudiced by that evidence being admitted that it would tend to prevent the trial being fair according to our views as to what a fair trial means in a criminal matter. During the argument I put as an illustration the case of an accused person having confessed his guilt to a police officer, evidence which is strictly relevant undoubtedly, but is always excluded in criminal proceedings if the admission or confession is obtained by a promise or by a threat by the person to whom it is made; but in a civil case like the present, if Mason had made a statement to a police officer showing that he was implicated, it would be impossible to say that evidence of that statement ought not to be admitted. It could be put to him, and he might explain it, though, of course, the jury might disbelieve his explanation. In a criminal proceeding for perjury the court cannot leave the matter to the jury unless there is corroboration; but in a civil action where the question of perjury is in issue, the court is absolutely free to find that there was perjury although there was no corroboration at all. The proceedings are entirely different.

That being so, is it right to say that, before this court can come to the conclusion that the dishonesty of Mason is proved, there must be evidence on which he would be convicted upon indictment? It does not follow. I am not dealing with the guilt or innocence of Mason; it is not before me. This piece of evidence,

- A which I think is material, as to his having been in association with notorious safe-breakers, would probably be excluded in a criminal proceeding, and therefore, if my judgment is for the defendant, it is not the same thing as saying that on a trial on the materials before me Mason would be convicted. I am not dealing with that. I am simply here to say whether the evidence before me is more consistent with the defendant's case than with that of the assured. One
- B must appreciate the gravity of the accusation made, and give full effect to that, but if the evidence is more consistent with the defendant's case than it is with the assured's case so as to lead one to the conclusion that this dishonesty is proved, in my view, one must say so, leaving to the future the question of a conviction on a criminal charge as absolutely unaffected by my judgment. I must answer from the point of view of the civil action the question whether Mason was or
- C was not implicated in this matter, or, to use the words of the policy, whether the goods were not lost through the dishonesty of Mason. I am satisfied on the evidence, Mason not having been called, that the keys were not obtained by him for a business purpose. It is idle to suggest that in an action involving this inquiry there could have been no evidence called by the assured of the supposed customer to whom Mason went with the jewels. It is a circumstance that weighs
- D with me that Mason has not been called. Brown having been examined some months ago, the assured knowing that this circumstance of Mason borrowing the keys for that supposed purpose was going to be before the court, Mason has not been called, and the supposed customer has not been called. Therefore, I find that Mason got the keys by a trick, and had the two keys in his custody for an hour. There is another circumstance—that the safe was not blown up
- E for the purpose of enabling the thief to get at the jewels; there is the circumstance of the fuse being placed in the safe; there is the circumstance of Mason finding out where Brown was that evening; there is the circumstance of Mason having made arrangements to spend the evening with him. Taking all those facts together, there being no explanation tendered to me on behalf of the plaintiff, no theory which I can make consistent with the fact that there was no
- F burglary, no breaking in, and no breaking out, I feel forced to the conclusion, regrettable as it is, that this was not a theft in which Mason took no share. That being so, there must be judgment for the defendant.

Judgment for defendant.

Solicitors: *Hutchison & Cuff; Windybank, Samuel & Lawrence.*

[*Reported by T. W. MORGAN, ESQ., Barrister-at-Law.*]

NOTE

MUNRO BRICE & CO. v. WAR RISKS ASSOCIATION, LTD. AND ANOTHER

[KING'S BENCH DIVISION (Bailhache, J.), March 20, 21, 25, 1918]

[Reported [1918] 2 K.B. 78; 88 L.J.K.B. 509; 118 L.T. 708;

34 T.L.R. 331; 14 Asp. M.L.C. 312]

Insurance—Marine insurance—Perils of the sea—F. c. and s. clause—Proof by assured of loss of ship—Cause of loss not proved—Right of assured to recover under policy—Need to negative exception.

When, in an action on a policy of marine insurance containing an f. c. and s. clause, the assured has proved that his ship was sunk at sea, he has made out a *prima facie* case against the underwriters on the policy, and it is for them to set up the f. c. and s. exception and bring themselves within it if they can.

Where an exception merely excludes from the operation of a promise a particular matter which, but for the exception, would fall within the promise, it is sufficient for the plaintiff to bring himself *prima facie* within the terms of the promise and leave it to the defendant to prove that the plaintiff's case is in fact within the excluded class, but where the exception is as wide as the promise the plaintiff must bring himself within the promise as qualified. Whether a promise is a promise with an exception or exceptions or is a qualified promise is a question of the construction of the instrument.

Notes. As to perils insured against in marine policies, see 22 HALSBURY'S LAWS (3rd Edn.) 73 et seq., and for cases see 29 DIGEST 197 et seq.

Cases referred to:

- (1) *Compania Maritima of Barcelona v. Wishart* (1918), 87 L.J.K.B. 1027; 118 L.T. 705; 34 T.L.R. 251; 14 Asp. M.L.C. 298; 23 Com. Cas. 264; 29 Digest 204, 1635.
- (2) *Dawson v. Wrench* (1849), 3 Exch. 359; 18 L.J.Ex. 229; 12 L.T.O.S. 405; 154 W.R. 883; 29 Digest 244, 1972.
- (3) *Wheeler v. Davidge* (1854), 9 Exch. 668; 2 C.L.R. 1077; 23 L.J.Ex. 221; 156 E.R. 286; 41 Digest 328, 1851.
- (4) *Crow v. Falk* (1846), 8 Q.B. 467; 15 L.J.Q.B. 183; 10 Jur. 374; 115 E.R. 952; 41 Digest 333, 1876.
- (5) *Vavasour v. Ormrod* (1827), 6 B. & C. 430; 9 Dow. & Ry. K.B. 597; 5 L.J.O.S.K.B. 172; 108 E.R. 509; 17 Digest (Repl.) 404, 2099.
- (6) *Latham v. Rutley* (1823), 2 B. & C. 20; 3 Dow. & Ry. K.B. 211; 1 L.J.O.S. K.B. 225; 107 E.R. 290; 8 Digest 17, 89.
- (7) *Ionides v. Universal Marine Insurance Co.* (1863), 14 C.B.N.S. 259; 2 New Rep. 123; 32 L.J.C.P. 170; 8 L.T. 705; 10 Jur. N.S. 18; 11 W.R. 858; 1 Mar. L.C. 353; 143 E.R. 445; 29 Digest 229, 1854.
- (8) *Powell v. Hyde* (1855), 5 E. & B. 607; 25 L.J.Q.B. 65; 26 L.T.O.S. 74; 2 Jur. N.S. 87; 4 W.R. 51; 119 E.R. 606; 29 Digest 217, 1735.
- (9) *Green v. Brown* (1743), 2 Stra. 1199; 93 E.R. 1126; 29 Digest 203, 1629.
- (10) *Gorman v. Hand in Hand Insurance Co.* (1877), I.R. 11 C.L. 224; 29 Digest 328, 2673iii.
- (11) *The Glendarroch*, [1894] P. 226; 63 L.J.P. 89; 70 L.T. 344; 10 T.L.R. 269; 38 Sol. Jo. 362; 7 Asp. M.L.C. 420; 6 R. 686, C.A.; 41 Digest 414, 2580.
- (12) *Hurst v. Evans*, ante p. 975; [1917] 1 K.B. 352; 86 L.J.K.B. 305; 116 L.T. 252; 33 T.L.R. 96; 29 Digest 417, 3257.

Action in the Commercial List tried by BAILHACHE, J.

The plaintiffs, owners of the sailing vessel *Inveramsay*, claimed to recover from one or other of two defendant insurers in respect of the loss of the vessel at sea. By a policy dated Jan. 20, 1917, the War Risks Association agreed to insure the vessel for £5,450 from Jan. 1, 1917, to Jan. 1, 1918, against the risks excluded from a marine policy by the free of capture and seizure clause. By a policy dated Jan. 26, 1917, the Anchor Marine Mutual Underwriting Association, Ltd., agreed to insure the vessel for £1,500 from Jan. 1, 1917, to Jan. 1, 1918, against perils of the sea. The policy contained an f. c. and s. clause. On Mar. 21, 1917 the *Inveramsay* left Gulf Port, bound for Fleetwood, with a cargo of timber. Thereafter she was never heard of. It was conceded that she had sunk at sea, but it was not known whether she was lost owing to a war risk or a marine risk.

Greer, K.C., and *Hyslop Maxwell* for the plaintiffs.

Leck, K.C., *MacKinnon, K.C.*, and *Greaves Lord* for the defendants, the War Risks Association.

R. A. Wright, K.C., and *Simey* for the defendants the Anchor Marine Mutual Underwriters Association, Ltd.

Cur. adv. vult.

A Mar. 25, 1918. **BAILHACHE, J.**—The plaintiffs, the owners of the sailing vessel *Inveramsay*, sue two sets of underwriters to recover from one or the other of them in respect of the loss of the vessel at sea. The marine risk underwriters are sued upon a policy dated Jan. 26, 1917, covering perils of the sea in the usual form and containing, as is also usual, the warranted free of capture and seizure clause. The war risks underwriters are sued upon a policy dated Jan. 20, 1917, against risks excluded from the marine policy by the free of capture and seizure clause.

So far as the *Inveramsay* is concerned all that is known of her is that she left Gulf Port, bound for Fleetwood, with a cargo of timber on Mar. 21, 1917. She was not overloaded; she carried a deck cargo, and she has never since been heard of. It is conceded that she has sunk at sea. The normal length of such a voyage as she was upon for a sailing ship is forty days, sometimes prolonged to sixty days, but rarely longer. Three extraneous facts are also known—namely, (i) that submarines were active off the Irish coast for a distance of 250 to 300 miles, and that a number of timber-carrying ships which left Gulf Port on a similar voyage were sunk by submarines. It is inadvisable to give the precise figures, although they were proved in evidence and I have them in mind.

C Another fact, proved from meteorological charts prepared from log-books and from actual log-books of vessels sailing on similar voyages, is (ii) the weather likely to have been met with by the *Inveramsay* on her voyage. From the meteorological charts it appears that there was no wind above force 9, which indicates a strong gale, in any locality in which the *Inveramsay* was likely to be, and that only on a few occasions and for short periods, and I am informed by seamen of experience that there is nothing in the recorded weather to account for the foundering of a well-found ship as the *Inveramsay* appears to have been. One of these witnesses, arguing from the meteorological charts, thought there would not have been heavy seas, a view which is not borne out by the log of the *Ancenis*. On the other hand, it is impossible to say with any degree of certainty what the actual course of a sailing vessel is upon a voyage of that length, and the log of the *Olivebank*, which left Gulf Port on Mar. 17, records a strong gale with squalls on April 9, and a freshening gale, whole gale, and strong gale (the two latter accompanied with heavy squalls) on April 12, 13 and 14. The *Ancenis*, which left Mobile on Mar. 18 and proceeded to sea on Mar. 25, met with an easterly storm on Mar. 30, and made very heavy weather of it on April 4 and 5, and from April 6 to 10. The sea especially seems to have been running very high, and it must be remembered that the *Inveramsay* carried a deck cargo. The third fact (iii) is that in nearly all the cases in which timber vessels were torpedoed off the Irish coast the fact seems to have been definitely known. This of itself would not be of great moment, as I know from experience in this court that vessels may be sunk by submarines near the coast without any positive evidence of the fact being procurable. It has, however, a bearing upon the problem presented by this case.

H

[His LORDSHIP said that on the evidence he was unable to say that the probabilities of the torpedoing of the *Inveramsay* were so great that he ought to hold as a matter of fact that she was torpedoed; she may, or may not, have been, and, therefore, the action upon the war risks policy failed, and he continued:] What is the result so far as the marine risks writers are concerned? I have on two former occasions expressed the opinion that in cases of this sort, where all that can be proved is that a vessel is lost at sea, no one knows how, the loss falls upon the marine policy. The assured having proved that his vessel foundered at sea has proved a loss by peril of the sea. The loss is then within the terms of the promise, and the question is: Must the assured go further and show that the sea peril was not induced by a cause excepted by the free of capture and seizure clause? If so, an assured, as in this case, being insured by two policies, one against marine and the other against war risks, may fail on both: on the latter because he cannot show that the loss was due to a war risk, on the

I

former because he cannot show that it was not. The free of capture and seizure clause is an exception clause, and my view was expressed without referring to the authorities, upon what I understand to be the ordinary principles applicable to contracts containing promises qualified by exceptions. This opinion of mine has, I find, been doubted by ROCHE, J., in *Compania Maritima of Barcelona v. Wishart* (1). It has been challenged by the marine underwriters in this case, and the point has been fully argued and the authorities cited.

In these circumstances, and having regard to the large sums of money involved in these disputes and their frequent occurrence, I have reconsidered the matter and looked into the cases, with what result I will now state. Great stress was laid upon a passage in BULLEN AND LEAKE ON PLEADING (3rd Edn.) p. 182. The passage deals with actions upon marine insurance policies and is as follows:

“Care must be taken to state the contract accurately, with all the exceptions and qualifications of the defendants’ liability (see *Dawson v. Wrench* (2), and the declaration must negative that the defendant comes within the exceptions. (Ib.; but see *Wheeler v. Bavidge* (3); *Crow v. Falk* (4)).”

It was suggested that the learned authors intended that not only must the exceptions be negatived but that the plaintiff must prove the negative. I think that is a misunderstanding. In this passage it is to be observed that the authors rely on *Dawson v. Wrench* (2), but refer to two cases as seeming to point the other way—*Wheeler v. Bavidge* (3) and *Crow v. Falk* (4). *Dawson v. Wrench* (2) was an action in which the plaintiff sued to recover a particular average loss upon a policy containing the three per cent. franchise, and in his declaration had set out the sum claimed but had not averred that it exceeded the franchise. On demurrer the court held the declaration was bad, and that the averment was necessary. That case was, if I may respectfully say so, rightly decided, and if demurrers were in vogue would, I think, be so decided to-day for reasons which will be given hereafter, but it does not, I think, for the same reasons support the wide general statement that all exceptions in a marine policy must be set out and negatived, still less that the plaintiff must prove the negative. The passage, even when understood as dealing with the form of the declaration and not with the burden of proof, is inconsistent with another passage on p. 60 of the same book, which I will read presently.

Crow v. Falk (4) is not very instructive, but *Wheeler v. Bavidge* (3) is interesting as showing that what is now settled law was then arguable. That was an action by charterers against shipowners for failing to make six successive voyages with their ship. The declaration set out the charterparty fully, including a clause containing a number of the usual exceptions, and it was held on demurrer that the declaration was good, and that, if the defendant relied upon the exceptions, he must plead them. This decision is entirely in accord with modern practice and, as I hope to show, is not in conflict with *Dawson v. Wrench* (2). The passage on p. 60 dealing with the general rules applicable to contracts with exceptions is as follows:

“If the covenant or clause in an agreement is absolute in itself, without any exception or proviso or any reference to any, it may be declared on as an absolute contract, although in a distinct part of the deed or instrument there is a proviso defeating or qualifying it under certain circumstances; such a proviso is in the nature of a defeasance and must be set up, if the facts permit it, by the other side. Sometimes the covenant or clause, although it does not contain the exception or proviso, refers to it by such words as ‘except as hereinafter excepted’, and in this case the exception or proviso must be stated in the declaration, for verba relata inesse videntur: *Vavasour v. Ormrod* (5).”

There seems at one time to have been a distinction between a proviso and an exception, but this distinction was regarded, as early as 1823, as too subtle even

A for the acute minds of those days: see *Latham v. Rutley* (6), and I gather that by 1868, at any rate, it had fallen into disrepute.

What strikes one about this statement of the rules of pleading is its artificial character. One would think that the duty of the plaintiff to set up and negative exceptions ought to depend upon the construction of the contract as a whole, taking the promise and exceptions together, and not upon the relative positions
B in the contract of the promise and the exceptions. Again, the rule as stated does not seem to be reliable, for if so, the free of capture and seizure exception and the particular average franchise clause, which is in the nature of an exception need not be set out and negated, and yet we find it stated in *BULLEN AND LEAKE ON PLEADING* (3rd Edn.) p. 182, that they must be so treated, and, as to the particular average franchise, there is the express decision of *Dawson v. Wrench* (2) to that effect. I have looked at a great many relevant declarations, and I find that the practice was to set out policies almost at full length, including the exceptions, and to negative those at any rate that bore upon the nature of the particular action. To mention only one instance, it was so done in the well-known case of *Ionides v. Universal Marine Insurance Co.* (7). The alternative possible practice of stating the legal effect of the contract without setting it out
D seems hardly ever to have been followed. The reason, no doubt, was the risk that, unless the legal effect was stated with precise accuracy, there might be a variance between the effect so stated and the contract as proved. If that happened the action failed, although the contract as proved would have supported the claim if the contract sued upon had been set out in full: see *Latham v. Rutley* (6). That was a risk which few pleaders would run, and it may be that the common practice of setting out the contract in full with all its exceptions led to the practice of
E negating the exceptions as a matter of precaution, and whether it was necessary to do so or not.

The practice of negating exceptions, even when the whole contract was set out in the declaration, was not universal, at any rate, after the Common Law Procedure Act, 1852, as appears from the declaration in *Powell v. Hyde* (8). In
F that case a British ship was fired at and sunk by a Russian fort. The policy was against the usual perils, with the free of capture and seizure clause. The declaration set out the policy including the clause, and averred that the vessel was by the accidents and certain of the perils insured against sunk and foundered and the goods lost to the plaintiff. The declaration did not negative the exceptions, and I find that in giving judgment one of the judges, *WIGHTMAN, J.*, said (5 E. & B. at p. 611):

"The declaration here does not state the precise nature of the peril causing the loss, as would have been necessary under the former rules of pleading"

—no doubt a reference to the alterations made by the Common Law Procedure Act, 1852. The case is interesting, because, if ever there was a case in which one
H would think it necessary to negative the free of capture and seizure exceptions, that would seem to be the case.

I noticed, in looking at the forms of declaration for actions for loss or damage to goods during carriage by sea, that, of the three given, two refer in general terms to the bill of lading exceptions and negative them, while one does not. It was, of course, at all times the practice for the defendant to set up in his
I plea any exceptions upon which he relied. Upon the whole, I have come to the conclusion that before the Judicature Acts it was considered the safer course to set out the exceptions and to negative them in the declaration, and that, too, whether they were contained in a separate clause or not. Some bolder spirits seem to have omitted them after the Act of 1852, and I doubt whether it was necessary to refer to them after that Act and the decision in *Wheeler v. Bavidge* (3), except in such cases as *Dawson v. Wrench* (2). It by no means follows that because the practice was to negative exceptions in the declaration

the plaintiff thereby undertook the burden of proving the negative. It is difficult to suppose that in an action for damage to cargo a shipper of goods under a bill of lading containing the common exceptions to act of God, King's enemies, and perils of the seas, called witnesses to prove that none of these exceptions became operative, while to turn to a different class of case—namely, libel upon a person—the declaration always alleged that the publication was false and malicious, yet I think no plaintiff, at any rate since the beginning of the last century, was called upon to prove either of these adjectives.

When one turns from the old form of pleading to the modern the change is striking. A form of statement of claim on a policy of marine insurance is given. It is quite short. The terms of the policy are not set out, still less are the exceptions. If a total loss is claimed, all one need say is "loss total", while it is noteworthy that if a particular average loss is claimed and the policy contains the three per cent. franchise, it is necessary to say "loss partial, exceeding three per cent." These forms are, I think, in accordance with the law as laid down in the decisions of both *Dawson v. Wrench* (2) and *Wheeler v. Bavidge* (3). I may further remark that when the form of total loss is used no particulars will be ordered of how the peril relied on arose. A plaintiff who alleges that his vessel was lost by a peril of the sea or by sinking cannot be ordered to state how the sinking came about. These forms were prepared at a time when the older rules of pleading were well known and when it was desired to simplify them. The fact that the form for a total loss does not make any provision for setting out or negating exceptions, and merely describes the loss as due to a peril insured against, would seem to show that its framers well knew what averments were necessary. If the question under discussion is to be decided upon forms of pleading, I have come to the conclusion that the free of capture and seizure exception need not be set out and need not be negated.

I now turn to consider a few decisions upon the burden of proof in a case like the present. The only authority I have found upon the question in the precise form in which it presents itself in this case is *Green v. Brown* (9). That case was decided in 1743 by LEE, C.J., but it arose in 1739 when we were at war with Spain. I will read the whole report (2 Stra. at pp. 1199, 1200). It is very short.

"The ship *Charming Peggy* was insured in 1739, from North Carolina to London, with a warranty against captures and seizures. And in an action the loss was laid to be by sinking at sea. All the evidence given was that she sailed out of port on her intended voyage and has never since been heard of. And several witnesses proved that in such a case the presumption is that she foundered at sea, all other sort of losses being generally heard of. The underwriters insisted that as captures and seizures were excepted it lay upon the assured to prove that the loss happened in the particular manner declared on. But the Chief Justice said it would be unreasonable to expect certain evidence of such a loss as where everybody on board is presumed to be drowned; and all that can be required is the best proof the nature of the case admits of, which the plaintiff has given; he therefore left it to the jury who found the loss according to the plaintiff's declaration."

An analogous question came before the Irish courts in 1877 in *Gorman v. Hand in Hand Insurance Co.* (10). The action was upon a fire insurance policy, and PALLES, C.B., thus deals with the matter (I.R. 11 C.L. at p. 230):

"The policy is not in its terms limited to damage by accidental fire; 'the society agrees (subject to the conditions indorsed which are to be taken as part of the policy), that if the property described shall be destroyed or damaged by fire . . . they will . . . pay or make good all such loss and damage.' The third indorsed condition provides that the policy shall not cover, inter alia, loss or damage caused by the act of an incendiary; and reading this condition, as we are bound to do, as part of the policy, the

A contract is that the defendants shall be liable for loss by fire, provided it be not the act of an incendiary. When, therefore, it is once shown that the loss resulted from fire, the plaintiff has established a *prima facie* case, and the onus is thrown upon the defendants to prove that the act which caused the fire was within the proviso. The defence is not in any sense a traverse of an allegation comprised within the general averments of the plaint; it is a plea in confession and avoidance, and the proof of it is upon the defendants."

I will only give the reference to *The Glendarroch* (11), but the case is well worth reading.

The last case to which I need refer is a recent decision of LUSH, J., *Hurst v. Evans* (12). That was an action upon a policy against loss or damage to jewellery from any cause whatever save and except loss by theft or dishonesty of any servant in the exclusive employment of the assured. LUSH, J., held that it was incumbent upon the assured to prove a theft by some person other than a servant in his exclusive employment. This judgment and that of PALLES, C.B., in *Gorman v. Hand in Hand Insurance Co.* (10) are in conflict, unless the distinction is to be found in the fact that in the case before PALLES, C.B., the exception was contained in a separate clause, while in the case before LUSH, J., the promise and the exception are in the same clause, a distinction upon which, as already stated, I am not inclined to rely. I own it would not have occurred to me, had I been advising the plaintiff on evidence in *Hurst v. Evans* (12), to advise that he must call all his servants and put them into the witness-box one after the other to deny that he or she stole the jewels. The procession would be a long one if the proprietors of a large store like Messrs. Whiteley were the plaintiffs. With all respect I venture to prefer the decision of PALLES, C.B.

This review of the authorities confirms me in my view that, as the law now stands, when in an action upon a policy of marine insurance the assured has proved that his ship was sunk at sea, he has made out a *prima facie* case against his underwriters on that policy, and it is for them to set up the free of capture and seizure exception and to bring themselves within it if they can. The rules now applicable for determining the burden of proof in such a case as the present may, I think, be stated as follows:—(i) The plaintiff must prove such facts as bring him *prima facie* within the terms of the promise; (ii) when the promise is qualified by exceptions, the question whether the plaintiff need prove facts which negative their application does not depend upon whether the exceptions are to be found in a separate clause or not: the question depends upon an entirely different consideration—namely, whether the exception is as wide as the promise, and thus qualifies the whole of the promise, or whether it merely excludes from the operation of the promise particular classes of cases which but for the exception would fall within it, leaving some part of the general scope of the promise unqualified: if so, it is sufficient for the plaintiff to bring himself *prima facie* within the terms of the promise, leaving it to the defendant to prove that, although *prima facie* within the terms, the plaintiff's case is in fact within the excluded exceptional class: illustrations of this rule are actions against common carriers and the analogous cases in which a promisor undertakes to perform a given act unless excused by certain excepted events, as, for example, a vendor to deliver, strikes excepted or a charterer to load a ship in a given number of lay days, subject to the usual exceptions now found in charterparties; (iii) when a promise is qualified by an exception which covers the whole scope of the promise, a plaintiff cannot make out a *prima facie* case unless he brings himself within the promise as qualified: there is *ex hypothesi* no unqualified part of the promise for the sole of his foot to stand upon: as an instance I take a marine policy with the particular average franchise: there, reading the promise and the exception together, the promise is not a promise to pay particular average or to pay particular average except in certain events: it is a promise to pay particular average exceeding three per cent.: to bring

himself within that promise a plaintiff must show more than a particular average loss, he must show a particular average loss exceeding three per cent.: this is the explanation, I think, of *Dawson v. Wrench* (2), and why that case is no authority for the wide general statement on BULLEN AND LEAKE ON PLEADING (3rd Edn.) p. 182, and why that case does not conflict with *Wheeler v. Bavidge* (3) or with my suggested rule (ii); (iv) whether a promise is a promise with exceptions or whether it is a qualified promise is in every case a question of construction of the instrument as a whole: see per PALLES, C.B., in *Gorman v. Hand in Hand Insurance Co.* (10); (v) in construing a contract with exceptions it must be borne in mind that a promise with exceptions can generally be turned by an alteration of phraseology into a qualified promise. The form in which the contract is expressed is therefore material.

Applying these rules to the present case, I adhere to the opinion I have expressed in former cases and give judgment against the marine underwriters with costs. I should add that I have not forgotten that the particular average franchise exception generally contains an exception to itself—namely, unless stranded. I have not referred to this fact as it has no bearing upon the matters under discussion.

Orders accordingly.

Solicitors: *Pritchard, Englefield & Co.*, for *Simpson, North, Hurley & Co.*, Liverpool; *G. G. H. Walker & Tree*, for *Weightman, Pedder & Co.*, Liverpool; *William A. Crump & Son.*

[Reported by T. W. MORGAN, ESQ., Barrister-at-Law.]

BRUCE MARRIOTT & CO. v. HOULDER LINE, LTD.

[COURT OF APPEAL (Swinfen Eady and Bankes, L.J.J., and A. T. Lawrence, J.), October 30, 31, November 10, 1916]

[Reported [1917] 1 K.B. 72; 86 L.J.K.B. 509; 115 L.T. 846;
61 Sol. Jo. 98; 22 Com. Cas. 116; 13 Asp. M.L.C. 550]

Shipping—Cargo—Re-stowage—General ship—Damage to cargo on quay during re-stowage at intermediate port—Liability of shipowners—Right to rely on exceptions clause in bill of lading.

Where a general ship loads at various ports cargo which is intended to be discharged at different places, it is necessarily incidental to the voyage that the shipowners should be at liberty to shift the cargo and this necessarily extends to placing cargo on the quay for such time as may be reasonable to enable re-stowage to be effectively done.

The plaintiffs were the shippers of certain machinery on board the defendants' ship, which was a general ship loading and discharging cargo at various places. Part of the machinery was accidentally damaged on the quay at an intermediate port during re-stowage operations. The defendants admitted the accident, but relied on an exceptions clause in the bill of lading. The plaintiffs contended that the defendants had been in breach of contract in unloading the machinery on the quay at the intermediate port, and they could not, therefore, rely on the exceptions clause.

Held: the defendants had not been in breach of contract and could rely on the exceptions clause.

Notes. Referred to: *Buerger v. Cunard Steamship Co.*, [1925] 2 K.B. 646.

As to exceptions clauses relieving the shipowner in general, see 30 HALSBURY'S LAWS (2nd Edn.) 315 et seq.

A Case referred to:

(1) *Hamlyn & Co. v. Wood & Co.*, [1891] 2 Q.B. 488; 60 L.J.Q.B. 734; 65 L.T. 286; 40 W.R. 24; 7 T.L.R. 731, C.A.; 12 Digest (Repl.) 684, 5266.

Also referred to in argument:

Davis v. Garrett (1830), 6 Bing. 716; L. & Welsb. 276; 4 Moo. & P. 540; 8 L.J.O.S.C.P. 253; 130 E.R. 1456; 41 Digest 488, 3188.

B

Leduc v. Ward (1888), 2 Q.B.D. 475; 57 L.J.Q.B. 379; 58 L.T. 908; 36 W.R. 537; 4 T.L.R. 313, C.A.; 41 Digest 485, 3172.

Lilley v. Doubleday (1881), 7 Q.B.D. 510; 51 L.J.Q.B. 310; 44 L.T. 814; 46 J.P. 708; 3 Digest (Repl.) 82, 183.

Roberts v. Shaw (1863), 4 B. & S. 44; 2 New Rep. 237; 32 L.J.Q.B. 308 8 L.T. 634; 10 Jur. N.S. 147; 11 W.R. 829; 1 Mar. L.C. 351; 122 E.R. 376; 41 Digest 662, 4943.

C

The Moorcock (1889), 14 P.D. 64; 58 L.J.P. 73; 60 L.T. 654; 37 W.R. 439; 5 T.L.R. 316; 6 Asp. M.L.C. 373, C.A.; 12 Digest (Repl.) 686, 5274.

Sleat v. Fagg (1822), 5 B. & Ald. 342; 106 E.R. 1216; 8 Digest (Repl.) 44, 266.

D

Appeal by the defendants from a decision of ROWLATT, J., in an action tried by him without a jury.

The plaintiffs' claim was for damages for breach of contract and breach of duty in and about the carriage of goods by sea by the defendants' steamship *Denby Grange*. The plaintiffs shipped on board the *Denby Grange* in London some packages of mining machinery for Buenos Aires, the bill of lading being dated Mar. 14, 1914. According to the bill of lading, the machinery was shipped in apparent good order and condition on the *Denby Grange*,

E

"Sailing from the Port of London for carriage to Buenos Aires via Newport, but with liberty to the steamer, either before or after proceeding towards that port, to proceed to and stay at any ports or places whatsoever (although in a contrary direction to or out of or beyond the route to the said port of discharge) once or oftener in any order, backwards or forwards, for loading or discharging cargo or passengers, or for any purpose whatsoever, and all such ports, places, and sailings shall be deemed included within the intended voyage."

F

The goods were, subject to the exceptions, to be delivered

"In the like apparent good order and condition from the ship's tackle (where the ship's responsibility shall cease) at the port of Buenos Aires or so near thereto as she may safely get and always afloat."

G

Clause 1 of the exceptions and stipulations provided:

"That the master, owners, or agents of the vessel, or its connections, shall not be responsible for loss, damage, or injury arising from any of the following perils, causes, or things, namely: . . . breakagè . . . whether any of the perils, causes, or things above mentioned, or the loss, damage, or injury arising therefrom, be occasioned by or arise from any act or omission, negligence, default, or error in judgment of the pilot, master, mariners, engineers, stevedores, workmen, or other persons in the service of the shipowners or their agents, whether on board the said ship or any other ship belonging to or chartered by them, for whose acts they would otherwise be liable, or otherwise howsoever."

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By cl. 4:

"The master, owners, or agents of the vessel have liberty to carry the said goods by the above steamer or other steamer or steamers . . . and, in so doing, without notice to shippers or consignees, to carry the goods past their port of destination, or land them at intermediate ports, and to tranship or land and store the goods, either on shore or afloat, and re-ship and forward the same by land, or by water, by craft steam, sail, or barge, whether in tow

or otherwise, at the steamer's expense but merchant's risk, it being understood that all claims for loss or damage consequent upon delay or detention of the goods from the foregoing or any other cause are excluded."

The *Denby Grange* was a general ship carrying cargoes to different ports in the River Plate. She started from Antwerp, put on board the plaintiffs' machinery in London, and then proceeded to Newport, where the plaintiffs' machinery was taken out of one hold for the purpose of re-stowage in another and was damaged by accident while on the quay. Before ROWLATT, J., the facts as to the re-stowage at Newport were agreed as stated in a letter of Mar. 22, 1914, from the defendants' representative at Newport to the defendants in London, which was as follows:

"As informed you previously, we had to shift the cylinder forming portion of condensing plant on account of the Bruce Marriott & Co. shipped in London in order to make stowage for earthenware pipes here. This we landed on the quay alongside the ship for the time being, and whilst shipping underframes yesterday in the No. 3 hold a gust of wind caught one of the frames as it was being lifted on board, with the result that it swung round, breaking the sling, and the underframes fell on the quay on to the cylinder No. 2366, breaking the cast-iron flange, indenting the tube and crushing same."

ROWLATT, J., gave judgment for the plaintiffs on the ground (*inter alia*) that the defendants were not entitled under the bill of lading to take the cylinder out of the ship and place it on the quay for the purposes of re-stowage, and that, therefore, they were not protected by cl. 1 of the exceptions of the bill of lading. The defendants appealed.

On Feb. 8 the Court of Appeal directed the appeal to stand over for further evidence, and consequently the defendants' manager at Newport made an affidavit to the following effect: "On the steamer's arrival at Newport two cylinders for San Juan had been stowed in the wings of No. 4 'tween deck and a casting for Zarate had been stowed in the square of the hatch. These cylinders weighed 3 tons 11 cwt., but occupied very large space and were light cargo. The steamer loaded a quantity of railway material at Antwerp and also at Newport, including several heavy lifts. She was to discharge this cargo at Zarate, and I was informed that there was no crane there capable of dealing with the heavy stuff. The owners accordingly arranged that the steamer's masts should be specially strengthened to enable them to deal with it. The steamer's masts had to be lifted out, and it was therefore impossible to load any cargo in the after part of Nos. 1 and 3 'tween decks until this work was completed. No. 2 'tween deck was to be used for bunker coals as that is the only 'tween deck available for the purpose. It was for these reasons that the casting for Zarate and the cylinders were loaded in No. 4 'tween deck. The cargo to be loaded at Newport weighed 1,756 tons, and included railway material, galvanised sheets, tinplates, ironplates, and a very large quantity of earthenware pipes for Buenos Aires. These pipes were very brittle and require very careful stowage, and should not be stowed with any other heavy cargo. It is also most important that any broken stowage should be avoided, otherwise the pipes are apt to get adrift and get broken. The steamer was to discharge at several ports in the River Plate and to go up to Zarate, which was some way up the river. The cargo had therefore to be stowed so as to maintain the steamer as far as possible on an even keel after the discharge of part of it in order that she might draw as little water as possible. In order to effect this it was necessary to stow light cargo in No. 4 so that the steamer might start a little down by the head. If the cylinders and casting had been left in No. 4 'tween deck it would have been necessary to block them off with heavy cargo, which would have put the steamer down by the stern. As the bunker coal in No. 2 'tween deck was consumed on the outward passage, the steamer would get to some extent down by the stern,

A and it was for this reason that she had to start down by the head. The draft of the steamer on sailing was 22 ft. 5 in. forward and 22 ft. 2 in. aft. For those reasons I found that the only practical method of stowing the ship safely was to take the castings out of No. 4 'tween deck and put them into No. 1 'tween deck. By this means the whole of No. 4 'tween deck contained earthenware pipes. The cylinder and casting were placed in No. 1 'tween deck in the square of the hatch, where they could be safely stowed. The earthenware pipes in No. 1 hold were shut off from the rest of the cargo at the forward end by a number of cases of stonework which were well secured. It was absolutely necessary for the safe stowage of the cargo and for the trim of the ship that this method of stowage should be adopted, and this could only be done by shifting the cylinders. It is by no means unusual with liners like the *Denby Grange* loading cargo at various ports and discharging at various ports to find it necessary to re-stow part of the cargo at Newport, and in some cases it is necessary to take the cargo out of the ship and put it on the quay for a short time in order to enable the cargo to be safely stowed. It is not always possible to ascertain what cargo will be available for a particular ship at Newport before she commences to load her cargo at Antwerp or London, and even if this were possible sometimes it is impossible to stow the cargo at the previous ports in such a way that it does not require re-stowage at Newport when the fresh cargo is put in owing to the order in which the cargo has to be discharged. In the circumstances wherever these cylinders and casting had been stowed in London it would have been necessary to take them out and re-stow them at Newport. To shift the cargo is a source of great trouble to the shipowner and delay to the steamer, and I never shift any cargo unless it is absolutely necessary for safety."

The appeal was re-argued upon this statement of facts on Oct. 30 and 31, 1916.

Roche, K.C., and Lewis Noad, for the defendants.

MacKinnon, K.C., and L. F. C. Darby, for the plaintiffs.

Cur. adv. vult.

F Nov. 10, 1916. The following judgments were read.

SWINFEN EADY, L.J., stated the facts and continued: The question, therefore, resolves itself into this: Were the defendants, under the circumstances which I have stated, entitled to remove the cylinder from No. 4 to No. 1 'tween deck hold? In my opinion they were. Both parties must be presumed to have contracted with reference to the known, ordinary, usual, well-established, and every necessary course of business. The presumption is that the parties intended to contract with regard to the well-known usages of trade. When necessary to re-stow for the safety of the ship, or to obtain and preserve a proper trim, or to enable the rest of the cargo to be safely and properly stowed, a usage to do so is certainly reasonable. Where a general ship loads cargo at various ports which is intended to be discharged at various different places, it is manifest that the cargo cannot always be taken on board in such order that the last loaded shall be the first to be discharged, or that the cargo last taken on board is suitable for being overstowed on cargo already shipped. The proper stowage of the cargo and the necessary readjustment of weight to preserve the proper trim of the ship may necessitate changes in stowage from time to time, and these were necessarily incidental to the voyage of this ship. I am of opinion that in removing the cylinder from No. 4 with a view to stowing it in No. 1 and in the meantime temporarily depositing it on the quay the defendants were not committing any breach of their contract of carriage as contained in the bill of lading, and accordingly that they are exempted from liability for the damage which occurred. The appeal must be allowed and judgment entered for the defendants with costs here and below.

BANKES, L.J., stated the facts and continued: The question which has to be decided is whether, upon the facts as now disclosed, a term must be implied in

the contract as contained in the bill of lading by which the appellants are entitled to move any goods after they have been placed on board, even to the extent of taking them out of the ship, if such moving is either usual in the course of loading or unloading the vessel at the authorised ports of call, or necessary for the safety or trim of the ship or the safety of the cargo. We were referred to the test applied by LORD ESHER in *Hamlyn & Co. v. Wood & Co.* (1), where he says ([1891] 2 Q.B. at p. 491):

"I have for a long time understood that rule to be that the court has no right to imply in a written contract any such stipulation, unless on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist."

Having regard to the fact that this vessel was, under the terms of the contract, to call at a number of ports to take in cargo, and at a number of ports to discharge cargo, it appears to me a necessary implication that the parties must have intended that the shipowners should have liberty to shift the cargo, should necessity arise to do so, either for the safety of the ship or cargo, or in the usual course of loading or unloading at the port of call. I cannot see any limitation to that right to shift provided what is done comes within the limits of what is reasonable or customary. If the right to shift extends to a right to shift from one part of a hold to another part of the same hold, or from one hold to another hold, it must, I think, necessarily extend to placing the cargo on the quay for such time as may be reasonably necessary to enable this to be effectively done.

The question is necessarily a business question. The only evidence before the court is that of the appellants' manager. So far as my own experience of such matters is concerned, it appears to me that the view he presents is a reasonable one, and that the stowing and discharging of a general cargo, consisting possibly of very many parcels of goods belonging to different owners, taken in at a number of ports, and to be discharged at a number of other ports, would be practically impossible unless such a liberty existed. In this view of the contract the appellants are entitled to succeed, because it is not disputed that if what the appellants did was within the terms of the contract the exceptions are wide enough to protect them from liability. For these reasons I think that the appeal succeeds.

A. T. LAWRENCE, J.—The question in this case is whether the landing of these cylinders at Newport for the purpose of re-stowing them was within the contract of carriage, that is, was the exercise of a right of the shipowner under it. I think it was. In my opinion it was incident to the voyage contemplated by this bill of lading. The ship was a general ship, intending to call at several ports, and the voyage involved going up the river, where banks and shallows make the trim and handiness of the ship of great importance. The cylinders were very light relatively to the space they occupied. It must have been obviously probable that the cargo to be taken in after the ship left London would involve some readjustment of weights to enable her to keep her trim. These considerations made it easy to accept the evidence called after the first hearing by the leave of the court. This evidence is to the effect that upon such a voyage it is the ordinary course to land and re-stow cargo where necessary.

The next question is: Does the bill of lading contain exceptions covering the shipowner against risks in so doing? I think it does. I agree with my brother ROWLATT that cl. 4 of the exceptions does not apply here. It is directed to a different set of circumstances, namely, to a case of transshipment to another ship or to some form of land carriage. But I think cl. 1 excepts the shipowner from liability for this damage to the cylinder. It excepts liability for loss or damage arising from (inter alia) "breakage," "stowage," "landing," and this even though due to negligence. The "delivery" to be made by the ship is "from the ship's tackle at . . . the port of Buenos Aires or so near thereto as she may safely

get and always lie afloat." These exceptions seem to me to include such a "breakage" as occurred to this cylinder when landed for re-stowage at Newport. I think, therefore, that the defendants are not liable, and that this appeal should be allowed.

Appeal allowed.

Solicitors: *Parker, Garrett, & Co.; William A. Crump & Son.*

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

Re CITY OF GLASGOW LIFE ASSURANCE CO.

[CHANCERY DIVISION (Sargant, J.), November 23, 1915, May 16, 1916]

[Reported [1916] 2 Ch. 557; 86 L.J.Ch. 86; 115 L.T. 519]

Insurance—Life assurance—Statutory deposit—Purchase of one assurance company by another—Transfer of deposit to purchasing company—Transfer to separate account "in respect of life assurance business of vendor company now dissolved"—Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 2 (1), s. 13.

An assurance company sold its business and assets to another assurance company. The vendor company was dissolved, but liabilities of that company remained in existence, such as fully paid-up policies in respect of which there had been no novation by the holders with the purchasing company.

Held: the court would not direct the transfer to the purchasing company of the statutory fund of £20,000 deposited in court by the vendor company unless the fund were carried to a special account which on its face showed that it was applicable to meet the vendor company's liabilities; accordingly, the court would order the transfer of the fund to the purchasing company to be carried over to a separate account of that company "in respect of the life assurance business" of the vendor company "now dissolved."

Re Popular Life Assurance Co. (1), [1909] 1 Ch. 80, distinguished and explained.

Notes. The Assurance Companies Act, 1909, was repealed and replaced, with amendments, by the Insurance Companies Act, 1958, Sched. 2, para. 1 (2) of which requires, in certain cases, the deposit of £20,000 in court. As to amalgamations and transfers see s. 11 of the Act of 1958.

As to rules regarding deposits, see 22 HALSBURY'S LAWS (3rd Edn.) 424-426; and for cases see 10 DIGEST (Repl.) 1150 et seq. For the Insurance Companies Act, 1958, see 38 HALSBURY'S STATUTES (2nd Edn.) 12.

Case referred to:

- (1) *Re Popular Life Assurance Co., Ltd.*, [1909] 1 Ch. 80; 78 L.J.Ch. 37; 99 L.T. 909; sub nom. *Re United Provident Assurance Co., Ltd.*, *Re Popular Life Assurance Co., Ltd.*, 25 T.L.R. 58; 53 Sol. Jo. 47; 10 Digest (Repl.) 1153, 8026.

Petition originally presented by the Scottish Union and National Insurance Co., hereafter called the Scottish Union, and the City of Glasgow Life Assurance Co., hereafter called the Glasgow Co., to the High Court of Justice in England asking that the fund in court to the credit of "Ex parte the City of Glasgow Life Assurance Co. in respect of life assurance business" might be transferred to an account "Ex parte the Scottish Union and National Insurance Co. in respect

of life assurance business" and for payment of the income of the fund to that company. After the petition had come on once and an order had been made on it as to the income and certain cash the Glasgow company was dissolved by proceedings in accordance with s. 195 of the Companies (Consolidation) Act, 1908, and the petition was amended in several particulars, including the striking out of the Glasgow company as a petitioner. The petition was further amended by asking that the Glasgow company's fund should be carried over to a separate account "Ex parte the Scottish Union and National Insurance Co. in respect of the life assurance business of the City of Glasgow Life Assurance Co. now dissolved," and that until further order the interest on the fund should be paid to the Scottish Union.

The Glasgow company was incorporated by a special Act passed in 1861, its powers being extended by another Act passed in 1892. In 1913 the company was registered as an unlimited company under the Companies (Consolidation) Act, 1908. The Scottish Union was incorporated by a special Act passed in 1878, its powers being extended by special Acts passed in 1886, 1892, and 1906. By its Act of 1892 the Scottish Union was empowered to make and carry into effect contracts for amalgamating with or purchasing or taking over the business or property of any company authorised to carry on any similar business. Each of the two companies in 1910 lodged in court securities representing the £20,000 required by s. 2 of the Assurance Companies Act, 1909, to be deposited with the Paymaster-General for and on behalf of the Supreme Court. In March, 1913, the two companies entered into a provisional agreement for the sale by the Glasgow company to the Scottish Union of all the business, goodwill, and assets of the former company, the latter company agreeing to keep separate and distinct the life assurance and annuity fund of the Glasgow company and to continue to hold that fund in trust for the protection and sole benefit of the policy-holders and annuitants of the Glasgow company subject to certain rights of the Scottish Union in part of the profits of the fund. By an order of the Court of Session in Scotland dated Oct. 16, 1913, the transfer was sanctioned in the terms of the provisional agreement and an addendum thereto. In November, 1913, the Glasgow company went into voluntary liquidation, and in December, 1913 its liquidators assigned all its assets to the Scottish Union, and in the following year this petition was presented by both companies. The Glasgow company had issued a very large number of life policies in which the premiums had after the amalgamation been paid to the Scottish Union, but the Glasgow company had also issued a large number of paid-up life policies which were still outstanding, and in respect of which there could not for a considerable time be any novation.

The material section dealing with amalgamation in the Assurance Companies Act, 1909, is s. 13.

W. R. Sheldon for the Scottish Union.

Austen-Cartmell for the Board of Trade.

SARGANT, J.—*Re Popular Life Assurance Co.* (1), as reported, seems to go rather further than it should.

In the present case the petitioners, who are two life assurance companies, a vendor company and a purchasing company, originally asked for the transfer out of court of the £20,000 deposit which had been paid in by the vendor company. It was shown that the vendor company, whether rightly or not, had purported to wind-up its affairs and become dissolved under the Act. It was a case in which there had been an approval of the scheme of amalgamation; but, it appeared that, although there were a very large number of policies on which annual or other periodical payments had been made to the purchasing company and although with regard to those policies it was probable or certain that there had been, by reason of that payment, a novation of the contract with the policy-holder, so that the purchasing company became liable instead of, and to the release of, the vendor company, s. 7 of the Life Assurance Companies Act, 1872, being

A no longer law and a novation therefore being possible in that way, yet in this particular case the vendor company had issued a very large number of fully paid-up policies, the consequence of which was that there had not been, and probably would not be for a very long time to come, a novation of the contracts between the original policy-holders and the vendor company.

B Under those circumstances it was suggested that the decision of WARRINGTON, J., in *Re Popular Life Assurance Co.* (1) applied and that the vendor company having actually been dissolved and there being no personal remedy at all against the vendor company, it necessarily followed that the remedy against the sum deposited in court had also gone, and, therefore, the purchasing company was entitled to have that fund transferred to it as the assignee of the vendor company without any provision at all being made for those policies of the vendor company.

C I do not think that that view of the case is really right, or that WARRINGTON, J., meant to go to that extent. I have had the papers sent to me by the Board of Trade, and I find that, in the petition in that case, it was stated that the purchasing company there had undertaken the liabilities of the vendor company on all policies issued by such company, and that the purchasing company had become liable on the said policies in the same way as the vendor company was liable thereunder.

D I think it must have been on that basis that the order was made by WARRINGTON, J. Of course, it is familiar that the court, at any time within two years of the dissolution of the company in a voluntary winding-up, could put an end to the dissolution, and, even apart from that, it is clear again that the assets of a company voluntarily wound-up cannot be transferred to a purchaser without providing, not merely for present liabilities, but for future possible

E liabilities, such as covenants under leases and so on. Therefore, as long as there are existing liabilities of a vendor company, in such a case as this it seems to me that it would not be right for the court to direct the transfer of the assurance fund to the purchasing company free from these possible liabilities on the vendor company. Indeed, as to the fact that the vendor company has in terms been dissolved, I feel some doubt as to whether a company ought to be dissolved under the Act while there are liabilities of the company outstanding, and while there are assets of the company not got in such an assurance fund in court. But, however that may be, the mere fact that the company has been dissolved may be rather an additional reason for keeping that particular asset of the company, such as the fund in court here, to meet the liabilities of the creditors.

F A suggestion has been made by the Board of Trade which seems to me amply to protect those policy holders who have not novated, namely, that the fund shall be carried to a special account which will on the face of it show that the fund is still applicable for meeting those liabilities in the possible, though perhaps very improbable, event of the policy holders having to resort to it, and I accordingly make the order which has been asked for.

Order accordingly.

Solicitors: *Young, Jones & Co.*; *Solicitor to the Board of Trade.*

[*Reported by L. MORGAN MAY, Esq., Barrister-at-Law.*]

Re NATIONAL STANDARD LIFE ASSURANCE CORPORATION.

[CHANCERY DIVISION (Neville, J.), November 14, 1916]

[Reported [1917] 1 Ch. 193; 86 L.J.Ch. 172; 115 L.T. 751;
33 T.L.R. 65; 61 Sol. Jo. 146]

Insurance—Life assurance—Statutory deposit—Winding-up of assurance company—Availability of deposit for costs of winding-up—Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 2 (3), s. 3 (2).

On the true construction of s. 3 (2) of the Assurance Companies Act, 1909, the statutory deposit of £20,000 required to be made by a company carrying on life assurance business **held** to be available for the costs of winding-up the life assurance business of the company and not to be subject to a first charge in favour of the policy holders.

Semble, where a company carried on more than one class of insurance business, the statutory deposit would not be available for all the costs of winding up since the fund would then be applied indirectly for purposes other than those of life assurance business contrary to s. 3 (2) of the Act of 1909.

Notes. The Assurance Companies Act, 1909, was repealed and replaced, with amendments, by the Insurance Companies Act, 1958. Paragraph 1 (2) of Sched. 2 to the Act of 1958 contains provisions for a statutory deposit of £20,000 to be made by assurance companies. Section 2 (3) of the Act of 1909 is replaced by para. 1 (3) of Sched. 2 to the Act of 1958 and s. 3 (2) of the Act of 1909, by s. 3 (2) of the Act of 1958.

Referred to: *Re South East Lancashire Insurance Co.*, [1935] Ch. 225; *Re Hearts of Oak Assurance Co.*, [1936] Ch. 558.

As to the winding-up of assurance companies, see 22 HALSBURY'S LAWS (3rd Edn.) 434 et seq. For cases on deposits to be made by insurance companies, see 10 DIGEST (Repl.) 1150 et seq. For the Insurance Companies Act, 1958, see 38 HALSBURY'S STATUTES (2nd Edn.) 127.

Case referred to in argument:

Re Nelson & Co., Ltd. (1906), 22 T.L.R. 406; 10 Digest (Repl.) 1151, 8014.

Summons taken out by the liquidator of a life assurance company asking whether securities in the hands of the Accountant-General, representing the sum of £20,000 deposited upon the registration of the company pursuant to the Life Assurance Companies Acts, 1870 and 1872, formed part of the general assets of the company so as to be available for (i) general costs of the winding-up (including getting in the general assets of the company other than the deposit of £20,000), and (ii) payment into court by way of security for costs in pending actions by the company in which the liquidator had been duly authorised by the court to proceed.

The company was incorporated in January, 1906, with the object of effecting assurances of all kinds (except marine insurance) but, in fact, the company transacted practically no business except life assurance business. On June 6, 1916, an order was made by the court for the compulsory winding-up of the company, and by order dated Aug. 21, the applicant was appointed liquidator. The assets of the company consisted of (a) a sum of £20,000 deposited in court under the Life Assurance Companies Acts, 1870 and 1872, which was now represented by securities of the approximate value of £12,500; (b) a claim for damages in an action commenced before the liquidation against the Royal Co-operative Collecting Society for having improperly induced certain agents of the company to commit breaches of their agreements of service with the company by transferring certain portions of the business of the company to the society; (c) a sum of between £200 and £300 due under an agreement with the

- A** Hearts of Oak Life and General Assurance Co., Ltd.; (d) a probable claim against some of the directors personally arising from their failure to provide capital in accordance with certain contracts entered into with the company; (e) the equity of redemption in respect of certain mortgages granted by the company; and (f) balance of a sum (if any) payable under an agreement with the Royal Co-operative Collecting Society. The items (d), (e) and (f) were of small and
- B** doubtful value. It appeared that the claims of creditors under policies of assurance issued by the company might exceed the amount of the statutory deposit. There were also large claims by persons other than policy holders amounting to some thousands of pounds. In the action commenced against the Royal Co-operative Collecting Society the liquidator had obtained leave to proceed, but, the company now being in liquidation, a sum of £50 was payable into court by
- C** way of security for costs.

The Assurance Companies Act, 1909, which re-enacted and extended the provisions of the Acts of 1870 and 1872, provided that every assurance company which carried on any one of five classes of assurance business should pay a deposit of £20,000. By s. 2 (3) of the Act of 1909 the deposit was to be deemed part of the assets of the company. Section 3 of the Act provided: “(1) In the case of

D an assurance company transacting other business besides that of assurance or transacting more than one class of assurance business, a separate account shall be kept of all receipts in respect of the assurance business or of each class of assurance business, and the receipts in respect of the assurance business, or, in the case of a company carrying on more than one class of assurance business, of each class of business, shall be carried to and form a separate assurance fund

E with an appropriate name: Provided that nothing in this section shall require the investments of any such fund to be kept separate from the investments of any other fund. (2) A fund of any particular class shall be as absolutely the security of the policy holders of that class as though it belonged to a company carrying on no other business than assurance business of that class, and shall not be liable for any contracts of the company for which it would not have been liable

F had the business of the company been only that of assurance of that class, and shall not be applied, directly or indirectly, for any purposes other than those of the class of business to which the fund is applicable.”

Percy Wheeler for the liquidator.

A. F. C. Luxmoore for the policyholders.

- G** NEVILLE, J.—The question here is whether the liquidator is entitled to resort to the deposit made by a life assurance company, which was engaged to some extent in carrying on other businesses, in order to satisfy the costs of the liquidation. The liquidator has only asked for a limited order, limiting his right to resort to that fund to the costs of the liquidation so far as they have been incurred in respect of the life assurance business; and that, of course, relieves me from
- H** considering the position as between the life assurance business and any other business which may exist.

What I have to decide is whether the effect of the Act of 1909, which repealed the Acts of 1870 and 1872, is to give to the life policy holders a security over the deposited fund equivalent to the security of debenture holders to whom a company has conveyed or assigned part or the whole of its property as security for their advances. In such a case the mortgagees are entitled to take possession of the assets of a company and to realise them for the purpose of satisfying the amount due upon the debentures, and until they are satisfied the costs of the liquidation cannot be thrown upon any of the assets which are subject to the security of the debenture holders. Is that the position in which the legislature intended to place policy holders in a life assurance company in regard to the £20,000 deposit which undoubtedly in one sense is a security for the payment of the amount on the life policies?

I

The material parts of the Act of 1909 for this purpose appear to me to be precisely identical with the same provisions in the Acts of 1870 and 1872 which are now repealed. The Act of 1909 is the Act which governs the case, but it seems to me that, if the Acts of 1870 and 1872 had governed the case, I should have arrived at the same conclusion. [HIS LORDSHIP read s. 2 (3) of the Act of 1909, and continued:] There is explicit indication that the deposit paid under the provisions of the Act is to be part of the assets of the company, and, except so far as it is excluded from the general liabilities to which assets of the company are subject, the deposit must still remain and be treated as the assets of the company. Then there is a provision in cases where a company carries on or intends to carry on another assurance business besides that of life assurance for the maintenance of a fund which is to be part of the separate assurance fund in respect of which the moneys are received by the company. Then comes s. 3 (2) upon which I think the whole matter really turns, subject to what I have already said, that one starts with the knowledge that the deposit is part of the assets of the company. What is the position of that fund with reference to the holders of life policies? [HIS LORDSHIP read s. 3 (2) and continued:] If the legislature had intended to put the policy holders of a particular class with regard to their fund in the position of debenture-holders having a charge given by the company on that particular part of the assets, nothing would have been easier than to have said so; but one must find a very clear meaning in the words used, identical to the creation of a fund like the fund upon which debenture-holders go, if one is to attribute the same meaning to them. It seems to me that that is not what has been said. The fund of a particular class is to be the security of the policy holders undoubtedly, but to what extent?—"as though it belonged to a company carrying on no other business than assurance business of that class." Of course, if it belonged to a company carrying on no other business than assurance business of that class, there is nothing in that provision at all to exonerate it from bearing the costs of the winding-up of the company in case of need. Then comes a further provision, which I think is explanatory:

"and [the fund] shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of assurance of that class."

That is to say, as I understand it, that persons who have contracted with the company on a different basis from that of life assurance are not to be entitled to claim payment of their claims out of this fund, which is the security of the life policy holders. I cannot see anything in that to prevent the fund being applicable for the purpose of the liquidation of the company where the company is being wound-up.

It seems to me, therefore, that, generally speaking, the security given is not such a security as to exonerate the fund from the costs of the liquidation. It may well be that the incidence of the cost of liquidation may in proper cases be distributed over the different funds representing the different businesses which a particular company carries on, and it may be that some of the costs incurred in a liquidation where a company is carrying on certain assurance businesses may not fall upon the deposit in respect of the life assurance, because one has to consider the words at the end of that section,

"shall not be applied directly or indirectly for any purposes other than those of the class of business to which the fund is applicable,"

and I can well conceive cases in which part of the costs of the winding-up, if those costs were to be paid out of the life assurance fund, would be indirectly, if not directly, applied for purposes other than those of the class of business to which the fund is applicable. But that point is not raised in the present case, because the liquidator is willing to take an order from the court referring only

A to the costs of the liquidation so far as they represent the costs of winding-up the life assurance business. I think that with that limitation the answer to the summons must be to the effect that the deposited fund is liable in the costs of the liquidation.

Order accordingly.

B Solicitors: *Close & Co.; Pontifex, Pitt & Johnson.*

[Reported by R. R. FORMOY, Esq., Barrister-at-Law.]

C

BONANZA CREEK GOLD MINING CO., LTD. v. REGEM,
ATTORNEY-GENERAL FOR QUEBEC AND OTHERS (INTER-
VENERS)

D

[PRIVY COUNCIL (Lord Buckmaster, L.C., Viscount Haldane, Lord Parker of Waddington and Lord Sumner), December 10, 13, 14, 15, 16, 17, 1915, February 24, 1916]

[Reported [1916] 1 A.C. 566; 85 L.J.P.C. 114; 114 L.T. 765;

E

32 T.L.R. 333; 26 D.L.R. 273; 10 W.W.R. 391;

34 W.L.R. 177; 25 Que. K.B. 170]

Canada—Provincial legislation—Company—Incorporation under provincial statute—Mining company—Capacity to acquire mining leases and permission to mine outside province—British North America Act, 1867 (30 & 31 Vict., c. 3), s. 92 (11).

F

A mining company incorporated in 1904 by letters patent issued by the lieutenant-governor of Ontario under the authority of the Companies Act (R.S. Ont., 1897, c. 91), s. 9, "and of any other power or authority whatsoever vested" in him on that behalf, acquired certain mining properties as assignees of leases granted by the Crown in the Yukon. In 1905 the company obtained a licence from the commissioner of the Yukon territory, under the Foreign Companies Ordinance of the territory, permitting them to carry on business in the territory, and in 1906 the company was granted by the dominion authorities a free miner's certificate issued under the regulations governing placer mining in the Yukon. In a petition of right, presented in 1908, the company claimed damages in respect of alleged wrongful acts and omissions by the Crown and its officers in relation to the mining claims, to which the Crown delivered an answer denying that the company had any power to carry on mining business in the Yukon, and pleaded further that there was no power to grant a free miner's certificate to a company incorporated under provincial powers, and no power in that company to accept such a certificate. By s. 192 (11) of the British North America Act, 1867 (6 HALSBURY'S STATUTES (2nd Edn.) 303) the legislature of a province has exclusive power to legislate in relation to the incorporation of companies with provincial objects.

G

H

I

Held: the words in s. 92 (11) "with provincial objects", while precluding the grant by a provincial legislature to a company of powers and rights in respect of objects outside the province, did not prohibit a company from accepting such powers and rights if granted *ab extra*, and, therefore, the appellant company had a status which enabled it to accept the licence from the commissioner of the Yukon territory and the certificate of free mining

from the dominion authorities and to acquire a good title to the mining locations under the leases in question.

Ashbury Railway Carriage and Iron Co. v. Riche (1) (1875), L.R. 7 H.L. 653, distinguished.

Notes. Followed: *A.-G. for Ontario v. A.-G. for Canada*, [1916] 1 A.C. 598; *Kittles v. Colonial Assurance Co.* (1917), 35 D.L.R. 588. Considered: *National Land and Loan Co. v. Rat Portage Lumber Co.* (1917), 36 D.L.R. 97. Discussed: *Re Lands and Houses of Canada* (1918), 44 D.L.R. 325. Followed: *Edwards v. Blackmore* (1918), 42 O.L.R. 104; *Honsberger v. Weyburn Townsite* (1919), 59 S.C.R. 281. Distinguished: *Weyburn Townsite Co., Ltd. v. Honsberger* (1919), 45 O.L.R. 176; *Re Mutual Investments, Ltd.* (1924), 56 O.L.R. 29. Applied: *Re Northwestern Trust Co.* (1926), 1 D.L.R. 689. Considered: *Williams v. R.*, [1940] D.R. 403. Distinguished: *Sun Life Assurance Co. v. Sisters Adorers of the Precious Blood* [1942] O.R. 708. Applied: *Heriteau v. W. D. Morris Realty, Ltd.*, [1943] O.R. 724. Considered: *Ref. re Bowater's Paper Mills, Ltd.*, [1950] S.C.R. 608; *C.P.R. v. Winnipeg*, [1952] S.C.R. 424. Distinguished: *P.E.I. Potato Board v. H. B. Willis Inc.*, [1952] 2 S.C.R. 392. Followed: *Aetna Factors Corp'n. v. Breau* [(1959)], 15 D.L.R. (2d) 322. Referred to: *A.-G. for Canada v. A.-G. for Alberta*, [1916] 1 A.C. 588; *Basil v. Spratt* (1917), 44 O.L.R. 155; *R. v. Manitoba Grain Co.* (1922), 66 D.L.R. 406; *Waterous Engine Co. v. Capreol* (1922), 52 O.L.R. 247; *Sass v. St. Nicholas Mutual Association*, [1937] 2 D.L.R. 761; *Ref. re Power to Disallow Legislation*, [1938] S.C.R. 71; *Gatineau Power Co. v. Fraser Companies* (1941), 15 M.P.R. 511; *R. v. Globe Indemnity*, [1945] O.R. 190; *S.M.T. (Eastern), Ltd. v. St. John*, [1946] 4 D.L.R. 209; *Carroll v. R.* [1947] 2 R.L. 321; *Carruthers Clinic v. Herdman*, 27 C.P.R. 96.

As to the legislative powers of Canadian provincial legislatures, see 5 HALSBURY'S LAWS (3rd Edn.) 495-502; and for cases see 8 DIGEST (Repl.) 722 et seq.

Cases referred to:

- (1) *Riche v. Ashbury Carriage and Iron Co.* (1874), L.R. 9 Exch. 224; 43 L.J. Ex. 177; 31 L.T. 339; 23 W.R. 7, Exch.; reversed sub nom. *Ashbury Railway Carriage and Iron Co. v. Riche* (1875), L.R. 7 H.L. 653; 44 L.J.Ex. 185; 33 L.T. 450; 24 W.R. 794, H.L.; 9 Digest (Repl.) 29, 6.
- (2) *Sutton's Hospital Case* (1612), 106 Rep. 23a; Jenk. 270; 77 E.R. 960, Ex. Ch.; 8 Digest (Repl.) 502, 2223.
- (3) *A.-G. for Commonwealth of Australia v. Colonial Sugar Refining Co., Ltd.*, [1914] A.C. 237; 83 L.J.P.C. 154; 110 L.T. 707; 30 T.L.R. 203, P.C.; 8 Digest (Repl.) 752, 296.
- (4) *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, [1892] A.C. 437; 61 L.J.P.C. 75; 67 L.T. 126; 8 T.L.R. 677, P.C.; 8 Digest (Repl.) 687, 18.
- (5) *Musgrave v. Pulido* (1879), 5 App. Cas. 102; 49 L.J.P.C. 20; 41 L.T. 629; 28 W.R. 373, P.C.; 8 Digest (Repl.) 689, 28.

Also referred to in argument:

- Comanche County v. Lewis* (1889), 133 U.S. 198.
- Canadian Pacific Rail. Co. v. Ottawa Fire Insurance Co.* (1907), 39 S.C.R. 405; 8 Digest (Repl.) 744, *571.
- Colonial Building and Investment Association v. A.-G. of Quebec* (1883), 9 App. Cas. 157; 53 L.J.P.C. 27; 49 L.T. 789, P.C.; 8 Digest (Repl.) 709, 147.
- Dobie v. Temporalities Board* (1882), 7 App. Cas. 136; 51 L.J.P.C. 26; 46 L.T. 1, P.C.; 8 Digest (Repl.) 750, 288.
- Compagnie Hydraulique de St. Francois v. Continental Heat and Light Co.*, [1909] A.C. 194; 78 L.J.P.C. 60; 99 L.T. 786, P.C.; 8 Digest (Repl.) 706, 131.

L.C.C. v. A.-G., [1902] A.C. 165; 71 L.J.Ch. 268; 86 L.T. 161; 66 J.P. 340; 50 W.R. 497; 18 T.L.R. 298, H.L.; 13 Digest (Repl.) 282, 1026.
A.-G. v. Great Eastern Rail Co. (1880), 5 App. Cas. 473; 49 L.J.Ch. 545; 42 L.T. 810; 44 J.P. 648; 28 W.R. 769, H.L.; 13 Digest (Repl.) 271, 957.
Canadian Southern Rail. Co. v. Gebhard (1883), 109 U.S. 527.
A.-G. for Ontario v. A.-G. for the Dominion, [1896] A.C. 348; 65 L.J.P.C. 26; 74 L.T. 533; 12 T.L.R. 388, P.C.; 8 Digest (Repl.) 707, 134.

Appeal, by special leave, from a judgment of the Supreme Court of Canada (reported 50 S.C.R. 534) affirming the judgment of the Exchequer Court of Canada (6 W.W.R. 1056).

Hellmuth, K.C., and *Moss, K.C.*, for the appellants.

Newcombe, K.C., *Barrington-Ward* (for *Raymond Asquith*, serving with His Majesty's forces), and *G. W. Mason* for the respondent.

Sir R. Finlay, K.C., *Nesbitt, K.C.*, *Laflaur, K.C.*, *Geoffrion, K.C.*, and *M. Macnaghten* (for *G. Lawrence*, serving with His Majesty's forces) for the Attorneys-General for Ontario, Quebec, Nova Scotia, and New Brunswick, interveners.

Lañctot, K.C., for the Attorney-General for Quebec, intervener.

Parlee, K.C., and *H. Douglas* (for *Sir H. Greenwood*, serving with His Majesty's forces) for the Attorney-General for Alberta, intervener.

Bayly, K.C., for the Attorney-General of Ontario, intervener.

H. Douglas for the Attorney-General for British Columbia, intervener.

Feb. 24, 1916. **VISCOUNT HALDANE.**—This is an appeal from a judgment of the Supreme Court of Canada in an action which gave rise to questions of constitutional importance as to the position of joint stock companies, incorporated within the provinces, but seeking to carry on their business beyond the provincial boundaries.

The appellants were incorporated in Ontario by letters patent, dated Dec. 23, 1904, and issued under the authority of the Ontario Companies Act [R.S. Ont., 1897, c. 191] and by virtue of any other authority or power then existing, in the name of the Sovereign and under the Great Seal of the province, by its lieutenant-governor. The letters patent recite that this Act authorises the lieutenant-governor in council by letters patent under the Great Seal to create and constitute bodies corporate and politic for any of the purposes or objects to which the legislative authority of the province extends. They go on to incorporate the company to carry on the businesses of mining and exploration in all their branches, and to acquire real and personal property, including mining claims, with incidental powers. There are no words which limit the area of operation or prohibit the company from carrying out its objects beyond the provincial boundaries. In the years 1899 and 1900 the Crown, through the Minister of the Interior of the Dominion, had granted to predecessors in title of the appellants leases of certain tracts of land, in what is now the Yukon district, for the purposes of hydraulic mining. Two of these leases contained exclusions of so much of the tracts as had been taken up and entered for placer mining claims. In the year 1900 the Crown entered into agreements with these predecessors in title to the effect that, if any of the placer mining claims within the tracts should be forfeited or surrendered, the Crown would include them in the tracts by supplementary leases. The original leases having subsequently been assigned to the appellants, and certain of the placer mining claims having reverted, the Crown purported in 1907 to demise to the appellants these claims, and to agree to demise to them such other of the claims as might thereafter revert, for the same terms of years as those for which the original leases were granted. In 1906 the Minister of the Interior of the Dominion had purported to issue to the appellants a free miner's certificate. This certificate was issued in conformity with certain regulations under an Order in Council made under the provisions of the Dominion Lands Act, which gives the right to a free miner's certificate to persons of over eighteen and to joint stock companies, the latter being defined to include any company incorporated "for

mining purposes under a Canadian charter or licensed by the government of Canada." When the Yukon district was, by the statute passed by the dominion Parliament in 1899, made a separate territory, power to make ordinances was conferred on the commissioner of the territory. Under this power the Foreign Companies Ordinance was passed, under which any company, incorporated otherwise than by or under the authority of an ordinance of the territory or an Act of the Parliament of Canada, was required to obtain a licence under the ordinance to carry on its business in the Yukon territory. Such a licence when issued was made sufficient evidence in the courts of the territory of the due licensing of the company. In September, 1905, the appellants obtained such a licence.

In 1908 the appellants presented a petition of right in the Exchequer Court of Canada, alleging that, in breach of the agreement entered into by the Crown, placer mining claims which had reverted to the Crown and should have been leased to the appellants had been wrongfully withheld from the appellants, and that by reason of this and of other breaches of the agreement the appellants had suffered heavy damage, for which they as suppliants prayed compensation. The respondent delivered an answer to the petition of right, the first two paragraphs of such answer being as follows:

" 1. The respondent denies that the suppliant has now or ever has had the power, either under letters patent, licence, free miner's certificate, or otherwise, to carry on the business of mining in the district of the Yukon, or to acquire any mines, mining claims, or mining locations therein, or any estate or interest by way of lease or otherwise in any such mines, mining claims, or locations. 2. Should a free miner's certificate have been issued to the suppliant the respondent claims that the same is and always has been invalid and of no force or effect, that there was no power to issue a free miner's certificate to the suppliant, a company incorporated under provincial letters patent, and that there was no power vested in the suppliant to accept such a certificate."

CASSELS, J., the judge of the Exchequer Court, ordered the questions of law raised by these paragraphs of the answer to be disposed of, and pending this stayed all other proceedings. He subsequently heard arguments upon the questions thus raised. As a result he decided that he ought to follow what he conceived to be the opinions given by the majority of the judges of the Supreme Court of Canada in a general reference which had been made to them in regard to companies. He thought that the majority in the Supreme Court had decided that a provincial company was confined in the exercise of its functions to the province where it was incorporated. He, therefore, dismissed the petition of right, but without costs, on the ground taken in the first of the above-quoted paragraphs of the answer. On the narrower ground taken in the second paragraph he did not enter.

There was an appeal to the Supreme Court, and the learned judges were divided in their views. The Chief Justice, DAVIS, J., and DUFF, J., were of opinion that it was ultra vires the appellants to exercise powers or to acquire rights outside the boundaries of the province of Ontario. IDINGTON, J., and ANGLIN, J., were of a different opinion. They held that, while a provincial company could exercise its powers as of right only within the province where it was incorporated, it was elsewhere in Canada like a foreign company, and had capacity to accept rights and powers conferred on it by comity by another government. The majority in the Supreme Court were, therefore, adverse to the appellants on the first question raised, that as to general capacity. On the question raised by the second paragraph of the answer, DUFF, J., expressed an opinion in favour of the appellants. On the question, which was one of construction, and arose only if he was wrong in his answer to the wider question, he thought that the condition of acquiring, under the Dominion Regulations approved by the Order in Council already referred to, the right to a mining location to be worked by hydraulic process,

A was the obtaining a free miner's certificate under the Dominion Regulations governing placer mining. Under these regulations a joint stock company might receive such a certificate if it came within the definition of being "incorporated for mining purposes under a Canadian charter or licensed by the government of Canada." Differing from the Chief Justice, who had been adverse to the appellants on this point also, DUFF, J., was of opinion that the expression "Canadian charter" meant, not a charter granted under Dominion authority, but one emanating from any lawful authority in Canada. Otherwise, as he pointed out, a company incorporated by Yukon authority, or by the Council of the North-West Territories before Yukon became a separate territory, would be excluded along with companies incorporated by the province of Canada before confederation.

C Their Lordships have come to the same conclusion on this point as DUFF, J. They think that the appellants, if they possessed legal capacity to receive such a dominion certificate, had it validly bestowed on them, and that, if so, they subsequently obtained a good title to the mining locations and also to the Yukon licence to carry on business which was granted to them. This subordinate question ought, therefore, to be answered in favour of the appellants.

D Their Lordships accordingly turn to the larger question raised by the first of the two paragraphs, a question which is of far-reaching importance. It is whether a company incorporated by provincial letters patent, issued in conformity with legislation under s. 92 of the British North America Act, can have capacity to acquire and exercise powers and rights outside the territorial boundaries of the province. In the absence of such capacity the certificates, licences, and leases already referred to were wholly inoperative, for if the company had no legal existence or capacity for purposes outside the boundaries of the province conferred on it by the government of Ontario, by whose grant exclusively it came into being, it is not apparent how any other government could bestow on it rights and powers which enlarged that existence and capacity. The answer to this question must depend on the construction to be placed on s. 92 of the British North America Act and on the Ontario Companies Act.

E Section 92 (11) confers exclusive power upon the provincial legislature to make laws in relation to the "incorporation of companies with provincial objects." The interpretation of this provision which has been adopted by the majority of the judges in the Supreme Court is that the introduction of the words "with provincial objects" imposes a territorial limit on legislation conferring the power of incorporation so completely that by or under provincial legislation no company can be incorporated with an existence in law that extends beyond the boundaries of the province. Neither directly by the language of a special Act, nor indirectly by bestowal through executive power, do they think that capacity can be given to operate outside the province, or to accept from an outside authority the power of so operating. For the company, it is said, is a pure creature of statute, existing only for objects prescribed by the legislature within the area of its authority, and is, therefore, restricted, so far as legal capacity is concerned, on the principle laid down in *Ashbury Railway Carriage and Iron Co. v. Riche* (1). Their Lordships, however, take the view that this principle amounts to no more than that the words employed to which a corporation owes its legal existence must have their natural meaning, whatever that may be. The words of the British Companies Act [that of 1862] were construed as importing that a company incorporated by the statutory memorandum of association which the Act prescribed could have no legal existence beyond such as was required for the particular objects of incorporation to which that memorandum limited it. A similar rule has been laid down as regards companies created by special Act.

I The doctrine means simply that it is wrong, in answering the question what powers the corporation possesses when incorporated exclusively by statute, to start by assuming that the legislature meant to create a company with a capacity resembling that of a natural person, such as a corporation created by charter

would have at common law, and then to ask whether there are words in the statute which take away the incidents of such a corporation. This was held by the House of Lords to be the error into which BLACKBURN, J., and the judges who agreed with him had fallen when they decided in *Riche v. Ashbury Carriage and Iron Co.* (1) in the court below that the analogy of the status and powers of a corporation created by a charter, as expounded in the *Sutton's Hospital Case* (2), should in the first instance be looked to. For to look to that analogy is to assume that the legislature has had a common law corporation in view, whereas the wording may not warrant the inference that it has done more than concern itself with its own creature. Such a creature, where its entire existence is derived from the statute, will have the incidents which the common law would attach if, but only if, the statute has by its language gone on to attach them. In the absence of such language they are excluded, and, if the corporation attempts to act as though they were not, it is doing what is ultra vires and so prohibited as lying outside its existence in contemplation of law. The question is simply one of interpretation of the words used. For the statute may be so framed that executive power to incorporate by charter, independently of the statute itself, which some authority, such as a lieutenant-governor, possessed before it came into operation, has been left intact. Or the statute may be in such a form that a new power to incorporate by charter has been created, directed to be exercised with a view to the attainment of, for example, merely territorial objects, but not directed in terms which confine the legal personality which the charter creates to existence for the purpose of these objects and within territorial limits. The language may be such as to show an intention to confer on the corporation the general capacity which the common law ordinarily attaches to corporations created by charter. In such a case a construction like that adopted by BLACKBURN, J., will be the true one.

Applying the principle so understood to the interpretation of s. 92 and of the Ontario Companies Act passed by virtue of it, the conclusion which results is different from that reached by the court below. For the words of s. 92 are, in their Lordships' opinion, wide enough to enable the legislature of the province to keep the power alive, if there existed in the executive at the time of confederation a power to incorporate companies with provincial objects, but with an ambit of vitality wider than that of the geographical limits of the province. Such provincial objects would be, of course, the only objects in respect of which the province could confer actual rights. Rights outside the province would have to be derived from authorities outside the province. It is, therefore, important to ascertain what were the powers in this regard of a lieutenant-governor before the British North America Act passed and, in the second place, what the Ontario Companies Act has really done.

The Act which was passed by the Imperial Parliament in 1840, in consequence of the Report on the State of Affairs in Canada made by Lord Durham, united the provinces of Upper and Lower Canada under a governor-general, who had power to appoint deputies to whom he could delegate his authority. This Act established a single legislature for the new United Province of Canada, and shortly after it had passed responsible government was there set up. In 1867 the British North America Act modified the constitution so established. This Act contained a preamble stating that the provinces of Canada, Nova Scotia, and New Brunswick, had expressed their desire to be federally united into one dominion under the Crown, with a constitution similar in principle to that of the United Kingdom. In *A.-G. for the Commonwealth of Australia v. Colonial Sugar Refining Co., Ltd.* (3), this board had occasion to comment on the contrast between the principles which underlie the distribution of powers in the constitutions of Canada and Australia respectively. They drew attention to the fact that the expression "federal" in the preamble of the British North America Act had been used in a somewhat loose fashion, and that the principle actually adopted was not that of federation in the strict sense, but one under which the

A constitutions of the provinces had been surrendered to the Imperial Parliament for the purpose of being re-fashioned. The result had been to establish wholly new dominion and provincial governments with defined powers and duties, both derived from the statute which was their legal source, the residual powers and duties being taken away from the old provinces and given to the Dominion. It is to be observed that the British North America Act has made a distribution between the dominion and the provinces which extends not only to legislative but to executive authority. The executive government and authority over Canada are primarily vested in the Sovereign. But the statute proceeds to enact, by s. 12, that all powers, authorities, and functions, which by any Imperial statute or by any statute of the provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, are at the Union vested in or exercisable by the respective governors or lieutenant-governors of these provinces shall, "as far as the same continue in existence and capable of being exercised after the Union in relation to the government of Canada," be vested in and exercisable by the governor-general. Section 65, on the other hand, provides that all such powers, authorities, and functions shall,

"as far as the same are capable of being exercised after the Union in relation to the government of Ontario and Quebec respectively, be vested in and exercisable by the lieutenant-governor of Ontario and Quebec respectively."

By s. 64 the constitution of the executive authority in Nova Scotia and New Brunswick was to continue as it existed at the Union until altered under the authority of the Act. The effect of these sections of the British North America Act is that, subject to certain express provisions in that Act and to the supreme authority of the Sovereign, who delegates to the governor-general and through his instrumentality to the lieutenant-governors the exercise of the prerogative on terms defined in their commissions, the distribution under the new grant of executive authority in substance follows the distribution under the new grant of legislative powers. In relation, for example, to the incorporation of companies in Ontario with provincial objects the powers of incorporation which the governor-general or lieutenant-governor possessed before the Union must be taken to have passed to the lieutenant-governor of Ontario, so far as concerns companies with this class of objects. Under both s. 12 and s. 65 the continuance of the powers thus delegated is made by implication to depend on the appropriate legislature not interfering.

There can be no doubt that prior to 1867 the governor-general was for many purposes intrusted with the exercise of the prerogative power of the Sovereign to incorporate companies throughout Canada, and such prerogative power to that extent became after confederation, and so far as provincial objects required its exercise, vested in the lieutenant-governors, to whom provincial Great Seals were assigned as evidences of their authority. Whatever obscurity may at one time have prevailed as to the position of a lieutenant-governor appointed on behalf of the Crown by the governor-general has been dispelled by the decision of this board in *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick* (4). It was there laid down that

"the act of the governor-general and his council in making the appointment is, within the meaning of the statute, the act of the Crown; and a lieutenant-governor, when appointed, is as much the representative of Her Majesty for all purposes of provincial government, as the governor-general himself is for all purposes of dominion government."

The form of the commission by which the governor-general appoints a lieutenant-governor to be lieutenant-governor of Ontario bears this out. For it runs in the name of the Sovereign, and is:

"To do and execute all things that shall belong to your said command and the trust we have reposed in you, according to the several provisions

and directions granted or appointed you by virtue of the Act of the United Kingdom of Great Britain and Ireland passed in the thirtieth year of the reign of Her late Majesty Queen Victoria, called and known as "The British North America Act, 1867," and of all other statutes in that behalf and of this our present commission, according to such instructions as are herewith given to you or which may from time to time be given to you in respect of the said province of Ontario under the sign manual of our governor-general of our said dominion of Canada, or by order of our Privy Council of Canada, and according to such laws as are or shall be in force in the said province of Ontario."

Their Lordships have now to consider the question whether legislation before or after confederation has been of such a character that any power of incorporation by charter from the Crown which formerly existed has been abrogated or interfered with to such an extent that companies so created no longer possess that capacity which the charter would otherwise have attached to them. Prior to confederation, the granting of letters patent under the Great Seal of the province of Canada for the incorporation of companies for manufacturing, mining, and certain other purposes was sanctioned and regulated by the Canadian statute of 1864. This statute authorised the governor-in-council to grant a charter of incorporation to persons who should petition for incorporation for the purposes of the enumerated kinds of business. Applicants for such a charter were to give notice in the "Canada Gazette" of, among other things, the object or purpose for which incorporation was sought. By s. 4 every company so incorporated under that Great Seal for any of the purposes mentioned in this Act was to be a body corporate capable of exercising all the functions of an incorporated company as if incorporated by a special Act of Parliament. Their Lordships construe this provision as an enabling one, and not as intended to restrict the existence of the company to what can be found in the words of the Act as distinguished from the letters patent granted in accordance with its provisions. It appears to them that the doctrine of *Ashbury Railway Carriage and Iron Co. v. Riche* (1) does not apply where, as here, the company purports to derive its existence from the act of the Sovereign and not merely from the words of the regulating statute. No doubt the grant of a charter could not have been validly made in contravention of the provisions of the Act. But, if validly granted, it appears to their Lordships that the charter conferred on the company a status resembling that of a corporation at common law, subject to the restrictions which are imposed on its proceedings. There is nothing in the language used which, for instance, would preclude such a company from having an office or branch in England or elsewhere outside Canada.

The Dominion Companies Act (c. 79 of the Revised Statutes of 1906) is, so far as Part 1 is concerned, framed on the same principle, although the machinery set up is somewhat different. Part 2 stands on another footing. This part deals only with companies directly incorporated by special Act of the Parliament of Canada, and to these it is obvious that other considerations may apply. But the companies to which Part 1 applies are, like those under the old statute, to be incorporated by letters patent, the only material difference being that the Act enables these to be granted by the Secretary of State under his own seal of office. When granted by s. 5 they constitute the shareholders a body corporate and politic for any of the purposes or objects, with certain exceptions, to which the legislative authority of the Parliament of Canada extends. The Sovereign, through the medium of the governor-general, in this way delegates the power of incorporation, subject to restrictions on its exercise, to the secretary of State, and it is by the exercise of the executive power of the Sovereign that the company is brought into existence. The Ontario Companies Act, which governs the present case, is c. 191 of the Revised Statutes of the province 1897. The principle

A is similar, save that the letters patent are to be granted directly by the lieutenant-governor of the province under the Great Seal of Ontario. Excepting in this respect, the provisions of s. 9, which corresponds to s. 5 of the dominion Act, are substantially the same as those of the latter section, so that, subject to the express restrictions in the statute, it is by the grant under the Great Seal and not by the words of the statute, which merely restrict the cases in which such a grant

B can be made, that the vitality of the corporation is to be measured. It will be observed that s. 107 enables an extra-provincial company desiring to carry on business within the province of Ontario to do so if authorised by licence from the lieutenant-governor, a provision which bears out the view indicated. It was obviously beyond the powers of the Ontario legislature to repeal the provisions of the Act of 1864, excepting in so far as the British North America Act enabled

C it to do this in matters relating to the province. If the legislature of Ontario had not interfered, the general character of an Ontario company constituted by grant would remain similar to that of a Canadian company before confederation.

The whole matter may be put thus. The limitations of the legislative powers of a province expressed in s. 92, and in particular the limitation of the power of legislation to such as relates to the incorporation of companies with provincial

D objects, confine the character of the actual powers and rights which the provincial government can bestow, either by legislation or through the executive, to powers and rights exercisable within the province. But actual powers and rights are one thing and capacity to accept extra-provincial powers and rights is quite another. In the case of a company created by charter the doctrine of ultra vires has no real application in the absence of statutory restriction added to what is

E written in the charter. Such a company has the capacity of a natural person to acquire powers and rights. If by the terms of the charter it is prohibited from doing so, a violation of this prohibition is an act not beyond its capacity, and is, therefore, not ultra vires, although such a violation may well give ground for proceedings by way of scire facias for the forfeiture of the charter. In the case of a company, the legal existence of which is wholly derived from the words of a

F statute, the company does not possess the general capacity of a natural person and the doctrine of ultra vires applies. Where, under legislation resembling that of the British Companies Act by a province of Canada in the exercise of powers which s. 92 confers, a provincial company has been incorporated by means of a memorandum of association analogous to that prescribed by the British Companies Act, the principle laid down by the House of Lords in *Ashbury Railway Carriage and Iron Co. v. Riche* (1), of course, applies. The capacity of such a company

G may be limited to capacity within the province, either because the memorandum of association has not allowed the company to exist for the purpose of carrying on any business outside the provincial boundaries, or because the statute under which incorporation took place did not authorise, and therefore excluded, incorporation for such a purpose. Assuming, however, that the provincial

H legislation has purported to authorise a memorandum of association permitting operations outside the province if power for the purpose is obtained ab extra, and that such a memorandum has been registered, the only question is whether the legislation was competent to the province under s. 92. If the words of this section are to receive the interpretation placed on them by the majority in the Supreme Court, the question will be answered in the negative. But their Lord-

I ships are of opinion that this interpretation was too narrow. The words "legislation in relation to the incorporation of companies with provincial objects" do not preclude the province from keeping alive the power of the executive to incorporate by charter in a fashion which confers a general capacity analogous to that of a natural person. Nor do they appear to preclude the province from legislating so as to create, by or by virtue of statute, a corporation with this general capacity. What the words really do is to preclude the grant to such a corporation, whether by legislation or by executive act according with the distribution of legislative authority, of powers and rights in respect of objects outside the province,

while leaving untouched the ability of the corporation, if otherwise adequately called into existence, to accept such powers and rights if granted *ab extra*. It is, in their Lordships' opinion, in this narrower sense alone that the restriction to provincial objects is to be interpreted. It follows, as the Ontario legislature has not thought fit to restrict the exercise by the lieutenant-governor of the prerogative power to incorporate by letters patent with the result of conferring a capacity analogous to that of a natural person, that the appellant company could accept powers and rights conferred on it by outside authorities. The conclusions at which their Lordships have thus arrived are sufficient to enable them to dispose of this appeal, for according to these conclusions the appellant company had a status which enabled it to accept from the dominion authorities the right of free mining, and to hold the leases in question and take the benefit of the agreements relating to the locations in the Yukon district, as well as of the licence from the Yukon authorities.

A yet larger view of the devolution and distribution of executive power in Canada was suggested in some of the arguments addressed to their Lordships from the Bar, and they are aware that this view has been contended for on former occasions in the dominion. It has been urged in several cases which have occurred that the governor-general and the lieutenant-governors of the provinces, excepting so far as the Royal prerogatives have been reserved expressly or by necessary implication, have the right to exercise them, as though by implication completely handed over and distributed in such a fashion as to cover the whole of the fields to which the self-government of Canada extends. The governor and the lieutenant-governors would thus be more nearly viceroys than representatives of the Sovereign under the restrictions explained in *Musgrave v. Pulido* (5), where it was laid down that, in the case of a Crown Colony, the commission of the governor must in each case be the measure of his executive authority, a principle which, in such a case as that of a self-governing dominion like Canada, might find its analogy in the terms not only of the commission but of the statute creating the constitution. The argument for the larger view concedes that it is the general rule in the construction of statutes that the Crown is not affected unless there be words to that effect, inasmuch as the law made by the Crown with the assent of the Lords and Commons is enacted *prima facie* for the subject and not for the Sovereign. But this principle of construction, it is said, cannot apply to an Act the expressed object of which is to grant a constitution with full legislative and executive powers. In the case of such an Act there is, therefore, no presumption that the general provisions it contains were not intended to include any matter of prerogative which, in the absence of the rule of construction above stated, would fall within the general words employed. For a constitution granted to a dominion for regulating its own affairs in legislation and government generally, cannot be created without dealing with the prerogative, and the British North America Act from beginning to end deals with matters of prerogative, for the most part without expressly naming the Sovereign.

If this argument were well-founded it would afford a short cut to the solution of the question which has arisen in this appeal. For under the distribution of the prerogative which it assumes it would be difficult to see how a lieutenant-governor, placed in the position of a viceroy as regards matters pertaining to the government of his province, could be excluded from the prerogative power of incorporating by charter, unless that power had been expressly taken away by legislation.

But their Lordships abstain from discussing at length the question so raised. They will only say that when, if ever, it comes to be argued, points of difficulty will have to be considered. There is no provision in the British North America Act corresponding even to s. 61 of the Australian Commonwealth Act, which, subject to the declaration of the discretionary right of delegation by the Sovereign in ch. 1, s. 2, provides that the executive power, though declared to be in the Sovereign, is yet to be exercisable by the governor-general. Moreover, in the Canadian Act there are various significant sections, such as s. 9, which

A declares the executive government and authority over Canada to continue and be vested in the Sovereign; s. 14, which declares the power of the Sovereign to authorise the governor-general to appoint deputies; s. 15, which, differing from s. 68 of the Commonwealth Act, says that the command-in-chief of the naval and military forces in Canada is to be deemed to continue and be vested in the Sovereign; and s. 16, which says that until the Sovereign otherwise directs, the seat of the government in Canada shall be Ottawa. These and other provisions of the British North America Act appear to preserve prerogative rights of the Crown which would pass if the scheme were that contended for, and to negative the theory that the governor-general is made a viceroy in the full sense, and they point to the different conclusion that for the measure of his powers the words of his commission and of the statute itself must be looked to. In *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick* (4) it was said by this Board that the provisions of the Act

“nowhere profess to curtail in any respect the rights and privileges of the Crown, or to disturb the relations then subsisting between the Sovereign and the provinces.”

D Properly understood, and subject to such express provisions of the Act as transfer what would otherwise remain prerogative powers, their Lordships are disposed to agree with this interpretation. It is quite consistent with it to hold that executive power is in many situations which arise under the statutory constitution of Canada conferred by implication in the grant of legislative power, so that where such situations arise the two kinds of authority are correlative. It follows that to this extent the Crown is bound and the prerogative affected. But such a conclusion is a very different one from the far-reaching principle contended for in the argument in question.

E For the reasons which they have assigned earlier in this judgment their Lordships will humbly advise His Majesty that this appeal should be allowed, and that the trial of the petition of right should be proceeded with. As these are proceedings arising out of a petition of right with reference to which, under the Petition of Right Act of Canada, there is discretion to award costs as against the Crown, the respondent will pay the appellants' costs here and in the courts below. There will be no order as to the costs of the interveners.

F Solicitors: *Blake & Redden; Charles Russell & Co.*

[Reported by W. E. REID, ESQ., Barrister-at-Law.]

EVANS v. EDINBURGH CORPORATION AND OTHERS

[HOUSE OF LORDS (Lord Buckmaster, L.C., Viscount Haldane, Lord Kinnear, Lord Atkinson and Lord Parker of Waddington), March 28, 1916]

[Reported [1916] 2 A.C. 45; 85 L.J.P.C. 200; 114 L.T. 911;
32 T.L.R. 396]

Highway—Negligence—Adjoining premises—Door opening outwards across highway.

Where premises are in themselves and apart from their use perfectly harmless neither the owner of the premises nor the highway authority is liable to any person who suffers injury by reason of a door being opened outwards across a highway. There is no duty at common law on such an owner not to keep premises with a door opening on the highway where that door, while unopened, is a perfectly harmless thing. Nor is there any duty which he owes to a passer-by to prevent any person ever opening the door so that it would be an obstruction.

Notes. As to the liability of occupiers of premises adjoining highways, see 28 HALSBURY'S LAWS (3rd Edn.) 72; and for cases see 36 DIGEST (Repl.) 45 et seq. As to negligence in relation to highways in general, see 28 HALSBURY'S LAWS (3rd Edn.) 62 et seq.; and for cases see 36 DIGEST (Repl.) 89 et seq.

Cases referred to in argument:

Johnson v. Mitchell & Co. (1885), 22 S.L.R. 698.

Tarry v. Ashton (1876), 1 Q.B.D. 314; 45 L.J.Q.B. 260; 34 L.T. 97; 40 J.P. 439; sub nom. *Terry v. Ashton*, 24 W.R. 581; 26 Digest (Repl.) 495, 1793.

Innes v. Edinburgh Magistrates (1798), Mor. Dict. 13189.

Elgin County Road Trustees v. Innes (1886), 14 R. (Ct. of Sess.) 48; 26 Digest (Repl.) 525, *851.

Appeal by the pursuer from an interlocutor of the First Division of the Court of Sessions (the LORD PRESIDENT, LORD SKERRINGTON, and LORD CULLEN), reported 1915 S.C. 895, reversing an interlocutor of LORD ANDERSON which granted an issue against both set of defenders.

The facts are set out in the judgment of the Lord Chancellor. The case is only reported as to the common law liability issue.

C. Gallop for the appellant.

D. F. Clyde, and *Walter Robinson* (both of the Scottish Bar) for the respondents, the highway authority.

W. Watson, K.C., and *F. A. Macquisten* (both of the Scottish Bar) for the owners of the premises.

LORD BUCKMASTER, L.C.—In this case on July 6, 1914, as the appellant was going down Ramsay Lane, Portobello, he ran his head against a door which was suddenly opened from a house that is in the possession of two of the respondents, Messrs. Binnie and Russell. It appears that this door was a door which opened from a garden of the premises into the road, and the allegation made by the appellant with regard to its use is that it was suddenly opened on the occasion in question, that he was consequently struck violently upon the face, and, I regret to say, suffered grave, and it is suggested by his counsel, in some respects permanent injuries.

The question is, who is responsible for the results of this accident? It is alleged by the appellant that the owners of the premises are responsible, and also the Lord Provost and the magistrates of the city of Edinburgh. So far as the respondents Messrs. Binnie and Russell are concerned, the case against them rests upon this—that they were the owners of the premises, part of which consisted of a

A door made to open outwards, and that that was the possession of a dangerous structure rendering its owners liable to any person who suffered injury by reason of the door being opened across the highway. It is not suggested anywhere in the condescendence in this case that the door on July 6, 1914, was opened by the respondents, or by anyone in their service; the claim against them begins and ends with the allegation that they were responsible for having premises which, if negligently used, might cause injury to a passer by. In spite of the industry of counsel for the appellant, it has been impossible to find any authority for such a proposition as that. It is perfectly true that if a man has premises so constructed that they may become a danger to passers-by—as, for example, by having affixed to the premises a projecting lamp, which he negligently allows to get out of repair, so that it falls upon the head of a passenger—he is liable for the accident that results. But that case has no relation to the case where the premises in themselves and apart from their use are perfectly harmless, as in the present instance. The utmost that can be urged by the occupant might be a cause of injury to an innocent passer-by. That is insufficient, in my opinion, to establish any liability against them for the accident that arose. If that be so, the claim against the Lord Provost and magistrates of the city of Edinburgh cannot be established on the ground of their allowing premises to be in a dangerous condition at common law.

VISCOUNT HALDANE.—I have very little to add. I agree with the reasons which the noble and learned Lord on the woolsack has given for the motion which he will propose. The appellant seeks to make out his case on a twofold basis. In the first place, he says that at common law he is entitled to succeed against the owners of the property on the ground of their breach of duty in so far as they have kept a door dangerously constructed in their wall, and that he has suffered from the natural and probable consequences of keeping a door in this fashion. But, my Lords, I am far from satisfied that there was any negligence or dereliction of duty at common law on the part of the owners in keeping the door in this fashion. A door so made certainly could have been rightly originally so constructed. In the absence of statutory prohibition there was no reason why the door should not be made opening out on to the highway, the owners either keeping it locked or imposing such injunctions upon those who made use of it as would secure the safe opening. But it appears that in the present case someone who is not named or specified is alleged to have opened this door with undue rashness and rapidity. There is no reason why the door should have been so opened, and, if it has been so opened, then I think the consequences arise, not from the door being of this structure, but from the use which has been made of it by somebody who is not shown to have been acting under the authority of the owners so as to make the maxim *respondet superior* apply. For that reason I think the case fails its common law footing.

LORD KINNEAR.—I agree entirely with both my noble and learned friends who have preceded me, and I do not think it necessary to add anything to what they have said.

LORD ATKINSON.—I also concur. As to the question of common law, negligence is a breach of duty, and to give a cause of action it must be a duty owed to the pursuer. Now what is the duty here which at common law the owners of these premises owe to the pursuer? There is no duty upon them at common law not to keep premises with a door opening on the street where that door, while unopened, is a perfectly harmless thing. Neither do I think that there is a duty cast upon them owing to a mere passer-by to prevent any person ever opening the door. The peculiarity of this case is that there is no averment that the person who did open the door was a person for whom the owners of the premises were in any way responsible. So that in order to succeed, inasmuch as this door is perfectly harmless if kept closed, the pursuer should show that the

defenders owed a duty to him never to allow any person to open it on to the street so that it would be an obstruction. I do not think the common law attaches any such duty to the owner of premises. On these grounds I think there is no cause of action disclosed in these proceedings.

LORD PARKER OF WADDINGTON.—I agree. In my opinion the appeal fails against both sets of defenders.

Appeal dismissed.

Solicitors: *W. Drummond Milliken*, for *M. Graham Yooll*, S.S.C., Edinburgh; *Beveridge, Greig & Co.*, for *Sir Thomas Hunter*, W.S., Town Clerk, Edinburgh; *Wetherfield, Son & Baines*, for *Hossack & Hamilton*, W.S., Edinburgh.

[Reported by *W. E. REID*, Esq., Barrister-at-Law.]

EWING v. BUTTERCUP MARGARINE CO., LTD.

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Bankes and Warrington, L.JJ.), April 24, 1917]

[Reported [1917] 2 Ch. 1; 86 L.J.Ch. 441; 117 L.T. 67; 33 T.L.R. 321; 61 Sol. Jo. 443; 34 R.P.C. 232]

Trade Name—Similarity—Injunction—New company registered under name closely resembling that of existing trader—Likelihood of confusion.

The court has jurisdiction to restrain a person from using a trade name similar to that used by an existing trader if it is calculated to deceive by causing such confusion between the two businesses as is likely to lead persons to conclude that the other trader's business is connected in some way with and is a branch of the existing trader's business, and it is not necessary for the existing trader to establish that his customers have been thereby induced to become customers of the other trader.

Notes. Followed: *Albion Motor Car Co., Ltd. v. Albion Carriage and Motor Body Works, Ltd.* (1917), 33 T.L.R. 346. Referred: *Dutton, Massey & Co. (Liverpool), Ltd. v. Dutton, Massey & Co., Ltd.* (1923), 40 R.P.C. 413; *Brestian v. Try*, [1958] R.P.C. 161.

As to trade names, see 32 HALSBURY'S LAWS (2nd Edn.) 614 et seq.; and for cases see 43 DIGEST 282 et seq.

Case referred to:

- (1) *Day v. Brownrigg* (1878), 10 Ch.D. 294; 48 L.J.Ch. 173; 39 L.T. 553; 27 W.R. 217; 28 Digest (Repl.) 863, 931.

Also referred to in argument:

Levy v. Walker (1879), 10 Ch.D. 436; 48 L.J.Ch. 273; 39 L.T. 654; 27 W.R. 370; 43 Digest 282, 1122.

Powell v. Birmingham Vinegar Brewery Co., [1894] A.C. 8; 63 L.J.Ch. 152; 70 L.T. 1; 58 J.P. 296; 10 T.L.R. 84; 6 R. 52; sub nom. *Re Powell's Trade Mark*, 11 R.P.C. 4, H.L.; 43 Digest 198, 458.

Ouwah Ceylon Estates, Ltd. v. Uva Ceylon Rubber Estates, Ltd. (1910), 103 L.T. 416; 27 T.L.R. 24; 27 R.P.C. 753, C.A.; 9 Digest (Repl.) 63, 228.

Hendriks v. Montagu (1881), 17 Ch.D. 638; 50 L.J.Ch. 456; 44 L.T. 879; 30 W.R. 168, C.A.; 9 Digest (Repl.) 59, 200.

A *George Outram & Co., Ltd. v. London Evening Newspapers Co., Ltd.* (1911), 27 T.L.R. 231; 55 Sol. Jo. 255; 28 R.P.C. 208; 37 Digest 547, 87.
North Cheshire and Manchester Brewery Co. v. Manchester Brewery Co., [1899] A.C. 83; 68 L.J.Ch. 74; 79 L.T. 645; 15 T.L.R. 110, H.L.; 9 Digest (Repl.) 60, 206.

B **Appeal** from a decision of ASTBURY, J., in an action in which the plaintiff claimed an injunction restraining the defendants from using or carrying on business under the name of "Buttercup Margarine Co., Ltd." and from using the name "Buttercup" or any other word likely to produce confusion with the plaintiff's business. ASTBURY, J., granted the injunction, and the defendants appealed.

Cunliffe, K.C., and *Owen Thompson* for the defendants.

C *Frank Russell, K.C.*, and *J. Ricardo* for the plaintiff.

D **LORD COZENS-HARDY, M.R.**—This is an appeal from a decision of ASTBURY, J. I agree with his judgment, and, I think, with every passage in it with only one exception. He says that this is a case which is "very near the line." In my opinion, it is a perfectly plain and clear case, not very near the line, but well over the line.

E The plaintiff has since 1904 been carrying on a business dealing with margarine, tea, and such articles, and he has upwards of 150 shops of his own in which he sells his own goods, including some 50 tons of margarine a week. The name under which he has carried on business is "Andrew Ewing, trading as the Buttercup Dairy Co." The business of the Buttercup Dairy Co. is largely carried on in Scotland, and to some extent in the North of England, but not near London or even the Midlands. It is a business which is extending southwards, and I do not in the least doubt that the Buttercup Dairy Co. will, if so minded, extend this business into the South of England. The defendants are the Buttercup Margarine Co., Ltd., and two directors of the company are added as co-defendants, though this for present purposes does not matter. The company is one which was registered in November, 1916, and, as soon as the plaintiff heard of it, he complained. The defendants have never carried on their business up to the present time; but the application to the court was made promptly and in time, with the result that the learned judge in the court below granted an injunction restraining them from carrying on business under the name of the Buttercup Margarine Co., Ltd. They were at the beginning of the year engaged in building a factory, but up to the present day, they have not made or sold an ounce of margarine.

G In a case like that, where the plaintiff is the owner of a business which has been established since 1904 and has a turnover of half a million a year, and must be regarded as an old-established business none the less because its actual sphere of operations is mainly in Scotland and the North of England, what should I expect the defendants as honest men or honest representatives of a newly formed company to do? I should expect them to say: "We are very sorry; we were not aware of your existence in Scotland, but as you object to our name, we will change it so as not in any way to interfere with you." Instead of doing that, they assert their right to use the name and file a mass of affidavits in support of their claim to do what they have threatened and continued to do. And they seek to justify the use of their name on the ground that the arm of the court is not long enough to reach a defendant who takes a name similar to that of the plaintiff, unless it can be shown that such name is calculated to deceive in the sense that a person desiring to be a customer of the plaintiff is thereby induced to become a customer of the defendant. And they say that there can be no deception here because they are wholesale dealers while the plaintiff is a retailer; that it is true that they have the fullest possible power under the memorandum and articles of association to carry on a retail business, but that, at the present moment, they have no such intention. I should be very sorry indeed if the jurisdiction of the court should have to be regarded as so limited. No doubt mere confusion due to some acts

of the defendants would not give rise to a cause of action. *Day v. Brownrigg* (1) is a good illustration of that. But I know of no authority, and I can see no principle, which withholds us from preventing injury to the plaintiff in his business as a trader by a confusion which will lead people to conclude that the defendants are really connected in some way with the plaintiff and are carrying on a branch of the plaintiff's business.

The evidence on behalf of the plaintiff, the bulk of which has been read, is summed-up in the passage in which he says

"that confusion which will be created in the manner hereinbefore suggested will undoubtedly operate to embarrass me in my business and cause serious injury, damage, and loss thereto."

I cannot bring myself to doubt that what the defendants are threatening and intending to do would affect, and in all probability seriously affect, the plaintiff's business. We can only prophesy, because the action was commenced before the defendants' business was begun. But I cannot bring myself to doubt that serious damage to the credit and prosperity of the plaintiff's business would arise from the confusion caused by the defendants deliberately and wilfully continuing to carry on business under a name so nearly resembling that under which the plaintiff is trading as to be calculated to deceive. In my opinion, this is, as I have already said, a case not on the line, but a case well over the line; and I think the judgment of *ASTBURY, J.*, was perfectly right, and that the appeal must be dismissed with costs.

BANKES, L.J.—I agree. The plaintiff has been carrying on business for a long time under the style of the Buttercup Dairy Co. and the distinctive feature of that trade name is "Buttercup." The defendants have recently incorporated themselves as a private limited company under the name of the Buttercup Margarine Co., Ltd., and they intend to manufacture margarine under that name and deal with it as wholesale manufacturers under that name. It is not a case in which the defendants have actually commenced manufacturing or trading, and, therefore, one is not dealing with the actual results of their trading, but with the probable or necessary results of their trading under the name which they have adopted.

A very large body of evidence has been filed on behalf of the plaintiff, consisting of affidavits by men connected with first-rate companies dealing in the provision trade in a very large way; and all those affidavits are, it seems to me, framed on the assumption that the defendants will manufacture margarine and put it on the market in some way identifying it as the margarine of their manufacture, and it is for that reason that they speak about a confusion in the minds of the public, and a confusion which will lead the public—by which is meant the public who purchase margarine—into the belief that the plaintiff's and the defendants' businesses are one, or that there is some connection between the two. If the court accepts the view put forward by these witnesses, and it seems to me to be the natural view, a case is plainly made out for the injunction. And it is perfectly immaterial for the defendants to say that they are wholesale dealers. What does that matter, if they intend to place their goods on the market as being of their manufacture with the intention that they shall retain their identity until they reach the retail purchasers? Or what does it matter that the business of the plaintiff at the present time is mainly confined to Scotland and parts of the North of England? All that seems to me to be perfectly immaterial. When the defendants put their case before the court, it becomes quite plain that they do intend that their manufactures shall retain their identity, because Sir Thomas Pyne, who makes the first affidavit for the defendants, says that they will sell their goods not in the retail market but in the wholesale market and under a distinctive trade mark or brand not yet determined on, but in no way resembling the defendant company's name. In making that assertion with regard to the

A trade mark or brand, he appears to me to be significantly silent about the name of his company, and it seems to me perfectly impossible to associate the defendant company's name with the manufactured article without producing the impression of which the plaintiff's witnesses speak.

It seems to me, therefore, that, on those materials, the plaintiff has abundantly made out his case, and that the learned judge in the court below was quite justified in coming to the conclusion that the only reasonable anticipation was that, unless the injunction went, there would be the confusion of which the plaintiff's witnesses speak.

WARRINGTON, L.J.—I am of the same opinion. The plaintiff carries on a large retail general provision business under the title of the Buttercup Dairy Co. The defendants were incorporated in November, 1916, and they have a cash capital of £12 10s.—250 preference shares of 1s. each—and have adopted as their registered name the title of the Buttercup Margarine Co., Ltd. Looking at these two names, it seems to me obvious that a trader or customer who had been in the habit of dealing with the plaintiff might well think that the plaintiff had adopted the name of Buttercup Margarine Co., Ltd. as his own name for the purposes of the margarine branch of his business, or for the purposes, if you will, of doing what it is said the defendants are going to do—namely, to make their own margarine instead of buying it in the market. If that be so, it seems to me that the plaintiff has proved enough. He has proved that the defendants have adopted such a name as may lead people who had been dealing with the plaintiff to believe that the defendants' business is a branch of, or associated with, the plaintiff's business. To induce the belief that my business is a branch of another man's business may do that other man damage in various ways. The quality of goods I sell, the kind of business I do, the credit or otherwise which I might enjoy, are all things which may immensely injure the other man who is assumed wrongly to be associated with me, and it is just that kind of injury that what the defendants have done here is likely to occasion. I think, therefore, that the learned judge in the court below was perfectly right.

Appeal dismissed.

Solicitors: *D. E. Bowen-Davies; Neve, Beck & Kirby.*

[*Reported by E. A. SCRATCHLEY, ESQ., Barrister-at-Law.*]

WEBSTER v. WEBSTER

[KING'S BENCH DIVISION (Rowlatt, J.), February 2, 1916]

[Reported [1916] 1 K.B. 714; 85 L.J.K.B. 691; 114 L.T. 701;
32 T.L.R. 290]

Husband and Wife—Action by husband against wife—Injunction—Husband's credit pledged by wife—Claim for injunction to restrain—Competency—Married Women's Property Act, 1882 (45 & 46 Vict., c. 75), s. 12.

A husband cannot obtain an injunction restraining his wife from pledging his credit, for this is an action in tort and is prohibited by s. 12 of the Married Women's Property Act, 1882.

Notes. Considered: *Hulton v. Hulton*, (1916) 2 K.B. 642. Referred: *Gottliffe v. Edelston*, [1930] 2 K.B. 378.

As to liability for torts committed by one spouse against the other, see 19 HALSBURY'S LAWS (3rd Edn.) 876-877; and for cases see 27 DIGEST (Repl.) 260 et seq. For the Married Women's Property Act, 1882, see 11 HALSBURY'S STATUTES (2nd Edn.) 799.

Case referred to:

- (1) *Routh v. Webster* (1847), 10 Beav. 561; 9 L.T.O.S. 491; 11 Jur. 701; 50 E.R. 698; 9 Digest (Repl.) 104, 475.

Also referred to in argument:

Walter v. Ashton, [1902] 2 Ch. 282; 71 L.J.Ch. 839; 87 L.T. 196; 51 W.R. 131; 18 T.L.R. 445; 36 Digest (Repl.) 448, 200.

Phillips v. Barnet (1876), 1 Q.B.D. 436; 45 L.J.Q.B. 277; 34 L.T. 177; 40 J.P. 564; 24 W.R. 345; 27 Digest (Repl.) 261, 2110.

Butler v. Butler (1885), 16 Q.B.D. 374; 55 L.J.Q.B. 55; 54 L.T. 591; 34 W.R. 132; 2 T.L.R. 132, C.A.; 27 Digest (Repl.) 202, 1609.

Earl Cowley v. Countess Cowley, [1901] A.C. 450; 70 L.J.P. 83; 85 L.T. 254; 50 W.R. 81; 17 T.L.R. 725, H.L.; 27 Digest (Repl.) 691, 6617.

Action tried by ROWLATT, J., without a jury.

The plaintiff, who was the husband of the defendant, married the defendant in July, 1915, and the parties separated in the following September. After the separation the plaintiff paid the defendant quarterly an allowance of £150 a year. The defendant obtained articles of clothing and jewellery to the value of nearly £1,000 on credit in her husband's name at shops where the husband either had an account or was known. The plaintiff claimed an injunction to restrain the defendant,

"her servants, or agents from pledging or seeking to pledge [his credit] or from incurring any debt or liability in his name, or from doing any act or thing whereby she exposes or may expose the plaintiff to contractual liability or the risk of being sued in respect of such liability."

By s. 12 of the Married Women's Property Act, 1882:

"Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies . . . for the protection and security of her own separate property, as if such property belonged to her as a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort."

McCardie and *R. O'Sullivan* for the plaintiff.

J. B. Matthews, K.C., and *H. Maddocks*, for the defendant.

ROWLATT, J.—This action was brought by the plaintiff to restrain his wife from pledging his credit. The parties were de facto living apart at the time the matters which gave rise to this action arose, and I do not propose to say a word

A as to whose fault that was. In any view of the causes of the separation it seems to me that the articles in respect of which the wife pledged her husband's credit were out of all reason and entirely beyond any authority she might possibly have had. The question is whether this action is competent. Counsel for the plaintiff contended that the principle of *Routh v. Webster* (1) could be extended so as to enable a plaintiff to restrain by injunction any person who attempts to pledge his credit and thereby bring him into peril of being harassed by litigation. That is the ground upon which the action is put. He further contended that the action could be brought by a husband as well against his wife as against anybody else who wrongfully pledges his credit. Before the Married Women's Property Act, 1882, there can be no doubt whatever that no such action as this by a husband against his wife would have been allowed at common law, and counsel for the plaintiff has not been able to produce to me any precedent for any action of that kind, or for any action analogous to it, even in equity. I can conceive that there must have been a large number of wives who have committed all sorts of excesses of authority in dealing with their husband's property or otherwise affecting their husband's interest, but no husband seems to have succeeded in getting his wife restrained from behaving in that way. So far as I understand the doctrines of the old courts of equity, I do not myself think that they would have extended their relief to cases of that kind not involving considerations of property as between husband and wife. Now we come to the Married Women's Property Act, 1882. Does this Act let in this action by a husband against his wife? It is very difficult to lay one's finger upon the precise words in the Act of 1882 which make it competent for husbands to bring those actions against their wives of which one sees examples every day. It is enacted by s. 12 that neither the husband nor the wife shall be entitled to sue the other in tort; but the statement that the husband can bring an action against his wife, to which the proviso as to actions of tort would be an exception, is nowhere to be found.

But it is said by counsel for the plaintiff, and he is probably right that it has always been considered that s. 1 (2), which renders a married woman liable to be sued as if she were a feme sole, is wide enough to confer the right of suing her on her husband also, though by s. 12 actions founded in tort were excepted. That brings me to the question whether an action founded on one person assuming to pledge the credit of another without authority is an action in tort. Tort is not a very accurate word, and perhaps it is a pity it is used in an Act of Parliament, but it seems to me that this action is one in tort within the meaning of s. 12 of the Act of 1882. Leaving out for a moment, the fact that the defendant is the plaintiff's wife, I understand that the ground of the claim against an agent would be that he had been making false statements to other people whereby damage had been and would be caused to the plaintiff. It seems to me that, if that case were made out, damages could be recovered if they had been suffered, because what the defendant had done would be without any justification whatever, and to his knowledge would injured the plaintiff—that is to say, the plaintiff would have a claim for damages in an action for tort. If that is the position in an action against an agent who had acted in this way and so caused damage to the plaintiff, it seems to me that the claim of the plaintiff, before he was damaged, would be an action, quia timet, for an injunction against the commission of an act which, if committed, would be a tort, and that therefore he is suing for a tort within the meaning of s. 12. That seems a short answer to the plaintiff's claim. Therefore I do not see my way to granting the claim for an injunction, and there must be judgment for the defendant.

Judgment for defendant.

Solicitors: *Crossman, Prichard, Crossman & Block*, for *Hedley & Thompson*, Sunderland; *Collyer-Bristow, Curtis, Booth, Birks & Langley*.

[Reported by L. H. BARNES, ESQ., Barrister-at-Law.]

Re MACKENZIE & CO., LTD.

[CHANCERY DIVISION (Astbury, J.), July 25, 1916]

[Reported [1916] 2 Ch. 450; 85 L.J.Ch. 804; 115 L.T. 440; 61 Sol. Jo. 29]

Company—Reduction of capital—Preference shares—Rights fixed by memorandum and articles—No priority as to capital—Fixed preferential dividend on amount paid up—Consent of holders of two-thirds to alterations of rights—Loss of capital—Rateable reduction—Confirmation of reduction.

The memorandum of association of a company provided that the capital should consist of 6,000 preference and 4,000 ordinary shares of £20 each, with the respective rights and privileges specified in the articles of association, and that such rights could be altered with the consent in writing of two-thirds of the issued shares of the class. The articles of association gave a power to the company to reduce its capital in any manner authorised by statute, and art. 62 provided that the preference shares should be called four per cent. cumulative preference shares, and that the holders should be entitled to dividends payable out of the profits at the rate of £4 per cent. per annum on the nominal amount of capital from time to time paid up or credited as paid up, such dividends to be cumulative and to be a first charge on the profits in a winding-up. Article 64 provided that the special rights attached to any class of share should not be altered without the sanction in writing of the holders of two-thirds of the issued shares of the class. The articles required that twenty-one days notice of a meeting of the company should be given, and provided that holders of preference shares were not entitled to vote unless the company made default for six calendar months in payment of the preference dividend. The company, suffered a loss of capital, but owing to the depressed state of the trade in which it was engaged, found that it had capital in excess of its needs and proposed to reduce it. At meetings of the company, attended only by ordinary shareholders, it was resolved to reduce the capital to £83,536 by cancelling some ordinary and preference shares which had never been issued, cancelling capital which had been lost to the extent of £5 on each preference share and each ordinary share which had been issued, and by repaying £3 on each such issued share. Prior to the said meetings, a circular had been sent to preference shareholders stating what was intended and asking for their views. More than a third of the preference shareholders opposed the scheme. They contended that their special rights were affected and that they could not be altered without the sanction in writing of two-thirds of the preference shareholders. The preference shares carried no priority as to repayment of capital. The opposing preference shareholders also contended that (a) although there was no provision in the articles to that effect, the preference shareholders ought to have been summoned to the meetings at which the resolutions were passed and permitted to express their views and (b) the scheme was not just and equitable.

Held: (i) the special rights of the preference shareholders were only those specified in art. 62, and those rights were subject to the right of the company to reduce its capital; and, therefore, their special rights were not altered by the proposed reduction so as to bring art. 64 into operation although in effect the dividends of preference shareholders would be reduced.

(ii) since there was no provision in the articles requiring the preference shareholders to be summoned to the meetings at which they had no right to vote, they had no right to be present, and the scheme was just and equitable.

Notes. Considered: *Greenhalgh v. Arderne Cinemas, Ltd.*, [1946] 1 All E.R. 512. Applied: *White v. Bristol Aeroplane Co.*, [1953] 1 All E.R. 40. Referred to: *Re Chatterley-Whitfield Collieries, Ltd.*, [1948] 2 All E.R. 593; *Re John Smith's Tadcaster Brewery Co.*, *The Company v. Greham Life Assurance Society*, [1953] 1 All E.R. 518.

As to reduction where shares of different classes, see 6 HALSBURY'S LAWS (3rd Edn.) 158 et seq., and cases there cited.

Cases referred to:

- (1) *Bannatyne v. Direct Spanish Telegraph Co.* (1886), 34 Ch.D. 287; 56 L.J.Ch. 107; 55 L.T. 716; 35 W.R. 125; 3 T.L.R. 104, C.A.; 9 Digest (Repl.) 151, 886.
- (2) *Re Barrow [Hæmatite] Steel Co.*, [1900] 2 Ch. 846; 69 L.J.Ch. 869; 83 L.T. 397; 16 T.L.R. 569; 9 Mans. 35; affirmed [1901] 2 Ch. 746; 71 L.J.Ch. 15; 85 L.T. 493; 50 W.R. 71; 18 T.L.R. 9; 9 Mans. 35, C.A.; 9 Digest (Repl.) 161, 949.

Also referred to in argument:

British and American Trustee and Finance Corp'n. v. Cooper, [1894] A.C. 399; 63 L.J.Ch. 425; 70 L.T. 882; 42 W.R. 652; 10 T.L.R. 415; 1 Mans. 256; 6 R. 146, H.L.; 9 Digest (Repl.) 151, 883.

Re Welsbach Incandescent Gas Light Co., Ltd., [1904] 1 Ch. 87; 73 L.J.Ch. 104; 89 L.T. 645; 52 W.R. 327; 20 T.L.R. 122; 11 Mans. 47, C.A.; 9 Digest (Repl.) 163, 969.

Poole v. National Bank of China, Ltd., [1907] A.C. 229; 76 L.J.Ch. 458; 96 L.T. 889; 23 T.L.R. 567; 51 Sol. Jo. 513; 14 Mans. 218, H.L.; 9 Digest (Repl.) 151, 885.

Ashbury v. Watson (1885), 30 Ch.D. 376; 54 L.J.Ch. 985; 54 L.T. 27; 33 W.R. 882; 1 T.L.R. 639, C.A.; 9 Digest (Repl.) 616, 4101.

Petition.

This company was incorporated on Oct. 2, 1900, under the Companies Acts, 1862-1898. The objects of the company were to acquire and carry on the business of wine and spirit merchants carried on by Kenneth Mackenzie and Peter Grant under the firm name of Kenneth Mackenzie & Co. Since the incorporation it had carried on business in London, Jeres, and Oporto.

By cl. 5 of the company's memorandum of association:

"The capital of the company is £200,000 divided into 10,000 shares of £20 each, whereof 6000 are 4 per cent. preference shares and 4000 are ordinary shares with the respective rights and privileges specified in the articles of association registered herewith.

Clause 6 was as follows:

"Subject to any express provision to the contrary made upon the creation of any class of shares, all or any of the special rights, privileges, and advantages attached to any class may with the sanction in writing of the holders of two-thirds of the issued shares of the class (but shall not without such sanction) be altered, modified, dealt with, or affected in any manner whatsoever subject to the last preceding provision . . . and any share for the time being unissued and any new shares from time to time created may be issued generally on such terms as the company may from time to time by special resolution determine.

The preference shares were original shares and therefore there was no provision in respect of them to the contrary of the provisions in cl. 6.

The following were the material articles of association:

"59. The company may by special resolution so far modify the conditions contained in the memorandum of association as to do the following things or any of them: . . . (c) Reduce its capital in any manner and with any

incident authorised by the statutes, and in particular if at any time any sum of capital paid up upon shares shall be in excess of the wants of the company on the ground that the amount thereof could be borrowed on debentures or otherwise, upon terms which in the opinion of the company or the directors are more advantageous to the company, it shall be lawful for the company to reduce its capital by the amount of such sum, and to pay off the sum to the members, either after or without extinguishing liability to calls in respect thereof and to borrow on debentures or otherwise the amount so paid off, or any part thereof, and to give the members or any of them debentures in satisfaction of the sum so to be paid off or any part thereof.

“Original Preference Shares.

“62. The shares in the original capital of the company numbered 1 to 6000, both inclusive, shall be called 4 per cent. cumulative preference shares, and the holders thereof shall be entitled to receive out of the profits of the company available for division among the members dividends at the rate of 4 per cent. per annum on the nominal amount of the capital from time to time paid up or credited as paid up on the 4 per cent. cumulative preference shares held by them respectively, such dividend to be cumulative and to be payable half-yearly on Jan. 1 and July 1 in each year, and to be a first charge on such profits upon a winding-up of the company.

“64. All or any of the special rights, privileges, and advantages attached to any class of shares may with the sanction in writing of the holders of two-thirds of the issued shares of the class, but shall not without such sanction, be altered, or modified, dealt with, or affected in any manner whatsoever.

“68. Twenty-one days' notice at the least (exclusive of the day on which notice is served, or deemed to be served, but inclusive of the day for which the notice is given), specifying the place, the day, and the hour of meeting. And in case of special business the general nature of such business shall be given, in manner hereinafter mentioned, to such members as are, under the provisions hereinafter contained, entitled to receive notice from the company; but the accidental omission to give such notice to, or the non-receipt of such notice by, any member shall not invalidate any resolution passed or proceeding at any such meeting.

“79. On a show of hands every member personally present and who shall be the holder of an ordinary share or ordinary shares have one vote, and every proxy or attorney for an absent member holding ordinary shares shall (in addition to his vote, if any, as a member) have a vote for each absent member for whom he shall to the satisfaction of the chairman prove that he is the proxy. In case of a poll every member who is the holder of ordinary shares shall have one vote for every ordinary share. Holders of preference shares (other than the said Kenneth Mackenzie) shall not be entitled to vote unless the company make default for six calendar months in payment of the preference dividend at the rate of 4 per cent. per annum. Holders of preference shares (other than the said Kenneth Mackenzie), if entitled to vote at general meetings, shall have one vote for every five preference shares held by them.”

The capital of the company paid up amounted to £137,560—viz., 5,300 preference shares of £20 each and 1,578 ordinary shares of £20 each, all fully paid. The preferential dividend was regularly paid, but no dividends had been paid on the ordinary shares since 1912. On a valuation of the assets in 1915 it was found that £34,390 had been lost or was unrepresented by available assets, which was equivalent to £5 per share on the issued capital, and that, after reducing the capital by writing off the sum of £5 in each of the issued preference and ordinary shares, the capital of the company would be in excess

of the wants of the company, owing to the depressed state of the wine trade, by at least £20,634, equivalent to £3 on each of the said issued shares.

By special resolutions passed and confirmed at extraordinary general meetings of the company by the members entitled to vote thereat respectively and present in person or by proxy, held on Oct. 8, and Nov. 5, 1915, it was resolved that the capital of the company be reduced from £200,000 (divided into 10,000 shares of £20 each, of which 6,000 were four per cent. cumulative preference shares and 4,000 were ordinary shares) to £82,536 divided into 5,300 four per cent. cumulative preference shares of £12 each and 1,578 ordinary shares of £12 each, and that such reduction be effected (i) by cancelling 700 preference shares and 2,422 ordinary shares which had respectively never been issued, and (ii) by cancelling capital which had been lost or was unrepresented by available assets to the extent of £5 per share upon each of the 5,300 preference shares and 1,578 ordinary shares which have respectively been issued, and (iii) by returning to the holders of the said 5,300 preference shares and 1,578 ordinary shares respectively paid up capital to the extent of £3 per share.

The resolutions of Oct. 8 and Nov. 5, 1915, were passed unanimously by the ordinary shareholders, but none of the preference shareholders were either present in person or represented. The confirmatory meeting was convened by the secretary one day short of the notice required by the articles of association.

Prior to the meetings at which the special resolutions were passed a circular, dated Sept. 15, was sent to every preferred shareholder stating precisely what was proposed to be done, and drawing attention to the fact that under the articles the preference shareholders were not entitled to vote at the extraordinary general meeting, but that the directors would be glad to hear whether they approved the scheme or not. Replies to that circular were received, 1,947 of such replies being in favour of the scheme and 2,210 against the scheme. On the petition presented to the court on Feb. 28, 1916, for confirmation of the reduction of capital proposed by the special resolutions of Oct. 8, and Nov. 5, 1915, 1,947 preference shareholders were represented who supported the scheme of reduction and 1,889—i.e., more than one-third of the issued preference shares—were represented who opposed it. The preference shareholders in opposition to the scheme contended they were entitled to have notice of every meeting and attend each meeting. They had no priority as to capital and, so long as their dividends were paid, no voting power under the articles. The preference dividends had been regularly paid, but no dividends had been paid on the ordinary shares since 1912.

The scheme of reduction was opposed on the ground that, having regard to the memorandum of association and to art. 64, the special rights and privileges attached to the preference shares could not be altered or modified without the written sanction of holders of two-thirds of the issued preference shares, which sanction had not been, and on the face of things could not be, obtained. Further, that the scheme was unfair and solely for the benefit of the ordinary shareholders, and that the reduction ought only to be sanctioned on the terms that the preference dividend was increased to $5\frac{1}{2}$ per cent., so that, before the £3 a share was returned, the reduced £15 shares would produce the same dividend as the original £20 shareholders had bargained for.

Frank Russell and W. R. Sheldon for the company.

J. H. Cunliffe, K.C., and *Bryan Farrer* for preference shareholders opposing the scheme.

ASTBURY, J.—This is a petition to sanction a reduction of capital from £200,000 to £82,000 odd. The company was incorporated for the purpose of carrying on the business of wine and spirit merchants and shippers, and it has 6,000 four per cent. cumulative preference shares of £20 each and 4,000 ordinary shares of the same denomination as its nominal capital. Of these it has issued 5,300 preference shares and 1,578 ordinary shares, and all these issued shares

are fully paid. The company is alleged to have lost capital to the amount of £34,390, and it is proposed to write off £5 from each of the preference and ordinary shares which have been issued and, having done so, to return £3 per share to each of the shareholders as being capital in excess of the present wants of the company. The petition is supported by the whole of the ordinary shareholders, and more than half the preference shareholders appearing on the petition are in favour of the sanction of the court being given to the reduction scheme, but a substantial amount of preference shareholders oppose the scheme on three grounds. First of all, they say that under the constitution of the company their rights are affected, and that, that being so, the matter cannot proceed without the sanction in writing of the holders of two-thirds of the issued preference shares, which having regard to the number who oppose, cannot be obtained. Secondly, the resolutions in favour of the reduction have been passed by the ordinary shareholders, who are the only shareholders entitled under the circumstances to vote, and it is objected that, although not entitled to vote, the preference shareholders ought to have been summoned, and had a right to attend and express their views at the meeting at which the resolutions were passed. Thirdly, it is suggested that the scheme is not a just and equitable one, that a portion of the loss which is alleged may turn out to be temporary having regard to the war, and that, if this is so, the scheme is in favour of the ordinary shareholders and to the disadvantage of the preference shareholders.

With regard to the first point, by cl. 5 of the memorandum the capital of the company is stated as being

“£200,000 divided into 10,000 shares of £20 each, whereof 6000 are 4 per cent. preference shares and 4000 ordinary shares with the respective rights and privileges specified in the articles of association registered herewith.”

Clause 6 of the memorandum provides that:

“Subject to any express provision to the contrary made upon the creation of any class of shares [all the preference shares that I have to deal with were originally created] all or any of the special rights, privileges, and advantages attached to any class may with the sanction in writing of the holders of two-thirds of the issued shares of the class (but shall not without such sanction) be altered, modified, dealt with, or affected.”

That, I think refers to the rights and privileges referred to in cl. 5 of the memorandum as being defined by the articles. Under art. 64 it is again provided that

“all or any of the special rights and privileges attached to any class of shares [the rights referred to in cl. 5 of the memorandum] may with the sanction in writing of the holders of two-thirds of the issued shares of that class . . . be altered or modified,”

and it is necessary to turn to art. 62 to discover what are the special rights, privileges, and advantages attached to the preference shareholders as a class. That article provides that the preference shares shall be called four per cent. cumulative preference shares and the holders shall be entitled to receive out of the profits of the company available for division among the members dividends at the rate of four per cent. per annum on the nominal amount of the capital. Then the words are, “from time to time paid up or credited as paid up” thereon, “such dividend to be cumulative . . . and to be a first charge on such profits” in a winding-up. By art. 59 of the original articles it is provided that the company may by special resolution reduce its capital in any manner authorised by statute, and by art. 79 it is provided that, except under circumstances which have not arisen, the ordinary shareholders alone shall have the right of voting at the meeting of the company. Therefore the result of the memorandum and articles shortly is this: that, subject to the right of this company to reduce its capital by the votes of the ordinary shareholders in any manner sanctioned by the statute, these preference shares are to be of the denomination of £20 each, and

A the special right, privilege, and advantage which is attached to those shares is a cumulative four per cent. preference dividend on the amount of capital from time to time paid up or credited as paid up. It is contended that the company has no power to reduce its capital, if any of the preference shares are included in the reduction without the consent of two-thirds of the issued shares of that class. I do not think that that is the right construction to place on these articles.

B In my judgment the fair and proper construction of these articles is that the special rights, privileges, and advantages of the preference shareholders are those, and those only stated, in art. 62, which is confined to the right to a cumulative preferential dividend on the amount of capital from time to time paid up or credited as paid up, and that that is without prejudice to the rights of the company, as provided in its articles, to reduce its capital in any way

C provided for by the Act, and provided that that reduction obtains the sanction of the court. Before leaving the first point I may mention that a number of authorities have been cited, which I do not propose to go through in detail; but where there are different classes of shares it has been held many times that the loss on a reduction in respect of loss ought to fall on those who would bear if in a winding up (see *Bannatyne v. Direct Spanish Telegraph Co.* (1)), and the view has been expressed by KAY, J., and, I think, by other judges, that *prima facie* where there are ordinary shares and preference shares having no preferential right to capital, a reduction of capital ought to fall on both sets of shares equally. Later cases, however, have shown that a scheme is not necessarily one that the court will not sanction if the loss, for good reasons, is made not to fall rateably on the different sets of shares. The fact that preference shares are by the memorandum stated to be so many pounds per share with a preference therein mentioned has never, that I know of, been relied on as a reason for refusing, on that ground simpliciter, the sanction to a reduction of capital involving the preference shares, although, as COZENS-HARDY, J., stated in *Re Barrow [Hæmatite] Steel Co.* (2), where the loss is not satisfactorily proved and no good reason is shown for a reduction of capital, the preference shareholders are entitled to object to it as being unfair to them and unduly in favour of the ordinary stockholders. In the present case I will say a word about that under the third heading.

F The second objection taken by the respondents is that the preference shareholders have not been summoned to the meetings at which the resolutions for reduction of capital were passed, although it is admitted they had no right to vote at the meetings. Prior to the meetings which were held on Oct. 8 and

G Nov. 5 last year, a circular dated Sept. 15 was sent to every single preference shareholder stating precisely what it was proposed to do, and drawing the shareholder's attention to the fact that under the articles the preference shareholders had no vote at the extraordinary general meeting, but that the directors would be glad to hear whether they approved this scheme or not. In answer to that circular replies were received from every single preference shareholder,

H and those replies amounted to 1,947 in favour of the scheme and 2,210 against the scheme, whereas at this present hearing in court 1,947 are represented in favour of the scheme and 1,889 against it. Under the circumstances I think, in the first place, that there is no provision under the articles that the preference shareholders shall be summoned to a meeting at which they are not entitled to vote; and, secondly, even if they were so, in the present case each preference

I shareholder has had a full statement laid before him of exactly what was proposed to be done at the meeting, and their views have been obtained accordingly.

Thirdly, and lastly, it is objected that this scheme is not fair on its merits for, I think, two principal reasons. There is a small sum owing from German and Austrian debtors which the directors not unnaturally think they are not likely to recover; a number of stocks have fallen in value, it is believed permanently, and those two sums together form something like one-seventh of the loss which is proposed to be taken into account in the reduction. The main loss has arisen

from an obviously permanent loss of assets, and on the whole, and on the evidence that is put before me, I do not see any sufficient ground for holding that this is not a just and equitable scheme, sanctioned as it is by the whole of the ordinary shareholders and by substantially half of the preference shareholders. The reasons for and against the scheme on this head are contained in two letters, one dated Oct. 4, 1915, from Messrs. Brownlie & Co., to the secretary, the answer being on Oct. 15 of the same year from the secretary of the company to the writers of the first letter. I do not propose to read those documents through, but, taking those and the evidence into consideration as best I can, I see no sufficient reason for holding that the persons entitled to vote for a reduction of capital in this company have not arrived at a scheme which is fair and just under the circumstances.

Solicitors: *Crosley & Burn; Kekeewich, Smith & Kaye, for Brownlie, Watson & Co.; Walter J. Payne.*

[Reported by G. P. LANGWORTHY, ESQ., Barrister-at-Law.]

JONES v. LEWIS

[KING'S BENCH DIVISION (Viscount Reading, C.J., Ridley and Rowlatt, JJ.), April 18, 1917]

[Reported [1917] 2 K.B. 117; 86 L.J.K.B. 782;
117 L.T. 127; 81 J.P. 131]

Coal Mine—Offence—Match found in miner's possession in mine—Miner not searched before entering mine—Competency of prosecution—Coal Mines Act, 1911 (1 & 2 Geo. 5, c. 50), s. 35 (1).

The Coal Mines Act, 1911, s. 35 (1), imposes an absolute prohibition on any person in a mine having in his possession a lucifer match or other apparatus for producing a light or spark,

Held, therefore, in proceedings for an offence under that subsection, it was not necessary to show that the person concerned had been searched under the provisions of that section.

Notes. For s. 35 of the Coal Mines Act, 1911, see now the Mines and Quarries Act, 1954, ss. 66 and 67.

As to contraband and smoking materials in a mine, see 26 HALSBURY'S LAWS (3rd Edn.) 676; and for cases see 34 Digest 742. For the Mines and Quarries Act, 1954, ss. 66, 67, see 34 HALSBURY'S STATUTES (2nd Edn.) 567, 568.

Case Stated by justices for the county of Glamorgan.

At a court of summary jurisdiction sitting at Aberdare, Glamorgan, on Aug. 30, 1916, the appellant preferred an information against the respondent, charging that, on June 13, 1916, in the parish of Aberdare, in the county of Glamorgan, being a person employed in the Tower Colliery, Hirwain, he unlawfully committed a breach of the Coal Mines Act, 1911, in that he had a match in his possession in the mine. The following facts were proved or admitted:—The appellant was the manager of the Tower Colliery, Hirwain. The respondent was a haulier employed at the colliery, and was on June 13, 1916, working on the day shift which commenced at 7 a.m. On that day some time after 9 a.m., the appellant, in company with the under-manager and two workmen, commenced searching men employed below ground in the mine under the provisions of s. 35 of the Coal Mines Act, 1911. About 10 a.m. the appellant met the respondent at the double

parting bringing out a full tram of coal, and searched his waistcoat and trousers, but found no lucifer match, cigar, pipe, or any contrivance for smoking therein. The appellant then asked the respondent where his coat was, to which the respondent replied that it was at the top of No. 3 Dip, and pointed it out hanging on a post about ten yards away. Thereupon the appellant proceeded to search the coat and found a match in the right-hand pocket thereof. Eight other hauliers had frequently passed the top of No. 3 Dip between 7 a.m. and 10 a.m., during which time the respondent had been going backwards and forwards with trams. The appellant himself had been searched by two workmen before meeting the respondent. On the same day, the respondent searched himself before going underground, and left his pipe at the locking station. He had found no match on his person when he left the station. After going in he took off his coat and hung it up in No. 3 Dip. At the colliery, ten per cent. of the workmen were searched every morning by the under-manager or the fireman. The appellant searched occasionally. The person appointed in writing to make such searches at the colliery was the fireman.

It was contended on behalf of the respondent that the search was unauthorised, inasmuch as the respondent was not searched before he commenced work, and the appellant was not the proper person to search. It was contended on behalf of the appellant that he, as the manager of the mine, had the right to search.

The justices found as a fact that the match was discovered by the appellant in the respondent's coat pocket at about 10 a.m. on June 13. The learned stipendiary magistrate for the Division of Miskin Higher, who sat with two of the justices on the hearing of the information, held as a matter of law that the appellant did not conform to the provisions and regulations of the Coal Mines Act, 1911, because (a) he did not cause the respondent to be searched before he commenced work for the purpose of ascertaining whether he had a match in his possession, nor immediately after entering the mine; and (b) the search was not made by the fireman, the person authorised in writing to search at the colliery, and, consequently, that the respondent could not properly be convicted on the evidence before the justices of having a match in his possession. The information was dismissed, and the appellant now appealed.

By the Coal Mines Act, 1911, s. 35:

"(1) In any mine or part of a mine in which safety lamps are required by the Act or the regulations of the mine to be used, no person shall have in possession any lucifer match nor any apparatus of any kind for producing a light or spark except so far as may be authorised for the purpose of shot firing or relighting lamps by an order made by the Secretary of State, or any cigar, cigarette, pipe, or contrivance for smoking. (2) The manager of a mine in which, or in any part of which, safety lamps are required by this Act or by the regulations of the mine to be used, shall, for the purpose of ascertaining before the persons employed below ground in the mine or in the part of the mine, as the case may be, commence work whether they have in their possession any lucifer match or such apparatus as aforesaid, or cigar, cigarette, pipe, or contrivance for smoking, cause either all those persons, or such of them as may be selected on a system approved by the inspector of the division, to be searched in the prescribed manner after or immediately before entering the mine or that part of the mine. (3) No person shall search any workman in pursuance of this section, unless he has previously given an opportunity to some two workmen employed in the mine to search himself, and no lucifer match, or such apparatus as aforesaid, and no cigar, cigarette, pipe, or contrivance for smoking, has been found on him. (4) Any person who refuses to allow himself to be searched in accordance with the foregoing provision shall be guilty of an offence against this Act, and shall not be allowed to enter the mine or the part of the mine,

as the case may be and any person who, on being searched, is found to have in his possession any of the articles prohibited under this section, shall be guilty of an offence against this Act."

Disturnal, K.C., and *Lincoln Reed* for the appellant.

Compston, K.C., and *Clive Lawrence* for the respondent.

VISCOUNT READING, C.J.—As the Case must be remitted to the justices and there may be a question as to further evidence, I do not propose to discuss its merits. The Case is stated on the point of law that the justices came to the conclusion that, notwithstanding that a match was found in the coat pocket of the respondent who was employed in the mine, no offence had been committed for the reason that the appellant had not caused the respondent to be searched before he commenced work, and because the search was not made by the person properly authorised to conduct the search. In my view, neither of those points is relevant to the matter before the justices. The justices, apparently, have come to the conclusion that, because of the words in s. 35 (4) of the Coal Mines Act, 1911, the offence under s. 35 has not been committed unless the search has been properly made in accordance with the Act. In my view, that is not a correct reading of the section. Subsection (1) of s. 35 makes it an offence for a person in a mine to have in his possession a lucifer match or any apparatus for producing a light or spark excepting so far as may be authorised in certain circumstances. In this case, the sole question is whether, having the match in the respondent's coat pocket, which is *prima facie* evidence that it was in his possession, is sufficient to constitute the offence. The justices find the fact that it was in his coat pocket, but, for reasons that they have given, believing that there were conditions precedent to the commission of the offence which were not fulfilled, they refused to convict. They were wrong in that, and, therefore, the case must go back with our view as to the law. It is right to say that the section, particularly sub-s. (4), may have caused some doubt in the minds of the justices; but, on examining the whole of the Act, it is quite clear that it is an offence to infringe the provisions of sub-s. (1) without regard to the other subsections of s. 35, and, by virtue of s. 103, the offence may be charged under the Summary Jurisdiction Acts.

It has been argued that the justices have not found that the match was in the respondent's possession, although they have said that it was in his coat; and it is suggested that somebody may have put it into the respondent's coat, and that we ought to give the opportunity of having it raised if the respondent wishes to do so. We leave that point open. It will be a matter of evidence for the justices to consider. We express no opinion on it as we have not the evidence before us. Therefore, the case must go back to the justices with this intimation of our view as to the law.

RIDLEY, J.—I agree. The justices must convict if they find that in fact the respondent was in possession of a match within the mine.

ROWLATT, J.—I am of the same opinion. The point is of some importance. By s. 35 (1) of the Coal Mines Act, 1911, the possession of a match, amongst other things, in a mine is absolutely prohibited. By virtue of ss. 75, 101 and 103 of the Act, a contravention of that provision becomes an offence punishable on summary conviction. There is nothing in the Act to make it a condition precedent of such a prosecution that the discovery of the match should have been due to a search. The words in s. 35 (4),

"any person who on being searched, is found to have in his possession any of the articles prohibited under this section, shall be guilty of an offence,"

are introduced to show that the person is searched under that subsection before he goes into the mine. The consequences of finding the article on him are not limited to preventing him entering the mine, but he is also to be liable to

a conviction. It is said, and perhaps rightly—I have not gone fully into the matter—that this search was authorised. That has nothing whatever to do with it. It is a very widely held fallacy that, if evidence is obtained against an accused person by some means which might have been resisted, no conviction can follow. There is no greater fallacy. Whether a collateral wrong has been committed is another matter. If there is admissible evidence of the facts which constitutes guilt, there is no difficulty about the matter at all.

Case remitted.

Solicitors: *Bell, Brodrick & Gray*, for *C. & W. Kenshole & Prosser*, Aberdare; *Smith, Rundell & Dods*, for *Morgan, Bruce & Nicholas*, Pontypridd.

[*Reported by J. A. SLATER, ESQ., Barrister-at-Law.*]

GREAT CENTRAL RAIL. CO. v. HEWLETT

[HOUSE OF LORDS (Lord Parker of Waddington, Lord Sumner and Lord Wrenbury), July 4, 6, 28, 1916]

[*Reported* [1916] 2 A.C. 511; 85 L.J.K.B. 1705; 115 L.T. 349; 32 T.L.R. 707; 60 Sol. Jo. 678; 14 L.G.R. 1015]

Negligence—Statutory powers—Exercise—Power to “maintain” obstruction in highway—Obstruction becoming dangerous owing to war-time lighting restrictions—Liability of recipient of power.

By a private Act a railway company was empowered to “maintain” certain posts which had been erected by them in the highway leading into a station yard and, when necessary, to renew and replace them in the site and position. No renewal or replacement had been necessary before April 13, 1915, when the respondent, while driving his cab on the highway, collided with one of the posts and suffered damage. At the time the lighting of the highway had been considerably reduced owing to the street lighting restrictions in force during the 1914–18 war.

Held: a person clothed with a statutory power to do an act must in doing it exercise reasonable care to prevent injury to others, but in the present case the railway company was empowered, not to do an act, but merely to maintain something which was already in the highway; their duty being merely to leave things as they were, they had done so, and, in doing so, they could not be said to be negligent; the fact that the danger arose in circumstances which excused or justified the company in not lighting the post was irrelevant.

Moore v. Lambeth Waterworks Co. (1) (1886), 17 Q.B.D. 462, applied.

Geddis v. Proprietors of Bann Reservoir (2) (1878), 3 App. Cas. 430, distinguished.

Notes. Distinguished: *Morrison v. Sheffield Corpn.*, ante p. 393. Considered: *Sheppard v. Glossop Borough Corpn.*, [1921] All E.R. Rep. 61; *Greenwood v. Central Service Co., Ltd.*, [1940] 3 All E.R. 389; *East Suffolk Rivers Catchment Board v. Kent*, [1940] 4 All E.R. 527. Applied: *Lyus v. Stepney Borough Council*, [1940] 4 All E.R. 463. Considered: *Fox v. Newcastle-upon-Tyne City Council*, [1941] 2 All E.R. 563; *Fisher v. Ruwiliip-Northwood U.D.C.*, [1945] 2 All E.R. 458; *Law v. Railway Executive* (1949), 65 T.L.R. 288. Referred: *Polkinghorn v. Lambeth Borough Council*, [1938] 1 All E.R. 339; *Wodehouse v. Levy*, [1940] 4 All E.R. 14; *Foster v. Gillingham Corpn.*, [1942] 1 All E.R. 304; *Knight v. Sheffield Corpn.*, [1942] 2 All E.R. 411; *Oakes v. Minister of War*

Transport (1944), 60 T.L.R. 319; *Wilson v. Kingston-on-Thames Corp.*, [1948] 2 All E.R. 780; *Baxter v. Stockton-on-Tees Corp.*, [1958] 2 All E.R. 675.

As to liability for negligence in exercising statutory powers, see 30 HALSBURY'S LAWS (3rd Edn.) 695-699, and for cases see 38 DIGEST (Repl.) 6 et seq.

Cases referred to:

- (1) *Moore v. Lambeth Waterworks Co.* (1886), 17 Q.B.D. 462; 55 L.J.Q.B. 304; 55 L.T. 309; 50 J.P. 756; 34 W.R. 559; 2 T.L.R. 597, C.A.; 38 Digest (Repl.) 41, 213.
- (2) *Geddis v. Proprietors of Bann Reservoir* (1878), 3 App. Cas. 430, H.L.; 38 Digest (Repl.) 16, 64.
- (3) *Manley v. St. Helens Canal and Rail. Co.* (1858), 2 H. & N. 840; 27 L.J. Ex. 159; 6 W.R. 297; 157 E.R. 346; 38 Digest (Repl.) 34, 174.
- (4) *Fisher v. Prowse*, *Cooper v. Walker* (1862), 2 B. & S. 770; 31 L.J.Q.B. 212; 6 L.T. 711; 26 J.P. 613; 8 Jur. N.S. 1208; 121 E.R. 1258; 26 Digest (Repl.) 277, 70.
- (5) *R. v. Pease* (1832), 4 B. & Ad. 30; 1 Nev. & [M.K.B.] 690; 1 Nev. & M.M.C. 535; 2 L.J.M.C. 26; 110 E.R. 366; 38 Digest (Repl.) 39, 205.
- (6) *Vaughan v. Taff Vale Rail. Co.* (1860), 5 H. & N. 679; 29 L.J.Ex. 247; 2 L.T. 394; 24 J.P. 453; 6 Jur. N.S. 899; 8 W.R. 549; 157 E.R. 1351; Ex.Ch.; 38 Digest (Repl.) 13, 54.

Appeal by the defendant company from an order of the Court of Appeal affirming an order made by DARLING, J., in an action tried by him with a special jury.

Sir John Simon, K.C., Gordon Hewart, K.C., and Barrington-Ward for the appellants.

Jowitt for the respondent.

The House took time for consideration.

July 28, 1916. The following opinions were read.

LORD PARKER OF WADDINGTON.—The facts of this case are simple, and the question for determination is a question of law only.

By the Manchester, Sheffield, and Lincolnshire (Extension to London, &c.) Act, 1893, the railway company, now known as the Great Central Rail. Co., obtained power to construct the Marylebone railway station with the approaches thereto and certain ancillary powers with reference to the construction of new roads and some degree of interference with existing roads, but it was provided by s. 91 that the company should, unless otherwise agreed between the company and the London County Council and vestry of the parish of St. Marylebone, leave open for public use the roadways and open space between the Marylebone Road and the south front of the company's passenger station buildings as shown on the plan signed by Sir Richard Paget, the chairman of the committee of the House of Commons to whom the Bill for the Act was referred. Among the roadways shown on the signed plan was an old roadway known as Melcombe Place, the whole area of which ought, according to the provisions of s. 91, to have been left open to the public. Nevertheless, the company, without obtaining the necessary consents, at some time prior to 1901, for the more convenient management of their station, erected in Melcombe Place certain gate posts from which collapsible steel gates could, when deemed advisable, be run out across the roadway, so as to close the entrance therefrom to the station yard. In so doing the company unlawfully obstructed the roadway and created a public nuisance. Subsequently, however, by s. 31 of the Great Central Railway Act, 1902, it was (inter alia) provided that, notwithstanding anything to the contrary contained in s. 91 of the earlier Act, the company might maintain the gate posts and gates in question, and might from time to time, when necessary, renew and replace the same in the same site and position, but such gates should be at all times kept open save and except in times of

A emergency, and so that the company should not close the same without giving the notices therein specified. The effect of s. 31 of the Act of 1902 was undoubtedly to convert what had theretofore been an unlawful obstruction to the highway, and, therefore, a public nuisance, into something the existence of which was perfectly legal and could in itself give rise to no right of action whether based on nuisance or otherwise.

B In the early hours of April 13, 1915, the respondent, while driving his cab from Melcombe Place into the station yard collided with one of the posts in question, and sustained damage the amount of which has been agreed at £50. In the action in which this appeal arises, the respondent sought to recover for this damage from the railway company on the ground, first, that the company had been guilty of negligence, and, secondly, that the posts amounted to a nuisance on the highway. It was admitted that the posts were, at the time of the collision, in precisely the same condition as when the Act of 1902 was passed. So far, therefore, as it was based on nuisance the respondent's claim was untenable and was not insisted on. The action turned on the question of negligence only. The negligence alleged was the omission of the company (i) to illuminate the posts to a degree sufficient to enable the respondent to avoid a collision; (ii) to paint the posts white so as to render them more visible; (iii) to board up the trellis work so that the obstacle could not be seen through; and (iv) to take precautions to warn persons using the highway of the existence of the obstacle. It was proved that the company had done none of these things. If, therefore, as held by DARLING, J., and the Court of Appeal (114 L.T. 713), the company were under a duty to take such steps as might from time to time be reasonable for the protection of the public against collision with the posts, it was a question for the jury whether the company ought reasonably under the circumstances to have done any of the things the omission to do which was relied on as constituting negligence, and the appeal must fail. If, on the other hand, your Lordships are of opinion that the company were under no such duty, the appeal must succeed.

F It is undoubtedly a well-settled principle of law that when statutory powers are conferred they must be exercised with reasonable care, so that if those who exercise them could by reasonable precautions have prevented an injury which has been occasioned and was likely to be occasioned by their exercise, damages for negligence may be recovered. To bring this principle into play in the present case the company must be shown to have been exercising a statutory power, the exercise of which was likely to occasion and did occasion the collision. The only statutory power which the company can be said to have been exercising is the power to maintain the posts conferred by s. 31 of the Act of 1902. What is the meaning of the word "maintain" as used in this section? Negatively it relieves the company from any obligation which might otherwise have existed to remove the posts. Positively it enables the company to do what is necessary to keep the posts there. It is only in its negative aspect that the company can be said to have been exercising this power. It has, in fact, done nothing at all.

I Is the principle relied on really applicable under these circumstances? In my opinion it is not. It seems to me that for its application the company must be doing something involving risk to others without taking reasonable precautions to obviate such risk. Here the risk arises not from what the company is doing, but from the existence of the gate posts legalised by the Act, coupled with the diminution of light necessitated by the exigencies of the war. It is reasonably certain that the legislature was, under the circumstances which prevailed when the Act was passed, satisfied that there was no appreciable risk to the public; otherwise the legalisation of the obstruction without expressly providing precautions to obviate the risk would be inexplicable. The change of circumstances cannot be relevant on any question of construction, and, in my opinion, the Act does not impose on the company any such obligation as suggested by the respondent, nor can any such obligation be based on the principle relied on.

Turning to the authorities cited in argument, your Lordships will find that two only have any bearing on the point for decision. The first is *Manley v. St. Helens Canal and Rail. Co.* (3). In that case a canal company having, by their special Act, power to make a canal, cutting across a public highway, and to carry the highway over the canal by means of a convenient bridge, erected for the purpose a swivel bridge which had to be opened whenever boats were passing up or down the canal, thereby causing on each occasion a dangerous gap in the highway. Subsequently, the company obtained another special Act which recited that the works authorised by the earlier Act had been completed and authorised the company to maintain the same and conferred on all persons the right to navigate the canal with boats for commercial purposes. A boatman opened the bridge to allow the passage of his boat along the canal, and the plaintiff's husband having fallen into the gap thus formed, an action was brought against the company for negligence. The action succeeded, but the reasons given by the judges differ. POLLOCK, C.B., and MARTIN, B., held that the original obligation of the company was to make and maintain a sufficient bridge, and that this obligation to maintain was not discharged by maintaining a bridge which, however sufficient 100 years ago, had, having regard to the altered circumstances, ceased to be sufficient for the public protection. The recital in the second Act did not operate to alter the company's obligations. WATSON, B., on the other hand, thought that, even admitting that the company had discharged their original obligation in making a sufficient bridge, they were liable for negligence in not taking precautions to prevent the bridge being used to the public danger. The bridge, he thought, ought to have been lighted and watched by the company. CHANNELL, B., was also of this opinion. As the bridge was liable to be opened, he assumed (he said) that the company were bound to take some precautions with reference to it. Perhaps there was no obligation to make a fixed bridge, but if the company made a swivel bridge there supervened on the statutory right a common law obligation to accompany the bridge with all necessary surrounding protection. In my opinion, apart from the diversity of opinion among the judges, this case is not really in point. The bridge erected was such that it must create danger to the public by causing a gap in the highway every time it was opened for traffic. It was not a work expressly authorised or sanctioned by the legislature. The case, therefore, cannot be used as an authority for the proposition that a mere power to maintain what the legislature has expressly sanctioned involves any obligation towards the public.

The second case to which we have been referred is *Moore v. Lambeth Waterworks Co.* (1). There the defendants, pursuant to a statutory power, had fixed a fire plug in a highway. The work was done without any negligence and in a proper workmanlike manner, the top being left level with the surface of the highway. By reason of the subsequent wearing away of the highway, there came a time when the fire plug projected some half inch above the surface. The plaintiff fell over the plug and was injured. It was held by the Court of Appeal, consisting of LORD ESHER and LINDLEY and LOPES, L.JJ., that, the accident not being due to any want of repair in the plug, the defendants were under no liability. The rights of the public were not greater than they would have been if the road had been dedicated with the plug already there: *Fisher v. Prowse* (4). This case appears to me to be directly in point, and I see no reason for dissenting from the conclusion come to by the Court of Appeal. I am of opinion, therefore, that the appeal ought to be allowed.

LORD SUMNER.—This appeal is about a post in the middle of a road outside the appellants' Marylebone terminus, into which one night the respondent managed to drive his cab. He was driving at six or seven miles an hour, though it was so dark that "he could not see the post until he hit it." The whole question is whether s. 31 of the Great Central Railway Act, 1902, impliedly obliges the railway company to make their gate posts visible to members of the public by

A some reasonable means or other in spite of the extreme darkness ordained by the Lighting Reduction Orders. It is clear that no such obligation is imposed in express terms.

If the case were not governed by the statute, the inquiry would have been whether the structures therein mentioned, including, as seems to be agreed, the post in question, had or had not been erected before the thoroughfare, in which they stand, was dedicated for the use of the public as a highway. If they had, the respondent must have taken that highway as he found it: if they had not, his action was undefended. In neither event would the appellants' care or want of care have been material. The question would have been simply nuisance or no nuisance, though in the former event the plaintiff's own negligence would have afforded a defence, if he were proved to have fouled the post through his own carelessness. How, then, does a question of negligence arise on the statute which could not have arisen at common law? The area in question was virtually dedicated as a public thoroughfare by the Manchester, Sheffield and Lincolnshire Railway (Extension to London, &c.) Act, 1893, s. 91. Thereafter the appellants erected structures there, and in 1901 they accepted the decision of BIGHAM, J., that these structures were a public nuisance. In 1902 they obtained the enactment of s. 31 in question. That section legalised their nuisance and relieved them of all obligation to abate it. It simply gave permission to maintain the gates and posts and from time to time, when necessary, to renew and replace the structures. It was admitted (rightly, I doubt not) that, if repairs or renewals become necessary, they must be executed with reasonable diligence, and that in executing them due care must be used for the protection of members of the public, but up to the time of this accident no necessity for renewal or replacement, whatever those terms may include, appears to have arisen. The railway company were not the lighting authority for this area, nor were they under any express obligation connected with the lighting. Under the Lighting Reduction Orders the lighting had been so reduced that the posts were practically invisible, and so the appellants had left them. It is not suggested that the lighting authority were in default; the case is one in which one party lawfully maintains in a highway something which is capable of becoming dangerous to the public unless another party takes steps to avert that danger, and where those steps have not been taken, and so it is analogous to *Moore v. Lambeth Waterworks* (1), a case which, unfortunately, was not brought to the attention of the Court of Appeal. Whether, as in that case, the danger becomes operative through negligent omission by the party who ought to have averted it, or, as here, it becomes operative under circumstances that excuse or justify that omission, cannot be material to the obligations of the party who lawfully maintains the structures in the highway. In either case he is free. I think that decisions on the liability of those who maintain structures adjoining a highway which become dangerous to those who use it are not now in point. As little are the cases where undertakers invite the public to enter and use their undertaking, whether for reward or not, and are in consequence held bound to see that it is free from traps and hidden dangers.

The analogy which led the Court of Appeal to decide for the respondent was that of *R. v. Pease* (5), *Vaughan v. Taff Vale Rail. Co.* (6), and *Geddis v. Proprietors of Bann Reservoir* (2). With great respect I think it was inapplicable on two grounds. In the first place, those are cases where the legislature had authorised undertakers to do overt acts which in the natural course of things were likely to prejudice members of the public. The present is a case in which, without any action at all, the respondents were authorised to leave something undone—namely, the abatement of what previously had been a nuisance. They were merely to maintain a status quo, the natural results of which could not prejudice anybody, for, if the place was lighted, no one ought to run into the place at all, since he could see it, and if, owing to fog for example, it was in darkness, no one ought to be injured by the post, since he had no business to drive so fast as to be damaged if he did run into it. In the second place, in such cases the authority

in question is given in general terms; it is, for example, authority to work railways and to run railway trains in their discretion, hence it is reasonable to infer that the legislature, in using such general terms, and in authorising for the undertakers' benefit what would otherwise be a nuisance, meant them to exercise their authority with reasonable care and not without it. Here the authority is specific and precise: the thing authorised is not an activity at all: the section leaves the railway company no selection or choice. It tells them to let things alone, and I do not think that in 1902 anyone could have formulated in intelligible terms the alleged duty to use care in regard to maintaining these posts in this road, or have given a concrete instance of the danger anticipated that would not have seemed fantastic. I am, accordingly, of opinion that this appeal ought to be allowed and that the judgments of both courts below should be set aside and judgment should be entered for the defendants. The railway company, seeking a decision on this Act of Parliament, forbore to press contributory negligence at the trial and at your Lordships' Bar, and disclaimed any order in their favour either as to costs or to repayment of the damages which the plaintiff had recovered. The appeal should, therefore, be allowed without costs.

LORD WRENBURY.—The respondent has recovered against the Great Central Rail. Co. judgment for damages for negligence. The company appeal. The whole question is whether in the matter in which the respondent alleges that the appellants were negligent they owed any duty. In my opinion, they did not.

The post with which the plaintiff came in collision was erected by the appellants some time before 1900. It was an obstruction in the highway. An action was brought against the appellants in 1900, and in that action it was decided that the post was an illegal obstruction. In 1902 the appellants obtained an Act which authorised them to maintain the post and from time to time when necessary to renew and replace it in the same site and position. The authority was not an authority to do anything actively (except as regards renewal and replacement upon which nothing turns), but a mere authority to leave things alone. The word "maintain" in the section means no more than "not remove." The result is that that which theretofore was an illegal obstruction became a legal obstruction. For greater accuracy the word "obstruction" (which implies something which improperly interferes with the rights in the highway) ought to be dropped. The post was no longer an obstruction to the highway. The legal highway was a road in which there stood a post. Whoever used the highway must use it as a highway with a post in it.

On a dark rainy night the plaintiff drove his taxi-cab into the post and suffered injury. Owing to the lighting (or more accurately the darkening) regulations due to the war the street was insufficiently lighted. The appellants were not the lighting authority. They owed no duty in that character. But they were negligent, so the plaintiff contends, because in maintaining the post they were laying a trap in the highway, or because they did not take reasonable steps to disclose the presence of the post, say, by painting it white or putting a red lamp upon it.

No one disputes the general proposition that a person who is clothed with a statutory power to do an act must in doing it exercise reasonable care to prevent injury to others, but in the present case the statutory authority was not to do an act, but to leave things as they were. In 1902 the post was in the highway illegally. The statute of 1902 said the statutory authority might leave it where it was. It thus became a post in the highway legally. The authority was not an authority to be active, but to be passive. The Act merely released an obligation—namely, the obligation not to obstruct the highway. From that state of fact no duty flows. If there be duty or authority to do an act it is possible to be negligent in doing it. If there be duty or authority to do or to abstain from doing an act according to circumstances it is possible to be negligent in abstaining from doing it. But if the duty or authority be simply not to do an act—merely to leave things as they are—it is impossible to be negligent in not doing anything.

1 The last is the present case. It is said, however, that "maintain" is not merely passive, but implies also something active, viz., doing acts of maintenance. This may be true—but it is not necessary to inquire whether it is or not. For the words of the statute, "renew and replace," plainly authorise affirmatively such acts to be done. I agree that in acts of renewal or replacement the appellants might be guilty of negligence. But they have done no such acts. Their only act has been to leave the post as it was.

3 I do not find it necessary to review the authorities which were cited. The respondent principally relied on *Manley v. St. Helens Canal and Rail. Co.* (3). The authority there was to do an act—namely, to make a bridge. The company made a swivel bridge which was dangerous, because when opened it left a chasm in the highway. A subsequent Act empowered the company to maintain the bridge. It was argued that the result was a legislative declaration that this was a perfect bridge and that the company owed no duty to guard against danger when the bridge was open. CHANNELL, B., supplied the answer, namely, that, as it was a bridge liable to be opened, the company were bound to take precautions against danger when it was opened. There is no similar consideration in the case of this post. The present case is like that of the fire plug in *Moore v. Lambeth Waterworks Co.* (1), as to which LINDLEY, L.J., said (17 Q.B.D. at p. 469):

"The plug itself was not out of repair. There was nothing the matter with it. It had not grown: it had not changed in any way."

There is a passage just below that with which I entirely agree and which may well conclude this present opinion (*ibid.* at p. 470):

5 "It is said that at common law, if anyone maintains something in a highway he must take care that it is not a nuisance and does not obstruct the traffic. I think that, as a universal proposition, that is not true, as is shown by those cases where high roads have been dedicated subject to obstruction; and I am not able to find any authority which goes the length of deciding that a person who is authorised or compelled by Act of Parliament to put a thing in the highway, is bound to do more than the statute requires him to do."

This becomes a *fortiori* when the Act did not authorise putting a thing in the highway, but authorised the retention of a thing already there. In my judgment, this appeal must be allowed and the action dismissed. The appellants do not ask for costs.

Solicitors: *Dixon H. Davies; Oswald Hickson & Field.*

[Reported by W. E. REID, Esq., Barrister-at-Law.]

LOVESY v. PALMER

[CHANCERY DIVISION (Younger, J.), April 7, 8, 11, 12, 1916]

[Reported [1916] 2 Ch. 233; 85 L.J.Ch. 481; 114 L.T. 1033]

Agent—Contract negotiated on behalf of undisclosed principal—Competency of principal to sue on contract—Contract of which memorandum necessary—Agent not liable on contract—Evidence of identity of principal—Admissibility.

Where a contract the enforcement of which depends on the existence of a signed memorandum has been negotiated by an agent on behalf of an undisclosed principal parol evidence is not admissible to prove the identity of the principal and that the other party to the contract knew that he was the principal, and the principal cannot sue on the contract unless by the memorandum the agent has made himself personally liable on it, for, if he has not done so, there can be no memorandum of the agreement at all.

Notes. Section 4 of the Statute of Frauds (which imposed the need of a written memorandum before certain contracts could be enforced) has been largely repealed, but it still applies to a guarantee, and under s. 40 of the Law of Property Act, 1925, no action may be brought on a contract for the sale of land, etc., unless the agreement or a memorandum thereof is in writing.

Considered: *Abdul Karim Basma v. Weekes*, [1950] 2 All E.R. 146. Referred to: *Keen v. Mear*, [1920] All E.R. Rep. 147.

As to contracts made by an agent, see 1 HALSBURY'S LAWS (3rd Edn.) 215, and for cases see 1 DIGEST (Repl.) 717 et seq.

Cases referred to:

- (1) *Potter v. Duffield* (1874), L.R. 18 Eq. 4; 43 L.J.Ch. 472; 22 W.R. 585; 12 Digest (Repl.) 161, 1032.
- (2) *Williams v. Byrnes* (1863), 1 Moo. P.C.C. N.S. 154; 2 New Rep. 47; 8 L.T. 69; 9 Jur. N.S. 363; 11 W.R. 487; 15 E.R. 660, P.C.; 12 Digest (Repl.) 145, 911.
- (3) *Jarrett v. Hunter* (1886), 34 Ch.D. 182; 56 L.J.Ch. 141; 55 L.T. 727; 51 L.P. 165; 35 W.R. 132; 3 T.L.R. 117; 12 Digest (Repl.) 164, 1052.
- (4) *Filby v. Hounsell*, [1896] 2 Ch. 737; 65 L.J.Ch. 852; 75 L.T. 270; 45 W.R. 232; 12 T.L.R. 612; 40 Sol. Jo. 703; 12 Digest (Repl.) 162, 1044.
- (5) *Southwell v. Bowditch* (1876), 1 C.P.D. 374; 45 L.J.Q.B. 630; 35 L.T. 196; 24 W.R. 838, C.A.; 1 Digest (Repl.) 731, 2755.
- (6) *Williams v. Jordan* (1877), 6 Ch.D. 517; 46 L.J.Ch. 681, 26 W.R. 230; 12 Digest (Repl.) 162, 1039.
- (7) *Warner v. Willington* (1856), 3 Drew. 523; 25 L.J.Ch. 662; 27 L.T.O.S. 194; 20 J.P. 774; 2 Jur. N.S. 433; 4 W.R. 531; 61 E.R. 1002; 12 Digest (Repl.) 163, 1049.
- (8) *Morris v. Wilson* (1859), 33 L.T.O.S. 56; 5 Jur. N.S. 168; 1 Digest (Repl.) 335, 191.
- (9) *Rossiter v. Miller* (1878), 3 App. Cas. 1124; 48 L.J.Ch. 10; 39 L.T. 173; 42 J.P. 804; 26 W.R. 865, H.L.; 12 Digest (Repl.) 165, 1063.
- (10) *Gadd v. Houghton* (1876), 1 Ex D. 357; 46 L.J.Q.B. 71; 35 L.T. 222; 1 Digest (Repl.) 730, 2746.

Also referred to in argument:

- Calder v. Dobell* (1871), L.R. 6 C.P. 486; 40 L.J.C.P. 224; 25 L.T. 129; 19 W.R. 978, Ex.Ch.; 1 Digest (Repl.) 669, 2353.
- Hough and Co. v. Manzanos and Co.* (1879), 4 Ex.D. 104; 48 L.J.Q.B. 398; 27 W.R. 536; 1 Digest (Repl.) 731, 2749.
- Hussey v. Horne-Payne* (1879), 4 App. Cas. 311; 48 L.J.Ch. 846; 41 L.T. 1; 43 J.P. 814; 27 W.R. 585, H.L.; 12 Digest (Repl.) 80, 440.

Action by the plaintiff, Charles Warren Lovesy, against the defendants, George Palmer and Harold Fitch Kemp, for a declaration that there was a binding contract between the defendants and the plaintiff to grant to a company to be formed by the plaintiff a lease of the Coronet Theatre, Notting Hill Gate, on the terms of an agreement for lease and a draft lease, i.e., a lease for fourteen years from Dec. 25, 1915, at a yearly rent of £1,000 for the first three years, £1,250 for the next four years, and £1,500 for the remaining seven years, containing the covenants usual in a lease for a theatre or cinema, and specific performance of the contract. The defendants were trustees for the debenture-holders of a company called Saunders Theatres, Ltd., and as such were holders of a lease of the Coronet Theatre. By their defence they denied that they had agreed either verbally or otherwise by themselves or by any agent or agents with the plaintiff or any person on his behalf for the grant to the company to be formed of a lease of the theatre on the terms stated, or on any terms. They admitted that they were in negotiation with the plaintiff's solicitor, Mr. Harraway, for the grant of the lease, but stated that no binding agreement resulted and that the names of the clients for whom Mr. Harraway was acting had never been disclosed.

Clouston, K.C., and *W. M. Hunt* for the plaintiff: We propose to call evidence to show that the plaintiff was the principal of Mr. Harraway, and that the defendants knew this to be the case. Harraway entered into a binding contract to accept the lease, notwithstanding that he was acting on behalf of an unnamed plaintiff (*Hough and Co. v. Manzanos and Co.*, 4 Exch. Div. 104), and therefore the plaintiff, who was his principal, may sue on the contract.

H. Terrell, K.C., and *Luxmoore* for the defendants: We object to the proposed evidence. There is no memorandum satisfying the requirements of the Statute of Frauds of any binding agreement between the defendant and either Harraway or the plaintiff. Harraway was expressed to be acting on behalf of clients, and was not intended to be bound; the plaintiff is not named as a contracting party and there is no sufficient description of him as such in the correspondence and documents.

HIS LORDSHIP admitted the evidence *de bene esse*.

YOUNGER, J.—This action raises many very nice questions, and one point of law which, in the present state of the authorities, is not an easy one to determine and, if it were not for the urgency of the case, I should have liked to take time to consider my judgment. In the interests, however, of both parties it is better that I should express at once the conclusion I have formed on the whole case, even if I may not succeed in giving my reasons with all the precision I should desire. The case is peculiar in this respect, that with the exception of two trivial matters on which the defendants rely, and as I think unsuccessfully, for the purpose of showing that there was no concluded bargain, the arrangements for the proposed lease were adjusted to the last detail.

[HIS LORDSHIP dealt with matters in respect of which it had been said that the negotiations had not been concluded, and continued:] But a much more serious question remains for decision. It is that on which the greater part of the argument has turned: Is there any agreement at all? If so, who are the parties to it? Is there any contract with the plaintiff? Has there ever been any contract with the plaintiff? Has the Statute of Frauds been complied with in relation to any such contract, if contract there be? The contract alleged in the statement of claim is a very clear and specific one. It is alleged that it is a contract entered into between the defendants as the trustees of a debenture trust deed with the plaintiff to grant to a company which was to be formed by the plaintiff a lease of the theatre. The statement of claim sets out a memorandum, the product of much negotiation, which did not come into existence as a thing agreed until Jan. 7, 1916. Accordingly, the agreement alleged is an agreement in the terms of that memorandum, and its date cannot have been earlier than Jan. 7, 1916, and the allegations in the statement of claim are those of an agreement made by the

plaintiff by Harraway as his solicitor or agent and by the defendants through Messrs. Oldfields as their solicitors and agents. In not one of the letters, which are set forth as constituting the memorandum of agreement, does the plaintiff's name occur. Not only so, but in these letters Harraway speaks of the persons on whose behalf he is acting as his "clients," and not as his "client." And in the letter of Jan. 7, 1916, which is one of those referred to, Harraway says:

"In order to make the matter clear, however, I would point out to you that my clients do not regard the building of the cinematograph box or alterations to the existing one, as the case may be, as a condition for obtaining the licence, but they regard this as an expense which they were obliged to make in any event which does not come within the operation of the note."

Therefore, in the memorandum relied upon not only is there no reference to the plaintiff as a contracting party, but the only reference that there is to anybody other than the defendants and Harraway is to persons in the plural, who are described as "clients" of Harraway, and not a person in the singular, a client. In the reply, however, further particulars of the memorandum are given and certain letters are referred to. If reference is made to these letters, I think I am right in saying that it is only in the letter of Dec. 1, 1915, that the name of Lovesy, the plaintiff, appears, and it is important to notice the connection in which his name does there appear. The defendant, Palmer, writing to Oldfields, says: "I inclose copy heads of agreement for proposed lease of Coronet Theatre to Mr. Lovesy, who intends, I think, to form a small company to operate a cinematograph entertainment." Included in this letter there are heads of agreement which suggest, or, if you like, require, that the intended lessee shall be, not the company which was to be the intended lessee under the memorandum as finally adjusted, but the plaintiff himself, so that the only relation in which the plaintiff's name appears in connection with the transaction is in that of lessee, a position which, according to the contract alleged, he was not to occupy, because the lease was to be taken by the company which was to be formed and not by the plaintiff at all. In the result, therefore, there is no reference either expressly or by necessary implication to the plaintiff in the whole of the documents referred to as constituting the memoranda, except in a character in which, according to the terms of the bargain as now alleged, he is not intended to figure.

In that state of things I have to see whether there is a memorandum sufficient to satisfy the Statute of Frauds. For this purpose I take the law from the statement of it in SIR GEORGE JESSEL's judgment in *Potter v. Duffield* (1), where, quoting from the judgment of SIR JOHN TAYLOR COLERIDGE in *Williams v. Byrnes* (2) he says (L.R. 18 Eq. at p. 7):

"The words [of the statute] require a written note of a bargain or contract, the statute clearly making no distinction between these two words. This language cannot be satisfied unless the existence of a bargain or contract appear evidenced in writing; and a bargain or contract cannot so appear unless the parties to it are specified, either nominally or by description or reference.' I take that to mean that the statute will be satisfied if the parties are sufficiently described, so that their identity cannot be fairly disputed."

Looking at this case from the point of view on which up to the present I am regarding it, there is here no memorandum signed by the defendants or their agents which contains, either in itself or by reference to any other document, the name of the plaintiff as a contracting party or any reference to any person who without dispute could be identified as necessarily being and meaning the plaintiff. Even if in the letter of Jan. 7, 1916, or in any other letter the word used by Harraway had been "client" instead of, as it is, "clients," that would not have been a sufficient description of the plaintiff. So much I think is clear from *Jarrett v. Hunter* (3). It is, I think, equally clear that, even if it be the fact, and I do not think it is the fact, that the defendants knew who the client was, or

A knew that the clients were in fact Lovesey, however inappropriate that description might be, the result would have been the same, because *Jarrett v. Hunter* (3) is also a clear authority for the proposition that the memorandum, being only made sufficient by means of oral evidence to show knowledge on the part of the other side, is not a memorandum in writing, and, inadmissible as such evidence must for the purpose always be, more clearly inadmissible is it where its effect as here is not to supplement, but to contradict the statement in the written memorandum that the clients for whom Harraway purported to act were "clients," and to show that the so-called clients were one client only. Under these circumstances I think that counsel for the defendants was right when he suggested at the beginning of the case that evidence as to the identity of the plaintiff was not admissible. I only admitted it de bene esse in order to avoid a difficulty in the event of the case going to the Court of Appeal. But I think it right to say now that the evidence has been taken that if it were admissible I should not myself conclude that the word "clients," which throughout the correspondence and on the draft lease is so frequently used by Harraway, ever meant, or ever was intended by him to mean, the plaintiff. I think the word "clients" so constantly used by him may have referred to a group of persons who were ultimately to come in and find the capital for the company which was to take the theatre. The word may have referred and probably did frequently refer, to them. Often, however, the word "clients" referred to the future company itself, and especially does one find that in the marginal notes which Harraway made on the draft lease before final adjustment, where he speaks of the obligations of the lessee as being the obligations of his clients, I think, therefore, in truth that the word "clients" as used throughout the correspondence was either used to mean a group of persons of whom the plaintiff was one, or to signify the company to be formed to take over the theatre. But I cannot find that by the word Harraway ever meant to refer to the plaintiff. So far as I can arrive at the true position of the plaintiff in this matter, I doubt if he was ever more than an intermediary with a genius for organising cinematograph undertakings, whose right was to obtain a fee from those who ultimately secured, as a result of his assistance, a lease of this theatre adapted for cinematograph purposes. Therefore, if the contract was a contract which was made by Harraway on behalf of the plaintiff, the action fails because there is no memorandum sufficient to satisfy the Statute of Frauds. The action, however, I think also fails on the ground that there is no evidence to show that the plaintiff was in truth the principal of Harraway in the transaction.

G But I may be wrong on this conclusion of fact, and, accordingly, I proceed to deal with the other questions argued on that footing. It was said by counsel for the plaintiff that here in fact there was a contract with Harraway personally, sufficiently evidenced under the statute, and not the less so because it was made, and one might even go so far as to say avowedly made, by Harraway on behalf of someone else. Counsel contended that there was nothing to prevent the plaintiff from coming forward and suing upon that contract, provided that he established, as it was said that he had done, that he was the principal of Harraway in relation to it. Further, counsel in his reply went so far as to suggest that Harraway was personally liable on the contract, and his final contentions were mainly directed to this aspect of the case. The earlier arguments, however, proceeded on the footing that it made no difference whether Harraway was or was not personally liable under the contract, and great reliance was placed on the case before ROMER, J., of *Filby v. Hounsell* (4). But before I deal with that case I wish to say that I do not find in the statement of claim that there is any sufficient allegation that it was ever intended, either by Harraway himself or by the defendants, that there should be imposed on Harraway, who throughout was known to be acting as solicitor for clients, any personal liability in relation to this matter, and I take the law on the subject to be that, if the true construction of the documents in the case be that the agent contracts only on behalf of an

undisclosed or unnamed principal and not on his own account, then he, the agent, can neither sue nor be sued on the agreement: *Southwell v. Bowditch* (5) and *Gadd v. Houghton* (10). My view is that on the true construction of the whole correspondence here Harraway contracted only on behalf of an unnamed principal or principals, or clients, and never on his own behalf, and I am of opinion as the result of the whole correspondence and of all the evidence which has been given that on such an agreement, if any agreement there was, he could at no time sue or be sued.

The only question that remains, therefore, is whether *Filby v. Hounsell* (4) and the decision of ROMER, J., in that case would enable Lovesy, all unnamed as he was, if he were in fact the principal, to sue on the contract, even although Harraway had never himself been liable upon it. I have read and re-read that case, and I have the greatest difficulty in understanding exactly what was the ground on which ROMER, J., as reported, rested his decision. Reading the case as reported, I cannot find that there was any moment of time at which the agent there was personally liable for anything. There was no acceptance of the offer which was addressed to him except on behalf of his principal. The only acceptance which constituted any contract was an acceptance upon which the principal alone could be sued. If the agent had accepted the contract in his own name, true it is that the principal when disclosed or discovered could, according to all authorities, both sue and be sued upon it. But the agent never did accept the contract for himself; he accepted it only on behalf of the principal, and, therefore, there was no moment of time at which that agent was, as far as I can see, responsible for any contract whatever as his own. Now, if in *Filby v. Hounsell* (4) the only contract was a contract made with the principal, then, as the principal's name appeared only in a document which was subsequent in point of date to the paper relied upon as constituting the memorandum under the statute, this would not satisfy the statute, for I find in *Williams v. Jordan* (6) that the reference to the name must be found in a document antecedent to the memorandum. SIR GEORGE JESSEL there says (6 Ch.D. at p. 520):

"In the case of *Warner v. Willington* (7), just as in this case, the lessor's name was not signed, and KINDERSLEY, V.-C., held that because the name of the lessor did not appear the memorandum was not sufficient to maintain an action or bill for specific performance. He said (3 Drew. at p. 530): 'But though this is the general rule, there is this exception, that if it can be ascertained who is the vendor or intended lessor from some other document which is sufficiently connected with the memorandum by clear reference' [and then SIR GEORGE JESSEL interpolates the words "of course he meant some other document previously existing"]—"that will cure the defect of the memorandum." "

Accordingly, as in the case before ROMER, J., the only reference to Mrs. Filby was in a document subsequent to the memorandum relied upon, I fail to see how at any moment of time there was any memorandum within the statute of an agreement binding her.

I have looked for, but I have been unable to find, any other case where it has ever been suggested that an unnamed principal can sue or be sued on a contract to which the statute applies where he is not himself sufficiently described in the memorandum, except in a case where by the memorandum the agent is himself liable on the contract, and I should not expect to find any such authority, because it appears clear that, unless the agent is liable on the contract, you can on the hypothesis have no memorandum of any agreement at all. The case cited in the argument in *Filby v. Hounsell* (4)—namely, *Morris v. Wilson* (8)—as justifying the view there contended for and ultimately adopted is, to my mind, quite consistent with what I have said, because I think it may very well have been that WOOD, V.-C., was there of opinion that the agent made himself personally liable. Further, if it was in fact decided in *Filby v. Hounsell* (4)

- A that there could within the statute be a sufficient memorandum of an agreement where the principal was not named and the agent was not bound, then I do not think that the decision can stand with the other authorities, such as *Rossiter v. Miller* (9) and *Jarrett v. Hunter* (3), or with the statute as I read it. But I think, when one looks carefully at *Filby v. Hounsell* (4), that ROMER, J., really gave the judgment he did because he assumed that the agent was liable
- B on the contract. I cannot myself see that the assumption was well founded, but if that was the basis of his decision, then the case presents no further difficulties, and is in entire harmony with all the authorities. If, however, he proceeded on that hypothesis, then *Filby v. Hounsell* (4) has, in the view I take of this case, no bearing here, and if *Filby v. Hounsell* (4) is to be dealt with upon the other hypothesis—namely, that the learned judge did not think it
- C necessary that the agent should be bound—then I think it is not in accordance with *Rossiter v. Miller* (9), nor with principle. On either view, therefore, *Filby v. Hounsell* (4) cannot be allowed to affect the result of the present action which appears to me to fail.

Action dismissed.

- D Solicitors: *H. V. Harraway; Oldfields.*

[Reported by N. TEBBUTT, Esq., Barrister-at-Law.]

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GREEN v. ALL MOTORS, LTD.

- F [COURT OF APPEAL (Swinfen Eady, Bankes and Scrutton, L.JJ.), January 19, 1917]

[Reported [1917] 1 K.B. 625; 86 L.J.K.B. 590; 116 L.T. 189]

Lien—Repairer's lien—Goods subject to hire-purchase agreement—Agreement by hirer to keep motor car in repair—Car sent for repair—Lien as against owner for cost of repairs.

G

By a hire-purchase agreement the plaintiff let a motor car to P. who agreed to keep it in good repair and working condition, the car to remain the property of the plaintiff until all the instalments under the agreement were paid. During the currency of the agreement the car was damaged and P. sent it to the defendants for repairs. P. made default in the final instalment of the purchase money, but the plaintiff did not terminate the agreement until after P. had agreed with the defendants for the repairs to the car to be carried out. The plaintiff then demanded possession of the car from the defendants, but did not tender the amount due for the cost of the repairs. The defendants refused to give the car up, claiming a lien on it for the cost of the repairs. The repairs were subsequently completed.

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Held: the defendants had a lien on the car as against the plaintiff for the cost of the repairs.

Keene v. Thomas (1) [1905] 1 K.B. 136, approved.

Notes. Considered: *Bowmaker, Ltd. v. Wycombe Motors, Ltd.*, [1946] 2 All E.R. 113. Referred: *Pennington v. Reliance Motor Works*, [1922] All E.R. Rep. 466; *Albemarle Supply Co., Ltd. v. Hind & Co.*, [1927] All E.R. Rep. 401.

As to a repairer's lien in respect of goods under a hire-purchase agreement, see 19 HALSBURY'S LAWS (3rd Edn.) 563; and for cases see 26 DIGEST (Repl.) 669.

Cases referred to:

- (1) *Keene v. Thomas*, [1905] 1 K.B. 136; 74 L.J.K.B. 21; 92 L.T. 19; 53 W.R. 336; 21 T.L.R. 2; 48 Sol. Jo. 815, D.C.; 26 Digest (Repl.) 669, 47.
- (2) *Williams v. Allsup* (1861), 10 C.B.N.S. 417; 30 L.J.C.P. 353; 4 L.T. 550; 8 Jur. N.S. 57; 1 Mar. L.C. 87; 142 E.R. 514; 41 Digest 186, 264.
- (3) *Singer Manufacturing Co. v. London and South Western Rail. Co.*, [1894] 1 Q.B. 833; 63 L.J.Q.B. 411; 70 L.T. 172; 42 W.R. 347; 10 T.L.R. 246; 38 Sol. Jo. 238; 10 R. 152, D.C.; 8 Digest (Repl.) 161, 1034.
- (4) *Cassils & Co. and Sassoon & Co. v. Holden Wood Bleaching Co., Ltd.* (1914), 84 L.J.K.B. 834; 112 L.T. 373, C.A.; 32 Digest 240, 245.
- (5) *Wehner v. Dene Steam Shipping Co.*, [1905] 2 K.B. 92; 74 L.J.K.B. 550; 21 T.L.R. 339; 10 Com. Cas. 139; 41 Digest 402, 2496.
- (6) *Lilley v. Barnsley* (1844), 1 Car. & Kir. 344; 2 Mood. & R. 548, N.P.; 32 Digest 248, 326.

Appeal from a decision of LUSH, J., in an action tried by him without a jury.

By an agreement dated July 28, 1915, the plaintiff, who was the owner of a motor car, let the car on hire to one Price (therein called "the hirer"), and in consideration thereof the hirer agreed:

"1. To pay to the owner on the execution hereof a rent or hire instalment of £50, another £50 on Aug. 20, and £65 on Oct. 20 next. 2. The hirer shall keep the car in good repair and working condition (damage by fire and other occurrence included, but ordinary and fair wear excepted) and shall keep the same in his own possession and shall not remove or permit to be removed the registered number or name plate affixed thereto. 3. If the hirer do not duly perform this agreement or if he commits any act of bankruptcy or if he shall suffer his effects to be distrained upon or taken in execution or allow any judgment against him to remain unsatisfied then and in any of such cases the owner may (without prejudice to his rights under this agreement) terminate the hiring and re-take possession of the car, and for that purpose leave and licence is hereby given to the owner to enter any premises occupied by the hirer or of which the hirer is tenant to re-take possession of the car. 4. If the hirer is in arrear with any instalment for more than seven days the whole balance payable under clause 1 hereof shall immediately become due."

The owner agreed:

"1. That if the hirer shall make all payments and observe all the conditions on its part hereinbefore contained the car shall become the sole and absolute property of the hirer. 2. Unless and until all moneys payable under this agreement be paid the car shall be and continue to be the sole property of the owner."

Both the instalments due on July 28 and on Aug. 20 were paid, leaving a balance due of £65, which was payable on Oct. 20. Before the date for the payment of the final instalment fell due, the car was so damaged as to cease to be in running condition. It was said that it was damaged by a collision; at any rate, the damage was not due to "ordinary and fair wear." The car in consequence was sent to Mitchells' Garage. Price then communicated with the defendants with regard to repairing the car, and, on Oct. 8, the defendants took the car away from Mitchells' Garage. The final instalment under the agreement was not paid by Price on Oct. 20. The defendants submitted to Price an estimate for the repairs, and, on Oct. 31, he accepted the estimate, and directed the defendants to proceed with the repairs. According to the evidence, the plaintiff had not established that down to that date he made any application for re-delivery of the car to him or in any way terminated the hiring. He did not learn until Nov. 16 that the car was in the possession of the defendants, and until that date he made no demand for possession of the car from them. The plaintiff

A brought an action to recover possession of the car, and damages for its detention. In pursuance of an order at chambers, the plaintiff paid £31 2s. 6d., the estimated cost of the repairs to the car, into court, and the defendants returned the car to him. LUSH, J., gave judgment for the plaintiff, and ordered that the money which the plaintiff had paid into court to release the car should be paid out to him. The defendants appealed.

B *C. C. Scott, K.C.*, and *Stutfield* for the defendants.
G. W. H. Jones for the plaintiff.

C **SWINFEN EADY, L.J.**—This is an appeal by the defendants from the decision of LUSH, J., who tried the action without a jury. The plaintiff claimed from the defendants the return of a motor car and damages for its detention. The defendants, in answer, alleged that they had a lien on the car, for £31 2s. 6d., the cost of the repairs to the car. In pursuance of an order at chambers the plaintiff paid that sum into court, and the car was returned by the defendants to the plaintiff. The question, therefore, is whether the defendants had at the time of action brought a lien for £31 2s. 6d. for the cost of the repairs to the car. [His LORDSHIP stated the facts, and continued:]

D In these circumstances, the question is whether the defendants had a lien on the car. By the agreement, Price had to keep the car in good repair and working condition. As the car was not in working condition, there was an obligation on Price to repair it. The car was required to be repaired by a skilled person, and it was within the contemplation of the parties at the time that they made the contract that the car might require to be sent to a repairing establishment to be repaired. That being so, the defendants would have a lien on the car for the reasonable cost of the work of repair. It is not suggested that the sum charged is unreasonable. In *Williams v. Allsup* (2) there was a mortgage of a ship, and the ship remained with the sanction of the mortgagees, the plaintiffs, in the possession and under the control of the mortgagor. The ship being out of repair, the mortgagor delivered her to the defendant, a shipwright, who took possession of her and effected the repairs. The defendant then claimed a lien on the ship. WILLES, J., said (10 C.B.N.S. at p. 427):

G “By the permission of the mortgagees the mortgagor has the use of the vessel. He has, therefore, a right to use her in the way in which vessels are ordinarily used. Upon the facts which appear on this case, this vessel could not be so used unless these repairs had been done to her. The state of things, therefore, seems to involve the right of the mortgagor to get the vessel repaired, not on the credit of the mortgagees, but upon the ordinary terms, subject to the shipwright’s lien.”

H Those remarks are applicable to the present case. Price was entitled to use the car in the way in which motor cars are ordinarily used, and he could not do so unless the car was repaired. Moreover, he was under an express obligation under the agreement to get the car repaired. Therefore he had a right to get the car repaired on the ordinary terms—that is to say, not on the credit of the owner, but on the terms that the repairer should have a lien on it for the reasonable cost of the repairs. That does not press hardly on the owner, because, as ERLE, C.J., pointed out in the same case (*ibid.*):

I “It is to be observed that the money expended in repairs adds to the value of the ship; and, looking to the rights and interests of the parties generally, it cannot be doubted that it is much to the advantage of the mortgagee that the mortgagor should be held to have power to confer a right of lien on the ship for repairs necessary to keep her seaworthy.”

The same principle was applied in *Keene v. Thomas* (1), the case of a hire-purchase agreement in respect of a dogcart, where LORD ALVERSTONE, C.J., said ([1905] 1 K.B. at p. 138):

"The principle laid down by COLLINS, J., in the case of *Singer Manufacturing Co. v. London and South Western Rail. Co.* (3) goes a long way to support the proposition that the hirer is entitled to use the hired chattel for all reasonable purposes, and in my opinion in this case the hirer of the chattel having undertaken to keep it in repair, and having at any rate a duty to take care of it, and having employed the defendant to repair it, has created a lien in respect of the proper cost of the repairs, not only against himself, but also against the plaintiff, the owner of the trap."

That is a decision of a Divisional Court, but it was referred to with approval by the Court of Appeal in *Cassils & Co. and Sassoon & Co. v. Holden Wood Bleaching Co.* (4). In *Keene v. Thomas* (1), at the time when the cart was sent to the defendant for repair, an instalment under the hire-purchase agreement was in arrear, but the agreement had not been terminated. The present is even a stronger case, because, at the time when the car was sent to the defendants to be repaired no default had been made in payment of an instalment. In these circumstances, the defendants had a valid lien on the car for the proper cost of the repairs. Judgment must, therefore, be entered for the defendants, and there must be an order for payment out to them of the sum of £31 2s. 6d. which is in court.

BANKES, L.J.—I agree. The materials which are before us are unsatisfactory, and I should have wished them more complete, especially with regard to what the learned judge actually decided. But on the materials before us, in my opinion, the decision of the learned judge was wrong. In *Keene v. Thomas* (1) the point, as stated by LORD ALVERSTONE, C.J. ([1905] 1 K.B. at p. 137) was

"whether the man who made the bargain with the repairer had authority from the plaintiff to make such a bargain."

That is the first point to be decided. The question, therefore, is whether on Oct. 31, when Price made the bargain with the defendants for the repair of the motor car, he had authority from the plaintiff to do so. In my opinion, he clearly had authority, unless the plaintiff had determined the hire-purchase agreement before that date. So far as I can judge from the materials before us, this point was not in question in the court below. That was not the issue which the plaintiff elected to fight. The issue which, as it appears to me, he elected to fight was whether any substantial part of the repairs had been done when the hire-purchase agreement was terminated, because, if they had not the plaintiff's contention was that the defendants could not claim a lien for any substantial part of the repairs. The reason I say this is because counsel for the plaintiff cited to the learned judge *Wehner v. Dene Steam Shipping Co.* (5), where it was held that a shipowner is not entitled to exercise a lien on freight in the hands of the ship's agents for charterparty hire accruing due. What the ground was on which the learned judge based his decision I cannot gather, but the real question on the facts before us is whether the plaintiff has proved that he determined the hire-purchase agreement before the order for the repairs was given and accepted. Unless he established that he fails. He has not established it. In my view, the fair inference from the evidence is that the agreement was not terminated when the order for the repairs was given and accepted. The defendants are, therefore, entitled to judgment.

SCRUTTON, L.J.—I am of the same opinion. I agree that it is not clear on what ground the learned judge based his judgment, nor is it clear what points were argued before him by the plaintiff. Counsel for the plaintiff cited to the learned judge *Wehner v. Dene Steam Shipping Co.* (5), but I fail to see what it has to do with this case. The materials before us are very unsatisfactory. The plaintiff is the owner of a motor car, and he sued the defendants, who are in possession of the car, in detinue. The defendants say the car was given to

- A them to repair by the person who had had it under a hire-purchase agreement, that they had a lien on it for the cost of the repairs, and that the plaintiff has never tendered to them the amount properly expended on the repairs. The law is clear. The hirer of a chattel is entitled to have it repaired so as to enable him to use it in the way in which such a chattel is ordinarily used. The hirer was, therefore, entitled, without any express authority from the owner, to have the
- B motor car repaired so as to enable him to use it as a motor car is ordinarily used. That is well put by WILLES, J., in *Williams v. Allsup* (2) (10 C.B.N.S. at p. 427), in the passage which has been read by SWINFEN EADY, L.J., and by COLLINS, J., in *Singer Manufacturing Co. v. London and South Western Rail. Co.* (3). In the present case, the hirer of the car had the express duty imposed on him of keeping the car in repair, and, therefore, of having it repaired when necessary.
- C That makes this case similar to *Keene v. Thomas* (1), which was a decision of a Divisional Court. Accordingly, the hirer had by contract a duty as well as a right, until the hire was terminated, to have the car repaired, with the ordinary consequence of giving the repairer a lien on the car for the proper cost of the repairs. Had the bailment been determined when the order to do the repairs was given by the hirer? On the evidence, the plaintiff has left it in doubt at what date he determined the bailment. As late as Nov. 6, the hirer was giving orders for repairs to be done to the car, which he could not have done unless he had then a right to have possession of the car. The plaintiff, therefore, has failed to prove it.
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A further question suggests itself to my mind which might give rise to some difficulty. If the plaintiff had ordered the defendants before the repairs were completed not to do any more repairs and had tendered to them the sum due for the work already done, could the defendants have claimed a lien for the contract price of the repairs? The point does not arise, but there is a *nisi prius* case of *Lilley v. Barnsley* (6) in which the argument of counsel and the ruling of ROLFE, B., suggest that the repairers would only have a lien for the cost of the work actually done. However, that is not what happened in this case,

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F and, therefore, the question does not arise. The plaintiff did not, on Nov. 16, tender for the cost of the work then done and tell the defendants to do no further work. The plaintiff in these circumstances was not entitled to the car on that date, and he cannot say that the defendants were wrong in going on with the repairs.

Appeal allowed.

Solicitors: *Bishop & Fenton-Jones; Lloyd, Richardson & Co.*

[Reported by E. J. M. CHAPLIN, Barrister-at-Law.]

HALSEY AND ANOTHER v. LOWENFIELD, LEIGH, THIRD PARTY

[COURT OF APPEAL (Viscount Reading, C.J., Warrington, L.J., and Lush, J.), May 16, 17, 18, July 28, 1916]

[Reported [1916] 2 K.B. 707; 85 L.J.K.B. 1498; 115 L.T. 617; 32 T.L.R. 709]

Landlord and Tenant—Enemy alien tenant—Lease entered into before outbreak of war—Right of landlord to recover rent.

Practice—Third party procedure—Right of enemy alien to invoke—Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (3).

By a lease dated Mar. 18, 1896, the predecessor in title of the plaintiff demised to the defendant premises for a term of twenty-four years from Christmas, 1895, at a yearly rent of £6,000 to be paid by monthly instalments of £500 in advance. Subsequently, the lease was assigned to the third party, L. In August, 1914, war was declared between Great Britain and Austria, and the defendant, an Austrian living in Austria, became an enemy alien. By a Royal Proclamation dated Sept. 19, 1914, relating to trading with the enemy, payments by or on account of enemies to British subjects were permitted if they arose out of transactions entered into before the war. On a claim by the plaintiffs for the rent due for the months of June, July and August, 1915, the defendant, by a third party notice, claimed to be indemnified, if he were held to be liable, by L. as assignee of the lease.

Held: (i) the lease was not suspended or determined by the outbreak of the war, and, therefore, the plaintiff was entitled to bring an action on the covenant in the lease and to recover the rent which was owing; (ii) in view of the terms of s. 24 (3) of the Supreme Court of Judicature Act, 1873 [see now s. 39 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925: 18 HALSBURY'S STATUTES (2nd Edn.) 472] the third party claim must be regarded as a separate action by the defendant, and, as such, he being an alien enemy, not maintainable by him.

Decision of RIDLEY, J., [1916] 1 K.B. 143, affirmed.

Notes. Distinguished: *Seligman v. Eagle Insurance Co.*, [1917] 1 Ch. 519; *Tingley v. Müller*, ante p. 470; *Ertel Bieber & Co. v. Rio Tinto Co., Ltd.*, [1918-19] All E.R. Rep. 127; *Orconera Iron Ore Co. v. Fried. Krupp Act* (1918), 87 L.J.Ch. 313; *Rodriguez v. Speyer Bros.*, [1918-19] All E.R. Rep. 884. Referred: *Schering Ltd. v. Stockholms Enskilda Bank Aktiebolag*, [1946] 1 All E.R. 36; *Arab Bank, Ltd. v. Barclays Bank (D.C. & O.)*, [1953] 2 All E.R. 263; *Bevan v. Bevan*, [1955] 2 All E.R. 206.

As to the position of enemy aliens, see HALSBURY'S LAWS (3rd Edn.), tit. War and Emergency, and for cases see 2 DIGEST (Repl.) 212 et seq.

Cases referred to:

- (1) *The Hoop* (1799), 1 Ch. Rob. 196; 2 Digest (Repl.) 241, 435.
- (2) *Esposito v. Bowden* (1857), 7 E. & B. 763; 8 State Tr.N.S. 807; 27 L.J.Q.B. 17; 29 L.T.O.S. 295; 3 Jur. N.S. 1209; 5 W.R. 732; 119 E.R. 1430, Ex. Ch.; 2 Digest (Repl.) 251, 524.
- (3) *Porter v. Freudenberg, Kreglinger v. S. Samuel and Rosenfeld, Re Mertens' Patents*, [1915] 1 K.B. 857; 84 L.J.K.B. 1001; 112 L.T. 313; 31 T.L.R. 162; 20 Com. Cas. 189; 32 P.P.C. 109, C.A.; 2 Digest (Repl.) 242, 444.
- (4) *The Parariellos* (1915), 84 L.J.P. 140; 112 L.T. 777; 31 T.L.R. 326; 59 Sol. Jo. 399; 13 Asp. M.L.C. 52; affirmed (1916), 85 L.J.P. 112; 114 L.T. 670; 32 T.L.R. 459; 60 Sol. Jo. 427; 13 Asp. M.L.C. 484, P.C.; 2 Digest (Repl.) 276, 640.

- A** (5) *Robson v. Premier Oil and Pipe Line Co., Ltd.*, [1915] 2 Ch. 124; 84 L.J.Ch. 629; 113 L.T. 523; 31 T.L.R. 420; 59 Sol. Jo. 475, C.A.; 2 Digest (Repl.) 259, 577.

Also referred to in argument:

- Janson v. Driefontein Consolidated Mines, Ltd.*, [1902] A.C. 484; 71 L.J.K.B. 857; 87 L.T. 372; 51 W.R. 142; 18 T.L.R. 796; 7 Com. Cas. 268, H.L.; 2 Digest (Repl.) 218, 308.
- B** *Arnhold Karberg & Co. v. Blythe, Green, Jourdain & Co., Theodor Schneider & Co. v. Burgett and Newsam*, [1915] 2 K.B. 379; 84 L.J.K.B. 1673; 113 L.T. 185; 31 T.L.R. 351; affirmed [1916] 1 K.B. 495; 85 L.J.K.B. 665; 114 L.T. 152; 32 T.L.R. 186; 60 Sol. Jo. 156; 21 Com. Cas. 174, C.A.; 2 Digest (Repl.) 280, 672.
- C** *Robinson & Co. v. Continental Insurance Co. of Mannheim*, [1915] 1 K.B. 155; 84 L.J.K.B. 238; 112 L.T. 125; 31 T.L.R. 20; 59 Sol. Jo. 7; 12 Asp. M.L.C. 574; 20 Com. Cas. 125; 2 Digest (Repl.) 247, 483.
- Leader, Plunkett and Leader v. Direction der Discontogesellschaft*, [1915] 3 K.B. 154; 84 L.J.K.B. 1806; 113 L.T. 596; 31 T.L.R. 464, C.A.; 2 Digest (Repl.) 247, 490.
- D** *Distington Hermitate Iron Co., Ltd. v. Possehl & Co.*, [1916] 1 K.B. 811; 85 L.J.K.B. 919; 115 L.T. 412; 32 T.L.R. 349; 2 Digest (Repl.) 271, 621.
- W. Wolf & Sons v. Carr, Parker & Co.* (1915), 31 T.L.R. 407, C.A.; 2 Digest (Repl.) 241, 439.
- Kreglinger & Co. v. Cohen (Trading as Samuel and Rosenfeld)* (1915), 31 T.L.R. 592; 2 Digest (Repl.) 273, 630.
- E** *London and Northern Estates Co. v. Schlesinger*, [1916] 1 K.B. 20; 85 L.J.K.B. 369; 114 L.T. 74; 32 T.L.R. 78; 60 Sol. Jo. 223; 2 Digest (Repl.) 274, 634.
- McVeigh v. United States* (1870), 11 Wall. 259.
- Wynne v. Tempest*, [1897] 1 Ch. 110; 66 L.J.Ch. 81; 75 L.T. 624; 45 W.R. 183; 13 T.L.R. 128; 41 Sol. Jo. 127; 26 Digest (Repl.) 231, 1784.
- F** *Moule v. Garrett* (1872), L.R. 7 Exch. 101; 41 L.J.Ex. 62; 26 L.T. 367; 20 W.R. 416, Ex. Ch.; 31 Digest (Repl.) 458, 5846.
- Kershaw v. Kelsey* (1868), 100 Mass. 561.
- McCheane v. Gyles*, [1902] 1 Ch. 287, 301; 71 L.J.Ch. 183; 86 L.T. 1; 50 W.R. 376; 46 Sol. Jo. 175, C.A.; Digest (Practice), 447, 1358.
- G** *Potts v. Bell* (1800), 8 Term Rep. 548; 101 E.R. 1540; 2 Digest (Repl.) 256, 562.
- R. v. Oppenheimer and Colbeck*, [1915] 2 K.B. 755; 84 L.J.K.B. 1760; 113 L.T. 383; 79 J.P. 383; 31 T.L.R. 369; 59 Sol. Jo. 442; 25 Cox, C.C. 39; 11 Cr. App. Rep. 146, C.C.A.; 2 Digest (Repl.) 259, 578.
- R. v. Kupfer*, [1915] 2 K.B. 321; 84 L.J.K.B. 1021; 112 L.T. 1138; 79 J.P. 270; 31 T.L.R. 223; 24 Cox, C.C. 705; 11 Cr. App. Rep. 91, C.C.A.; 2 Digest (Repl.) 259, 579.

H **Appeal** by the defendant from the decision of RIDLEY, J., in an action tried by him without a jury, reported [1916] 1 K.B. 143.

Heber Hart, K.C., and *Blanco White* for the defendant.

Rose-Innes, K.C., and *Lilley* for the plaintiff.

Graham Mould for Leigh, third party.

I

Cur. adv. vult.

July 28, 1916. The following judgments were read.

VISCOUNT READING, C.J.—The plaintiffs sued the defendant to recover £1,500 for rent due to them at the rate of £500 per month in respect of the Prince of Wales' Theatre, London, for the months of June, July, and August, 1915. Save as to part of the amount claimed it is not disputed that the plaintiffs are entitled to the rent, but it is contended that as the defendant is an alien

enemy, that is, an Austrian subject residing in Austria, he is not liable to pay the rent on the ground that, owing to the state of war, the contract hitherto subsisting between him and the plaintiffs is dissolved or suspended. If found liable to the plaintiffs, the defendant, by a third party notice, claimed indemnity against John Leigh. RIDLEY, J., gave judgment for the plaintiffs, and held that the defendant could not maintain the third party claim. The defendant appeals from this decision and asks that judgment be entered for him on the plaintiffs' claim, and, if held liable, he appeals against RIDLEY, J.'s judgment on the third party claim.

On Mar. 18, 1896, Edgar Bruce, deceased, and predecessor in title of the plaintiffs, granted an underlease to the defendant of the Prince of Wales' Theatre, expiring on Dec. 26, 1919, at a yearly rent of £6,000, payable in advance by monthly instalments of £500. In March, 1899, the defendant assigned the lease to one Lederer. Lederer entered into the usual covenant to indemnify the defendant against his liability for rent to his lessor. In April, 1899, Lederer assigned the lease to George Edwardes. On Aug. 31, 1899, Edwardes assigned to Leigh, the third party, in whom the term was vested at the date of the trial.

The question raised in the case is whether the plaintiffs during the war can sue an alien enemy under a lease granted before the war. It is contended on behalf of the defendant that upon the outbreak of war all intercourse, commercial or otherwise, between persons resident here and alien enemies became illegal, and consequently that a lease granted before the war to one who since the war became an alien enemy was either suspended during the war or determined, and that no action could be brought during the war to recover payment under the covenant in the lease from an alien enemy. That commercial intercourse between inhabitants of this country with alien enemies, unless permitted by the Sovereign, is prohibited and illegal is beyond question: see *The Hoop* (1); *Esposito v. Bowden* (2); and *Porter v. Freudenberg* (3). This prohibition at common law of intercourse between residents in this country and alien enemies is not confined to commercial or trading intercourse: see *The Panariellos* (4); *Robson v. Premier Oil and Pipe Co.* (5). The prohibition is based upon public policy, which forbids the doing of acts that will or may be to the advantage of the enemy State by increasing its capacity for prolonging hostilities and by adding to the resources available to individuals in the enemy State: see *Porter v. Freudenberg* (3). In the present case the contract whereby the defendant covenanted inter alia to pay rent in respect of the property known as the Prince of Wales' Theatre was a subsisting and valid and enforceable contract at the outbreak of war. Since the war no intercourse has in fact taken place with the alien enemy, unless it can be said that seeking to obtain payment by him of the rent due under the lease is within the prohibition of common law and consequently illegal. It is contended for the defendant that not only would the payment be illegal, but that the lease itself must be treated as at an end or suspended in consequence of the war. Payment by or on account of an alien enemy to persons resident in this country is not trading with the enemy and is permitted if the payment arises out of a transaction entered into before the outbreak of war. This is provided in s. 7 of the proclamation relating to trading with the enemy, dated Sept. 9, 1914, which has legislative authority, for by the Trading with the Enemy Act, 1914, s. 1 (2), it is declared that "any act permitted under any such proclamation shall not be deemed to be trading with the enemy." In order to avoid misconception, the payment is permitted only when not made under or accompanied by terms, conditions, or circumstances which would in themselves constitute a trading with the enemy. Upon this ground I hold that the plaintiffs would not commit an illegal act if they claimed and received payment from the defendant of rent due under a lease granted to him before the war, and that they are entitled to succeed in this action.

I have had the opportunity of reading WARRINGTON, L.J.'s judgment, and I agree with his conclusions as to the continued validity of the lease at the

A outbreak of war and with his reasons for this conclusion. I desire to add that the contention that a lessee who has become an alien enemy is released from all obligations undertaken before the war cannot be sustained. There is no authority for such a proposition in any of the cases or text-books, and, in my judgment, it is unsound in principle. The prohibition of intercourse between persons in this country and alien enemies is based on public policy, and it would indeed be a strange result if a law so founded was held to apply to relieve an alien enemy of obligations incurred before the war in respect of property of which he is not deprived by the Crown, for the property of alien enemies is at common law subject to confiscation by the Crown in virtue of the Royal prerogative: see *HALE'S PLEAS OF THE CROWN*, vol. 1, p. 95; and *Porter v. Freudenberg* (3). But if the Crown refrains from exercising the right to confiscate, and allows the alien enemy to continue in ownership of the property, he holds it subject to all its obligations; it would be manifestly absurd that he should derive the advantage of holding the property without liability to perform the obligations incident to his right of ownership. For example, if a freehold is held by him subject to a restricted covenant not to build within a period of years, can it be said that the consequence of war is that the alien enemy is allowed to remain the owner of the estate but is freed from the obligations of the covenant? If the contract is dissolved as contended, the estate would be freed for ever from the burden of the covenant. In my judgment, the covenant remains not withstanding the war. If there is a breach of covenant the enemy may be sued, although no doubt there are difficulties in serving him. In the present case those difficulties have been surmounted, and the alien enemy has appeared.

E In my view, RIDLEY, J.'s judgment in favour of the plaintiffs upon the point of liability of the defendant is correct.

It was argued that if the alien enemy's rights under the covenants are not dissolved by the war, at least they are suspended, and that, therefore, the plaintiffs' rights under the covenants are also suspended, but it is the remedy of the alien enemy which is suspended, not because the covenant has ceased to operate during the war, but because the alien enemy cannot have recourse to the King's courts to enforce a right until he has ceased to be an alien enemy.

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This brings me to the next point, namely, whether the defendant can enforce his claim to indemnity by a third party notice. The objection taken is that he cannot become "actor" in proceedings in the King's courts, and that he must be regarded as a plaintiff in an action seeking a remedy against a third party, who must be regarded as a defendant. RIDLEY, J., has upheld this objection, and I come to the same conclusion. This point turns entirely upon the interpretation of the language of the Supreme Court of Judicature Act, 1873, s. 24 (3), in reference to third party notices:

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H "and every person served with any such notice shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim, as if he had been duly sued in the ordinary way by such defendant."

The right of the defendant to bring a third party into an action to which he was not a party was given in order to enable the defendant to pursue his remedy for indemnity in the action in which it was sought to make him liable to the plaintiff, but although the third party thus becomes a party to the cause his rights in respect of his defence against a claim for indemnity are preserved to him and are to be treated as if in an action brought against him. If the alien enemy had brought a separate action against the third party one of the answers would have been, as it is now, that the alien enemy could not sue during the war. We must decide according to the words of the statute, which are plain, and, therefore, we must regard the third party claim for this purpose as a separate action by the defendant, with the inevitable result that the defendant's third

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party claim fails. The appeal must be dismissed, and with costs. LUSH, J., A read this judgment, and desires me to say that he agrees with it.

WARRINGTON, L.J., stated the facts and continued: The first question is whether under the circumstances of this case the outbreak of war discharged the defendant, an alien enemy, from his liability otherwise indisputable, to pay the rent under the lease of 1896. The following general propositions are, I think, clearly established: (i) By the common law of England on the outbreak of war between Great Britain and another nation it becomes unlawful for a British subject to engage in any intercourse with an enemy, whether of a commercial nature or otherwise, unless it be with the permission, express or implied, of the executive authority. (ii) It follows that any intercourse on the part of a subject of Great Britain with an enemy incidental to the performance by either party of contractual obligations is unlawful. These propositions are, I think, covered by authority: see *The Panariellos* (4), and the cases there cited; and *Robson v. Premier Oil and Pipe Line Co.* (5). It follows that, if a contract at the outbreak of war remains to be performed by both parties, it would be unlawful for that one of them who is a British subject to perform his part. The contract would be an illegal contract and both parties would be discharged. I think, moreover, that though the substantive obligation to be performed is that of the enemy only, yet if its performance necessitates the concurrence of the other party, the promisee, and that involves unlawful intercourse with the alien, the latter would be discharged from his obligation. This is really only an example of the general rule, for the concurrence of the promisee would be afforded in pursuance of a duty arising from a contractual relation.

The next question is whether the present case comes within the rule. It must first be determined what relative obligations of the plaintiffs and the defendant remained to be performed at the outbreak of war. As regards the covenants by the lessor, I think it must be taken that they would all run with the land, and that the benefit of them would pass to the assignee. It is true that among them was a covenant by the lessor to perform the lessee's covenants contained in the superior lease, and it is of course possible that that lease may have contained a covenant of an exceptional character which would not run with the land. The superior lease has not been put in evidence, but I think we are entitled to assume as against the defendant, on whom the onus rests of establishing his defence, that it did not contain such an exceptional covenant. If I am right so far, the only substantive obligations as between the parties to the present action remaining to be performed were those to be performed by the defendant. Of these the only one with which we are concerned is the covenant for payment of the rent. Did the performance of this obligation by the defendant require the concurrence of the plaintiffs, and, if so, would such concurrence be unlawful? It did require the plaintiffs' concurrence, inasmuch as payment by one party involved receipt by the other. It does not follow, however, that such receipt was unlawful, and I think the proclamation of Sept. 19, 1914, establishes that it was not, but was an act permitted by the executive authority. The proclamation, after warning people against doing certain acts and entering into certain transactions as involving trading with the enemy, contains the following provision:

"Nothing in this proclamation shall be deemed to prohibit payments by or on account of enemies to persons resident, carrying on business, or being in our Dominions, if such payments arise out of transactions entered into before the outbreak of war or otherwise permitted."

In terms the clause purports to allow payments by or on account of the enemy and says nothing about receipts; but I think it must be construed to authorise—if such authority be necessary—the receipt by a British subject of a payment so made. If this is so, the performance by the defendant of his obligation did

A not involve any unlawful act on the plaintiffs' part, and I see no reason why the defendant should be treated as released. I think the appeal from the judgment against the defendant fails and must be dismissed.

B Now as to the third party notice. The question is whether the third party is entitled to be placed in the same position as he would be in if he were defendant to an action by the present defendant as plaintiff. In that case he would be entitled to judgment inasmuch as the remedy of the plaintiff, as an alien enemy, would be suspended during the war: *Porter v. Freudenberg* (3). The right to issue the third party notice is derived from the Supreme Court of Judicature Act, 1873, and the rules thereunder. Subsection (3) of s. 24 is as follows:

C "The said courts respectively, and every judge thereof, shall also have power to grant to any defendant in respect of any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right, or title claimed or asserted by him, all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleading, and as the said courts respectively, or any judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner; and also all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any rule of court or any order of the court, as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose; and every person served with any such notice shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim, as if he had been duly sued in the ordinary way by such defendant."

F In my opinion this deals with procedure only, and does not affect the rights of either the original defendant or the third party. If the third party had been sued in the ordinary way he would have been entitled to claim judgment on the ground that the suit could not be maintained. This is, in my opinion, a right in respect of his defence against the claim made by the third party notice, and he is, therefore, under the express words of the statute entitled to insist on such right. In this respect also the judgment is, in my opinion, correct and should be affirmed. I desire to add that I concur in the general observations of the Lord Chief Justice as to the position of alien enemies holding property in this country. Substantially the appeal fails, and I think the appellant should pay the costs.

Appeal dismissed.

Solicitors: *Hutchinson & Cuff; Valpy, Peckham & Chaplin; C. F. J. Jennings.*

[*Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.*]

Re YENIDJE TOBACCO CO., LTD.

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Pickford and Warrington, L.J.J.), July 27, 28, 1916]

[Reported [1916] 2 Ch. 426; 86 L.J.Ch. 1; 115 L.T. 530; 32 T.L.R. 709; 60 Sol. Jo. 707; [1916] H.B.R. 140]

Company—Winding-up—“Just and equitable”—Interpretation—Not to be read ejusdem generis with specific statutory grounds—Deadlock in management of company—Application of principles of dissolution of partnership—Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 129.

Section 129 of the Companies (Consolidation) Act, 1908 [now s. 222 of the Companies Act, 1948 (3 HALSBURY'S STATUTES (2nd Edn.) 452)] provided: “A company may be wound-up by the court” on five specific grounds, and, by para. (vi), “if the court is of opinion that it is just and equitable that the company should be wound-up.”

Held: the words of para. (vi) were not to be read ejusdem generis with the words of the preceding specific provisions.

The two life directors of a private company each held an equal number of the class of shares which carried voting rights, and in the articles there was no provision for a casting vote by either of them. Differences arose between the two directors. They would not speak to each other and a third person had to convey communications between them, the one refused to give effect to the award of an arbitrator in favour of his co-director on a dispute between them, and one director had brought an action for fraud against the other.

Held: the company was in effect a partnership between the two directors, and the same principles should be applied as those which were applied in a case of dissolution of partnership; there existed in the management of the company a deadlock which could not have been contemplated by the parties when the company was formed; in these circumstances it was “just and equitable” that the company should be wound-up; and a winding-up order would be made.

Notes. Considered: *Lock v. John Blackwood, Ltd.*, [1924] All E.R. Rep. 200. Applied: *Re Davis and Collett, Ltd.*, [1935] All E.R. Rep. 315. Considered: *Rayfield v. Hands*, [1958] 2 All E.R. 194. Referred to: *Re Cuthbert Cooper & Sons, Ltd.*, [1937] 2 All E.R. 466; *Scottish Co-operative Society v. Meyer*, [1958] 3 All E.R. 66; *Re H. R. Harmer, Ltd.*, [1958] 3 All E.R. 689.

As to grounds of compulsory winding-up, see 6 HALSBURY'S LAWS (3rd Edn.) 531-535, and for cases see 10 DIGEST (Repl.) 852 et seq.

Cases referred to in argument:

Re Sailing Ship Ventmere Co., [1897] W.N. 58; 10 Digest (Repl.) 856, 5640. *Re Furriers' Alliance, Ltd.* (1906), 51 Sol. Jo. 172; 10 Digest (Repl.) 863, 5682. *Re Fromm's Extract Co., Ltd.* (1901), 17 T.L.R. 302, C.A.; 10 Digest (Repl.) 860, 5662.

Appeal from an order of ASTBURY, J., that the Yenidje Tobacco Co., Ltd., a private company, should be wound-up.

The winding-up petition was brought by one Marcus Weinberg, one of two directors of the company, and was resisted by Louis Rothman, the other director. ASTBURY, J., made a winding-up order against which Rothman appealed.

Frank Russell, K.C., and *A. H. Richardson*, for the petitioning director.

Gore-Browne, K.C., and *Henriques*, for the respondent director, were not called on to argue.

LORD COZENS-HARDY, M.R.—This is an appeal from a decision of ASTBURY, J., who ordered a private company to be compulsorily wound-up.

A I think it right to consider what is the precise position of a private company such as this, and in what respects it can fairly be called a partnership in the clothes or under the guise of a private company.

In the present case two tobacco manufacturers, one Rothman and the other Weinberg, were minded to amalgamate their businesses. They formed a private limited company, under the constitution of which they are the sole shareholders. Although the holdings of the two members in "B" shares and preference shares are unequal—one having a larger holding than the other—the only shares which give the power of voting—that is, the "A" shares—carry precisely equal voting rights, because each of the two shareholders hold an equal number of shares of that class. There is a provision in the articles of association of the company that there shall be no casting vote, and that one director is to form a quorum. There is a provision that in the event of a dispute between the directors the matter in dispute shall be referred to arbitration, but there is no provision whatever in the articles, and I cannot imagine such a provision, that in the general management of the company all disputes between the directors shall go to arbitration. Certainly, having regard to the result of the one arbitration which has been held, it would be absurd to suggest that the working out of that provision costs little. The one dispute to which I have just referred was about a Mr. Litiger who was in the employment of the company as its factory manager. That dispute was referred to two arbitrators who could not agree. An umpire was appointed, and the result was that the parties were some eighteen days before the arbitrators and umpire, the costs of the arbitrators and umpire alone amounting to upwards of £1,000, to say nothing of the costs of the two parties each of whom had to pay his own costs. In those circumstances, supposing this had been an ordinary partnership between two people having equal shares, there being no provision to terminate it, what would have been the position? I think that it is quite clear that under the law of partnership, as has been asserted in this court for many years and is now laid down by the Partnership Act, 1890, that state of things might be a ground for a dissolution of the partnership, for the reasons which are stated by LORD LINDLEY in his book on PARTNERSHIP (6th Edn. 657) in the passage which I will read, and which I think it is quite unnecessary to state is justified by the authorities to which he refers:

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"Refusal to meet on matters of business, continued quarrelling, and such a state of animosity as precludes all reasonable hope of reconciliation and friendly co-operation, have been held sufficient to justify a dissolution. It is not necessary, in order to induce the court to interfere, to show personal rudeness on the part of one partner to the other, or even gross misconduct as a partner. All that is necessary is to satisfy the court that it is impossible for the partners to place that confidence in each other which each has a right to expect, and that such impossibility has not been caused by the person seeking to take advantage of it."

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H Here we have this fact. Rothman has commenced an action charging Weinberg with fraud in obtaining the agreement under which he, Rothman, sold his business to the company. I ask myself the question: When one of the two partners has commenced and has not discontinued an action charging his co-partner with fraud in the inception of the partnership, is it likely, is it reasonable, is it common-sense, to suppose those two partners can work together in the manner in which they ought to work in the conduct of the partnership business? Can they do so when things have reached such a pass that after the eighteen days' arbitration which terminated in favour of Weinberg on the only point that was referred, Rothman declines to give effect to it, in the sense that, although the award decided that Litiger had not been dismissed and ought to be continued as a servant of the firm until removed, Rothman will not allow him to come and do his work, so that he, Litiger, is in the happy position now of receiving his wage of £5 a week without being allowed to do any work for the company in respect of which he is a

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servant. The matter does not stop there. It is sworn to that these two directors are not on speaking terms, and the so-called meetings of the board of directors have been almost a farce. They will not speak to each other on the board. Some third person has to convey communications which ought to go directly from one to the other.

Is it possible that it is not "just and equitable" [within now s. 222 (f) of the Companies Act, 1948] that that state of things should not be allowed to continue, but that the court should intervene and say: "This is not what the parties contemplated by the arrangement which they entered into?" They assumed, and it is the foundation of the whole of the agreement which was made, that the two would act as reasonable men with reasonable courtesy and reasonable conduct in every way towards each other, and that arbitration was only to deal with some particular dispute between the board which might be wanted to go to arbitration. Certainly the state of things that the only two directors will not speak to each other and no business can be conducted which deserves the name of business in the affairs of the company should not be allowed to continue.

I have treated this matter as a partnership. Under the Partnership Act, of course, the application for a dissolution would take the form of an action. This is not a partnership strictly, it is not a case in which it can be dissolved by action. But ought not the same principles precisely to apply to a case like this, where, in substance, it is a partnership. It is a partnership taking the form or the guise of a private company, and it is a private company as to which there is no way to be found out of the state of things which now exists except by means of a compulsory order. It has been urged upon us that, although it is admitted that the "just and equitable" clause in s. 129 of the Companies (Consolidation) Act, 1908 (s. 129 (vi)) which provides that a company may be wound-up by the court "if the court is of opinion that it is just and equitable that the company should be wound-up" is not to be read as being ejusdem generis with the preceding provisions of the section which afford certain specific grounds for winding-up [now s. 222 (f) of the Act of 1948], it has been held not to apply except where the substratum of the company has gone and there is a complete deadlock. Those are the two instances which are given. But I should be very sorry to suppose that they are strictly the limits of the "just and equitable" clause as found in the Companies (Consolidation) Act, 1908. I think that in a case like the present we are bound to say that circumstances which would justify the winding-up of a partnership by action are circumstances which should induce the court to exercise its jurisdiction under the "just and equitable" clause and to wind-up the company. ASTBURY, J., dealt with this case, as it seems to me, in a most satisfactory way. At the end of his judgment he said that he tried to suggest a solution. He suggested that the two shareholders should "continue for six months to see if they can get on better, or that they should appoint one or more additional directors to assist them in the business." But this neither would do. If ever there was a case of deadlock I think that it exists here. But, whether it exists or not, I think that the circumstances are such that we ought to apply, if necessary, the analogy of the partnership law, and to say that this company is now in a state which could not have been contemplated by the parties when the company was formed and ought to be terminated as soon as possible. We are told that the court ought not to interfere because the company is prosperous, making large profits, rather larger profits than before the dispute became so acute. I think one's knowledge from what one sees in the streets can quite account for that. The number of cigarettes that are sold is enormous, and we can take judicial notice of that in judging whether the business is much larger than it was before. Whether there would be such profits made in circumstances like this or not, it does not seem to me to remove the difficulty which exists, which is contrary to the good faith and essence of this, that the parties formed the scheme of a company managed by these two directors which should be worked

A amicably, and it would not justify the continuance of the state of things which we
B find here. In my opinion, the appeal fails and ought to be dismissed with costs.

PICKFORD, L.J.—I agree.

WARRINGTON, L.J., stated the facts and continued: If this had been an
ordinary partnership, with an action for dissolution, it seems to me quite clear
B that the plaintiff—the petitioner in this case is equivalent to the plaintiff—would
have had sufficient ground for a dissolution of partnership according to the
ordinary principle by which the court is guided in such matters. Section 129 of
the Companies (Consolidation) Act, 1908, which defines the grounds upon which
the court can make an order for winding-up a company, includes the provision
C that such an order may be made if the court is of opinion that it is “just and
equitable that the company should be wound-up.” At one time it was thought
and there was judicial opinion in support of it, that in order to bring the case
within that statutory provision it must be shown to be ejusdem generis with a
number of other grounds which had been specified in a previous part of the section.
But that opinion has long been abandoned, and the court has in more cases than
one expressed the view that a company may be wound-up if, for example, the
D state of things is such that what may be called a deadlock has been arrived at in
the management of the business of the company. I am prepared to say that in a
case like the present, where there are only two persons interested, where there are
no shareholders other than those two, where there are no means of overruling
by the action of a general meeting of shareholders the trouble which is occasioned
by the quarrels of the two directors and shareholders, the company ought to be
E wound-up if there exists such a ground as would be sufficient for the dissolution of
a private partnership at the suit of one of the partners against the other of
the partners. Such ground exists in the present case. I think, therefore, that it is
“just and equitable that the company should be wound-up.”

There is one other point to which I ought to refer. It is said that according to
the constitution of the company there is provided a means by which the quarrels
F of these directors can be overridden for the benefit and advantage of the company
and the deadlock can be got rid of. The means suggested is the provision in
art. 106 for reference to arbitration. But, in my judgment, that article does not
contemplate a case such as the present, where in the daily intercourse between
the two directors they are unwilling to speak to each other and discuss the
affairs of the company. It relates, I think, to specific cases where a particular
G resolution important to the company cannot be passed because of a difference of
opinion between the two directors, and it is, therefore, necessary to obtain the
authority of some third person who will say what is to be done. It seems to me
that that has no reference to the ordinary everyday business of the company and
its conduct, and that it really does not provide the means of getting rid of the
difficulties which are encountered in the present case. For these reasons I think
H that the order made by ASTBURY, J., was quite right and that the company
must be wound-up.

Appeal dismissed.

Solicitors: *Geo. & Wm. Webb; Arthur S. Joseph.*

[*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.*]

Re TOD. BRADSHAW v. TURNER.

[CHANCERY DIVISION (Sargant, J.), February 24, 25, 1916]

[Reported [1916] 1 Ch. 567; 85 L.J.Ch. 668; 114 L.T. 839; 32 T.L.R. 344; 60 Sol. Jo. 403]

Administration of Estates—Hotchpot—Advances during testator's lifetime to be brought in—Method of bringing into account the capital of and interest on advance.

By his will dated Jan. 18, 1892, a testator, who died in 1893, devised and bequeathed his residuary real and personal estate to the trustees of his will on the usual trusts for sale and conversion and directed that income until such conversion should be treated as income. The testator then directed his trustees to raise specified sums of money out of the proceeds of such sale and (in the case of each of his three married daughters) to add the same to the funds subject to their respective marriage settlements, and (in the case of an unmarried daughter) to hold the same on trusts for the daughter and her issue, with remainders over. The testator declared that his will was made on the assumption that his residuary estate (including the money to the income of which his wife was entitled under his marriage settlement and sums totally £7,300 which he had paid on account of his son, J.H.T., and "which sums are to be deducted from the share of my residuary estate hereinafter given in trust for his wife and family") would amount to upwards of £60,000. The testator then directed his trustees to hold his net residuary estate as to one half thereof on trust to transfer the same to three named persons to be held by them on trust to pay the income to M.T. (the wife of J.H.T.) and after her death for the benefit of J.H.T., his wife for the time being and his children and other issue; and the testator directed his trustees to stand possessed of the other moiety of his residuary estate, subject to raising £5,000 for A.M.T., on trust for A.M.T. for life, and after his death for A.M.T.'s wife and children. The will provided for the testator's children to bring into hotchpot sums advanced to them by the testator exceeding £1,000, with interest, and the trustees were given power to postpone sale. Various investments were from time to time appropriated to each of the two settled shares of residue, the appropriations to A.M.T.'s share having exceeded those to J.H.T.'s share by £3,300, so reducing to £4,000 the amount to be accounted for by J.H.T.'s share. A large proportion of the testator's residuary estate had not been realised, and it was desired to divide the remaining residuary estate between the two shares. The question arose how the income from the residuary estate (having regard to the necessity for J.H.T. to bring moneys into account) ought to have been divided, and how the division of capital ought to be made.

Held: in dividing the income, A.M.T.'s share ought first to receive interest at four per cent. per annum on the amount remaining to be equalised, and the rest should be divided equally; and in dividing the capital, A.M.T.'s share should first receive property to the value of £4,000, and an equal distribution should be made of the balance.

Re Poyser (1), [1908] 1 Ch. 828, applied.

Re Hargreaves (2) (1903), 88 L.T. 100, distinguished and explained.

Notes. Considered: *Re Mansel, Smith v. Mansel*, [1929] All E.R. Rep. 189. *Re Wills, Dulverton v. Macleod*, [1939] 2 All E.R. 775. Followed and applied: *Re Hillas-Drake, National Provincial Bank v. Liddell*, [1944] 1 All E.R. 375.

As to hotchpot, see 34 HALSBURY'S LAWS (2nd Edn.) 424 et seq.; and for cases see 44 DIGEST 1238 et seq.

A Cases referred to:

- (1) *Re Poyser, London v. Poyser*, [1908] 1 Ch. 828; 77 L.J.Ch. 482; 99 L.T. 50; 44 Digest 1248, 10768.
- (2) *Re Hargreaves, Hargreaves v. Hargreaves* (1903), 88 L.T. 100, C.A.; 44 Digest 1248, 10767.
- (3) *Re Rees, Rees v. George* (1881), 17 Ch.D. 701; 50 L.J.Ch. 328; 44 L.T. 241; 29 W.R. 301; 44 Digest 1245, 10752.
- (4) *Re Lambert, Middleton v. Moore*, [1897] 2 Ch. 169; sub nom. *Re Lambert, Moore v. Middleton*, 66 L.J.Ch. 624; 76 L.T. 752; 45 W.R. 661; 41 Sol. Jo. 560; 44 Digest 1247, 10763.
- (5) *Re Forster-Brown, Barry v. Forster-Brown*, [1914] 2 Ch. 584; 84 L.J.Ch. 361; 112 L.T. 681; 44 Digest 1249, 10771.
- (6) *Re Craven, Watson v. Craven*, [1914] 1 Ch. 358; 83 L.J.Ch. 403; 109 L.T. 846; 58 Sol. Jo. 138; 44 Digest 1248, 10770.
- (7) *Re Willoughby, Willoughby v. Decies*, [1911] 2 Ch. 581; 80 L.J.Ch. 562; 104 L.T. 907, C.A.; 44 Digest 1245, 10750.
- (8) *Re Gilbert, Gilbert v. Gilbert*, [1908] W.N. 63; 44 Digest 1247, 10764.
- (9) *Re Hart, Hart v. Arnold* (1912), 107 L.T. 757; 44 Digest 1248, 10769.

D Also referred to in argument:

- Re Dallmeyer, Dallmeyer v. Dallmeyer*, [1896] 1 Ch. 372; 65 L.J.Ch. 201; 73 L.T. 671; 40 Sol. Jo. 156; sub nom. *Re Dalmeyer*, 44 W.R. 375, C.A.; 44 Digest 1246, 10753.
- Re Davy, Hollingsworth v. Davey*, [1908] 1 Ch. 61; 77 L.J.Ch. 67; 97 L.T. 654, C.A.; 44 Digest 1246, 10760.
- Re Cooke, Randall v. Cooke*, [1916] 1 Ch. 480; 85 L.J.Ch. 452; 114 L.T. 555; 60 Sol. Jo. 403; 44 Digest 1249, 10772.

Adjourned Summons to determine on what principle income and capital should be apportioned so as to be able to carry out a scheme of division of the unappropriated part of a large estate of a testator who died in 1893. The will was dated Jan. 18, 1892. By it the testator appointed his wife Louisa Tod and his sons John Henry Tod and Alexander Maxwell Tod executors and trustees thereof, and, after giving two pecuniary legacies, he gave to his wife the use of his house at Walmer, called Walmer Lodge, rent free for a year from his death, and on her ceasing to occupy the same he directed that it should form part of his residuary estate. The only other testamentary provision for his wife was that she was to have the use of certain plate and other articles during her life. After some other dispositions of specified properties, the testator devised and bequeathed his residuary real and personal estate to the trustees of the will,

“upon trust at such time or times after my decease as they shall judge expedient to sell the same . . . [And he directed that] the yearly produce, until conversion of my real and personal estate, shall, as from the day of my decease, be considered as the income thereof for the purpose of the trusts and provisions of this my will, and be applied accordingly.”

Then followed a direction that the trustees should hold the money of which the testator died possessed and which should arise from the sales aforesaid (after payment of his debts, funeral and testamentary expenses, and pecuniary legacies) as to each of three sums of £6,000 on trust for each of his married daughters, Anna G. Ogilvie, Eleanor M. Paxton, and Alice E. Christian. These sums he directed to be paid to the trustees for the time being of the same three daughters' marriage settlements, to be held by them respectively on the trusts (subject to a slight variation) of the marriage settlements. Another sum of £6,000 was directed to be held by the will trustees in favour of the testator's unmarried daughter Emily J. L. Tod during her life, and afterwards for her children and issue, and in case of the death of any such four daughters and the failure of her issue attaining a vested interest in the moneys so given, the testator directed that such moneys

should be divided between J. H. Tod, A. M. Tod, and such of the testator's said daughters as should be then living (or should, whether sons or daughters, have died leaving issue who should have attained, or might live to attain, vested interests in the trust moneys bequeathed upon trust for them respectively) in equal shares, except that Alice E. Christian and Emily J. L. Tod were given a general power of appointment of part of their legacies of £6,000 each. Then the will proceeded as follows:

"And I direct that the sum or sums so becoming divisible to my said sons and daughters respectively shall be considered as an addition or additions to the sums hereinbefore or hereinafter given, upon trust for them respectively and be disposed of accordingly. But I declare that this my will is made on the assumption that the residuary real and personal estate disposed of hereby (including the money to the income of which my wife is entitled under the trusts of the settlement executed on our marriage, and the sums of £5,000 and £2,300, or thereabouts, which I have paid on account of my son John Henry Tod, and which sums are to be deducted from the share of my residuary estate hereinafter given in trust for his wife and family) after payment thereof of my debts, funeral and testamentary expenses, and the legacies hereby given (other than legacies to my said wife or any of my said children) will amount to upwards of £60,000. And I direct my said trustees to stand possessed of the residue of my said residuary estate, after payment thereof of the moneys hereinbefore mentioned, as to one-half thereof, upon trust to pay, transfer, or invest the same in the names of my said wife and my said son Alexander Maxwell Tod, to be held by them . . . upon trust to pay the income thereof to Mary Tod, wife of J. H. Tod, for her separate use for life, and after her death for the benefit of J. H. Tod, his wife for the time being, and his children and more remote issue, and, after the decease of J. H. Tod and his wife Mary,"

upon certain trusts in favour of their children. Then the will proceeded:

"And I direct my said first-named trustees to stand possessed of the other moiety of the said residue of my estate, upon trusts,"

subject to raising a sum of £5,000 for A. M. Tod, for investment, and to pay the annual produce thereof to A. M. Tod for life (subject to a forfeiture clause which is immaterial to this report). After A. M. Tod's death the investments of his share were to go as to £3,000 to his wife, Belle, for life, and after her death, as to that sum and the rest of A. M. Tod's share in residue, upon trust for his children. The will also contained the following provisions:

"Provided always, that, if I shall at any time hereafter give to any son or daughter of mine any sum of money exceeding the sum of £1,000 sterling at any one time, any sum or sums of money so advanced shall be considered as a payment by me on account of the sums hereinbefore bequeathed to or in trust for him or her or his or her children, and the amount so given (with interest from the day of the date of such advance) shall be brought into account and deducted from the sum hereinbefore bequeathed to him or her.

"And I direct that all investments to be made in pursuance of my will shall be made [in certain specified securities] with full power to continue any investments I may have at the time of my death for such time as my trustees may think proper.

"And I declare that it shall be lawful for my trustees to postpone the sale of my freehold property for as long as they may think proper, and, so long as any freehold or leasehold property hereinbefore given to them shall remain unsold, to grant leases of such unsold freehold and leasehold property for such term or terms of years, for such purposes, and such rents, and subject to such conditions as my trustees shall think expedient. I direct that the trusts and powers hereinbefore confided to my trustees herein named may be exercised

A by the trustees or trustee for the time being of this my will. And I also declare that the power to appoint new trustees of this my will shall be vested in the surviving or continuing trustees or trustee or in the executors or administrators of the last surviving trustee, and that on the occasion of any appointment of a new trustee or new trustees of this my will it shall be lawful for the person or persons making such appointment at pleasure either to increase
B or diminish the number of trustees; and that it shall be lawful for the person or persons making such appointment to appoint different sets of trustees of the respective moneys or shares hereinbefore bequeathed to or for the benefit of my said sons and daughters, or of the funds respectively representing the same."

C There were two codicils to the will which are not material to this report. The testator died on July 8, 1893, and, his widow having renounced probate, the will and codicils were proved by J. H. Tod and A. M. Tod.

The widow died in December, 1894 and J. H. Tod died in 1904. A. M. Tod died in July, 1914 without having obtained his discharge. Maurice E. Turner was in July, 1904 appointed a trustee of the will and codicils in the place of J. H. Tod, and Emily J. L. Tod's legacy of £6,000 was transferred to separate
D trustees. On June 10, 1912, Henry C. Bradshaw, Arthur B. Brown, and Henry Scott were appointed trustees of the will and codicils, in place of A. M. Tod and in addition to M. E. Turner (except as to Emily J. L. Tod's legacy of £6,000 and another legacy); Henry Scott was appointed a trustee in the place of A. M. Tod, and in addition to M. E. Turner, in respect of the property appropriated to J. H. Tod's share; and H. C. Bradshaw and A. B. Brown were appointed trustees,
E in the places of A. M. Tod and M. E. Turner, in respect of the property appropriated to A. M. Tod's share.

A large part of the testator's estate remained unrealised down to the issuing of the summons mentioned below, and a considerable part of the estate consisted of house property. A number of investments were, from time to time down to
F 1910, appropriated to the two settled shares, the appropriations to A. M. Tod's share having exceeded those to J. H. Tod's share by £3,300, and thereby the amount remaining to be accounted for by J. H. Tod's share was reduced to £4,000.

The income from the unappropriated property had been applied during 1909, 1910, 1911, and 1912 in accordance with the principle laid down in *Re Hargreaves*
G (2) and in 1913 and 1914 it was applied according to the principle laid down in *Re Poyser* (1). It was now desired to have a scheme for division, with the consent of all parties and subject to the approbation of the court as to the infants. This originating summons was accordingly taken out to ask whether the distribution of income in the years 1909–1912, on the principle of *Re Hargreaves* (2), was right, and whether now, in the apportionment of the capital between the two shares,
H the apportionment ought to be on a corresponding principle, or whether, on the other hand, the principle of *Re Poyser* (1) ought to have been applied, and there should have been paid to A. M. Tod's share during the years 1909–1912 interest at four per cent. on the amount remaining to be equalised, with a division of the residue of the income; and in the same way whether, on appropriation of the capital, there ought (as the scheme provided) to be first appropriated to that
I share property of the value of £4,000, which was the amount remaining to be equalised, and then an equal distribution should be made of the balance.

Horace Freeman for the plaintiffs.

R. Roope Reeve for persons in the same interest as the plaintiffs.

Cecil W. Turner for the persons interested in J. H. Tod's share.

Fairfax Luxmoore for other parties.

SARGANT, J.—This case raises the question of the limits of the application of the rule or principle in *Re Hargreaves* (2).

In the present case the will of the testator is a comparatively simple one, and was made on Jan. 18, 1892. He died shortly afterwards, and his wife died on Dec. 25, 1894, and they had several children. His widow appears to have been amply provided for by settlements, and he makes no provision for her by his will, except that he allows her the use of his house at Walmer called Walmer Lodge, and provides that she may also have the use of the plate and so on. The material parts of the will are these: [His LORDSHIP read the facts of the case as set out above, and continued as follows:] He provided for four sums of £6,000 each, one for each of his daughters, and for the settlement of the sum left to the daughter who was unmarried at the date of the will, the other three sums being given to the trustees of the marriage settlements of the three daughters who were then already married. The will is to be construed on the assumption that the testator's estate was of the value of upwards of £60,000. The testator directs the general trustees of his will (who were different persons from the trustees of J. H. Tod's share) to hold the other moiety of the residue on trust, after raising £5,000, in trust for A. M. Tod, and then for his wife and family. There is another material clause which I ought to refer to, although it did not actually take effect, and that is the clause as to bringing into hotchpot sums of over £1,000.

What happened was as follows: A large part of the testator's estate remained unrealised down to the date of the present application, and a considerable part of it consisted of house property at Walmer. A number of investments were, from time to time down to 1910, appropriated to the two settled shares, the appropriations to A. M. Tod's share exceeding those to J. H. Tod's share by £3,300, and thus the amount remaining to be accounted for by J. H. Tod's share has been reduced to £4,000. It is now proposed, with the consent of the various parties interested (as to some who were infants, subject to the approbation of the court), to have a scheme of division of the estate still remaining unappropriated between the two moieties. The income of the unappropriated estate in 1909, 1910, 1911, and 1912 was applied on the principle of *Re Hargreaves* (2), and in 1913 and 1914 the income was distributed on the principle of *Re Poyser* (1).

The question now raised by originating summons taken out by the trustees of A. M. Tod's share relates both to capital and to income—viz., whether the distribution of income during 1909, 1910, 1911, and 1912 on the principle of *Re Hargreaves* (2) was right, and whether now in the apportionment of the capital between the two shares the apportionment ought to be on a corresponding principle, or whether, on the other hand, the principle of *Re Poyser* (1) ought to have been applied and there should have been paid to A. M. Tod's share during the years mentioned interest at four per cent. on the amount remaining to be equalised, with a division of the residue of the income equally; and in the same way whether, on appropriation of the capital, there ought (as the scheme provides) to be first appropriated to that share property of the value of £4,000, which was the amount remaining to be equalised, and then an equal distribution should be made of the balance.

I think that, for the purpose of dealing with this very simple case, I ought to look at the general principles and consider how the law stood before *Re Hargreaves* (2) was decided. As to that, there does not seem to be any doubt at all. Whether for the purpose of making good an advance within the language of the Statute of Distributions, or for the purpose of equalising an advancement made after the date of the will, where the will directed the distribution of the residue in equal shares between children, or, in the third case of a will giving the residue among children, with a special provision that advancements made prior to the date of the will ought to be deducted, or brought into account, or brought into hotchpot, or debited, the universal practice of the court was, I think, that which was stated by JESSEL, M.R., in *Re Rees* (3). There it was held that the advanced children must bring their advances into hotchpot with interest at four per cent. per annum up to the distribution of the estate. The Master of the Rolls was dealing there with a case where distribution was postponed until the

A widow's death, and he held that the sums advanced carried interest as from her death. He stated the practice of the court quite generally, and I do not think that any question as to that practice could possibly have been raised before the decision of *Re Hargreaves* (2). *Re Lambert* (4) is a decision of STIRLING, J., to the same effect, although he only allowed interest at the rate of three per cent.—a rate which has since been corrected to four per cent. Then came *Re Hargreaves* (2), which has been very frequently commented on, and generally distinguished. In my opinion, as I have already stated in *Re Forster-Brown* (5), *Re Hargreaves* (2) was an extremely special case, and one which depended on the particular language employed in the will, and on that language as interpreted by ROMER and COZENS-HARDY, L.J.J. I think the language of COZENS-HARDY, L.J., is the more general in its application, and, therefore, I will read that (88 L.T. at p. 101):

“On the language of this will I cannot doubt that an actual ascertainment of the shares as from the moment of the testator's death was contemplated. The hotchpot clause contains an express provision that the securities that are to be brought into hotchpot are to be ascertained at the average price at the day of his death. It would be very singular indeed if part were to be ascertained in that way and the rest not.”

Both he and ROMER, L.J., clearly thought that there were special provisions in that case for the fractional ascertainment of the shares of the estate at the date of the death as at the then present values of the assets forming part of that estate, which mainly consisted of railway stocks and Stock Exchange securities. Since *Re Hargreaves* (2) WARRINGTON, J., has dealt with more or less similar cases in *Re Poyser* (1) and *Re Craven* (6), and in each case he has distinguished *Re Hargreaves* (2), and clearly indicated his opinion that it was a very special case not affecting the general practice of the court; and certainly I can find in *Re Hargreaves* (2), as reported, absolutely nothing whatever to suggest that it was intended there in any way to question or alter the ordinary practice of the court in an ordinary case of advancement with a direction for bringing that advance into account.

BUCKLEY, L.J., in *Re Willoughby* (7), refers to *Re Hargreaves* (2) as being a decision founded on the particular facts of that case and a very special case. As against that there is a note of a decision of NEVILLE, J., in *Re Gilbert* (8), but that note is not sufficiently full to justify me in drawing any real inference as to the exact provisions of the will or the exact grounds on which the learned judge proceeded. EVE, J., in *Re Hart* (9) seems to have come to the conclusion that the principle of *Re Hargreaves* (2) ought to be applied there, but I think that EVE, J., considered that the scheme of the will there was such as to render the decision in *Re Hargreaves* (2) more applicable than that in *Re Poyser* (1), and apparently those two cases were the only authorities to which he was referred. He was not taken back at all to the question of the general practice of the court antecedent to *Re Hargreaves* (2), and *Re Rees* (3) and *Re Lambert* (4) do not appear to have been cited to him at all. It appears to me that the decision is only valuable, therefore, with reference to the particular will which the learned judge had to construe there, and was not really intended to deal with the general practice of the court. In my judgment, the general practice of the court has not been affected by that case, and, if one considers it on principle, I do not see how a direction that an advance shall be debited against a share or shall be deducted as against a share or shall be brought into hotchpot can, when the advance has been made in money, be properly given effect to except by crediting the unadvanced shares for the purposes of the division with money advanced and distributing the estate on the basis that the money advanced should be first paid to the unadvanced shares, and that then the residue should be distributed equally.

It seems to me that it is a considerable refinement to equalise an advance of money by setting off against it the fractional share of an estate, and that, although

that ought to be done where the language of the will, as interpreted by the Court of Appeal in *Re Hargreaves* (2), specially directs that fractional shares should be so treated, in an ordinary common form case of the kind now before the court the advance of money has to be equalised by making up to the unadvanced share of money a sum of money, and not a fractional proportion. Until *Re Hargreaves* (2) it would have been impossible to raise any question here at all, although, in view of that decision, the question was rightly raised in the present case. I hope that some case of this kind will shortly be taken to the Court of Appeal so that the general doctrine of the court may be settled, either by way of affirming the general practice before *Re Hargreaves* (2) was decided, or by laying down affirmatively that in ordinary cases the principle of that case ought to be followed. I, therefore, hold that the method adopted in 1913 (in accordance with *Re Poyser* (1)) was the correct method.

Solicitors: Collyer-Bristow, Curtis, Booth, Birks & Langley; E. F. Turner & Sons; Oldfields.

[Reported by L. MORGAN MAY, Esq., Barrister-at-Law.]

Re WILSON. Ex Parte JONES

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Phillimore, L.J., and Sargant, J.), April 14, 17, 1916]

[Reported 85 L.J.K.B. 1408; 114 L.T. 969; [1916] H.B.R. 70]

Bankruptcy—Receiving order—Jurisdiction to make—Deed of arrangement previously executed—Assent by petitioning creditor—Deed void as not satisfying statutory requirements—Deeds of Arrangement Act, 1914 (4 & 5 Geo. 5, c. 47), s. 5 (1).

Where a deed of arrangement is void because the affidavit required by s. 5 (1) of the Deeds of Arrangement Act, 1914, to be made by the debtor stating the total estimated amount of property and liabilities included under the deed, the total amount of the composition (if any) payable thereunder, and the names and addresses of the creditors was made by an attorney on behalf of the debtor instead of by the debtor personally, a creditor who assented to the deed is not disentitled from presenting a petition in bankruptcy against the debtor and obtaining a receiving order, notwithstanding the circumstances of the case, PHILLIMORE, L.J., dissentiente, not being such as would justify the court, under s. 7 (3) of the Bankruptcy Act, 1883 [now s. 5 (3) of Bankruptcy Act, 1914 (2 HALSBURY'S STATUTES (2nd Edn.)) 321] in holding that for sufficient cause no receiving order ought to be made.

Notes. Referred: *Huddersfield Fine Worsteds v. Todd*, [1925] All E.R. Rep. 475.

As to receiving orders and deeds of arrangement, see 2 HALSBURY'S LAWS (3rd Edn.) 313 et seq., 608 et seq., and for cases see 4 DIGEST (Repl.) 169 et seq., 5 DIGEST (Repl.) 1134 et seq.

Cases referred to:

- (1) *Re Wilson*, [1916] 1 K.B. 382; 85 L.J.K.B. 329; 114 L.T. 32; 32 L.T.R. 86; 60 Sol. Jo. 90; [1916] H.B.R. 17, C.A.; 5 Digest (Repl.) 1135, 9166.
- (2) *Re Sedgwick, Ex parte McMurdo* (1888), 60 L.T. 9; 37 W.R. 72; 5 T.L.R. 4; sub nom. *Re Sedgwick, Ex parte Sedgwick*, 5 Morr. 262, C.A.; 4 Digest (Repl.) 110, 481.

Also referred to in argument:

Ponsford, Baker & Co. v. Union of London and Smith's Bank, Ltd. (1906), 94 L.T. 812; 22 T.L.R. 581; reversed, [1906] 2 Ch. 444; 75 L.J.Ch. 724; 95 L.T. 333; 22 T.L.T. 812; 13 Mans. 321; 5 Digest (Repl.) 690, 6059.
Re Bagley, [1911] 1 K.B. 317; 80 L.J.K.B. 168; 103 L.T. 470; 55 Sol. Jo. 48; 18 Mans. 1, C.A.; 5 Digest (Repl.) 1154, 9324.

Appeal by the debtor from an order of a Divisional Court (HORRIDGE, J., and ROWLATT, J.) sitting in bankruptcy.

McCall, K.C., and *Tindale Davis* for the debtor.

E. W. Hansell and *Graham Milward* for the petitioning creditor.

LORD COZENS-HARDY, M.R.—The bankrupt, Major Wilson, was a maltster and farmer, carrying on an old-established business which owned a good many assets. In the early part of 1915 he was serving his country abroad as an officer in the army. There were at least two writs which might be followed by executions out against him. A judgment was obtained, and in one of those actions it is said no appearance was entered for the defendant because the writ was handed over to the bank manager, he taking no notice of it. However that may be, judgment was obtained against Major Wilson by a Mr. Jones. Matters were then obviously getting rather serious. Major Wilson had executed a power of attorney in favour of his sister enabling her to carry on his business to a certain extent. Then there was correspondence by the family solicitor, who called a meeting of creditors, the result of which was that the solicitor wrote a letter to Major Wilson advising him that the best thing that could be done would be to execute a deed of arrangement under the Deeds of Arrangement Act, 1914, and that that could not be done without a fresh power of attorney, because the power of attorney which Major Wilson's sister then held did not go far enough to authorise execution by her of such a deed. The notice in the letter sent to Major Wilson said:

“ You had better do this. If you do not execute it some one or more of your creditors who have obtained judgment may take proceedings against you in bankruptcy.”

A power of attorney was sent to Major Wilson abroad—a power of attorney which authorised the sister not merely to execute a deed of arrangement on his behalf, but also to make the affidavit required by the statute. The deed was executed pursuant to that power of attorney, and an affidavit was made by the sister as was required to be done under the Act by the debtor himself. The trustee appointed by the deed proceeded to act under it. He took possession of Major Wilson's property. He sold part of it. He did this so far as a great part of it is concerned with the full approval of Major Wilson, who was over here for a short time in May, 1915, and had conversations with the trustee, approved of what he had done, and congratulated him on the price he had obtained, and, as appears from the report in the LAW REPORTS of some previous proceedings which took place, *Re Wilson* (1) ([1916] 1 K.B. at p. 384),

“ he took no exception whatever to the deed, and he asked, if possible, that no sale of his furniture should take place until he was able to return to this country. The furniture was not sold. The trustee explained to the debtor that he was about to offer all the public houses comprised in the estate for sale by auction, and that he had already instructed an auctioneer to act in the matter. The debtor did not object, and inquired what funds were in hand, and suggested that the trustee should pay a substantial dividend to the creditors. On May 12, 1915, the trustee wrote to the debtor giving him particulars of what was going on as regarded the estate, and on May 29 he wrote and informed him that the licensed properties would be offered at the Star and Garter on Wednesday, June 22.”

The debtor said that the trustee told him "that the farm valuations brought in something over £5,000. 'This I consider good and far above the estimate shown in my returns.'" Then follows this (*ibid* at p. 385):

"In October, 1915 [no dividend having been paid under the deed meantime]—the debtor applied to the county court judge for a declaration that the deed of arrangement was void upon the ground that it did not comply with the provisions of the Deeds of Arrangement Act, 1914, first, because under the provisions of ss. 1 to 5 of the Act the deed must be executed by the debtor personally, and the affidavit in support must be sworn by the debtor personally; secondly, because the power of attorney in itself was a deed of arrangement under s. 1 (2) (e), and, not being registered, was void; and, thirdly, because the assent of the statutory majority of the creditors to the deed required by s. 3 of the Act had not been obtained."

That application came before the county court judge and subsequently before the Divisional Court, and the Divisional Court there held on that application that the Court of Bankruptcy could declare the deed void. That decision came before this court by way of a preliminary objection, and we held that there was no jurisdiction in the Court of Bankruptcy, acting under its jurisdiction in bankruptcy, to declare the deed void, and was a matter intrusted to the High Court. We did not express any opinion on the question of the validity of the deed of arrangement in that case, because, as we had no jurisdiction to deal with the matter at all, it was not right for us to go into the merits. I myself felt no doubt whatever at that time that the deed could not be supported under the Deeds of Arrangement Act, 1914. I will express no opinion whether the deed was void because it was executed by the attorney under a power. I think that is probably not a good objection to take. But it was plainly void because there was no affidavit by the debtor.

The order made by the county court judge sitting in bankruptcy jurisdiction having been set aside, the major commenced two actions, one against the trustee to have the deed declared void, claiming damages and relief against him, and the second action against the bank, presumably for something done by the bank under the terms of the deed. That was in November, 1915. It was followed by a meeting of creditors, at which Mr. Jones presided. It is said that he was also a member of the committee of inspection under the deed of March, 1915. At that meeting the trustee explained the position and the creditors who assented to the deed and signed the resolution authorised the defence of the action and gave a guarantee in very wide form that the signatories would indemnify the trustee for costs, and also provide for his remuneration under the deed. Mr. Jones declined to give his consent to this. Mr. Jones then served a bankruptcy notice, and there arises the question whether the bankruptcy notice following the act of bankruptcy had been complied with. He went to the county court and the registrar made a receiving order. The case then came before the Divisional Court who affirmed the order.

The matter is confused and difficult by reason, no doubt, of the strange conduct of Major Wilson, the bankrupt. He takes up this position: "I executed this deed because you requested me to do it." What did they request him to do? To execute a valid deed? To say that they requested him to execute a deed which was a nullity is, to my mind, quite absurd. The deed that he executed he now says is a nullity, and never has been anything else but a nullity. It is said that whether the deed is good or bad is a matter which ought to be tried, and tried only in the King's Bench action. But why? The matter is ripe for decision now. There is an admitted act of bankruptcy, because of the notice requiring time and so forth, and the only answer to this part of the case is the deed which was executed. The court must, in a case of this kind when a deed of arrangement is set up in answer to a bankruptcy petition and the validity of the deed is challenged, decide at the earliest opportunity whether there is any valid deed, and

if there is any reason why there should not be an adjudication. It is said that there is here a sort of estoppel. It is quite beyond me to see how that can arise here, how a person who has himself denied the validity of the deed can say, "You are estopped as against me from disputing that the deed is valid." The matter seems to have been put so clearly in ROWLATT, J.'s judgment, that I should like to refer to what he says (85 L.J.K.B. at pp. 1412, 1413):

"The first point made against this petition in bankruptcy is that there is a deed of arrangement assented to by the petitioning creditor. The petitioning creditor says to that: 'There is an apparent deed, but it is a nullity.' Now, that raises an issue which it seems to me the court is bound to try. There is no question about it having jurisdiction to try it, because it does not arise under the section of the Deeds of Arrangement Act, 1914, which we had to construe on a former occasion; it arises in the ordinary course of bankruptcy where a deed is set up in answer to a step taken in bankruptcy, and whether it is a good deed or not is a question which has to be tried, and I think it has to be tried now. It is not necessary to say that some other court is going to try the question later on; it arises now, and this creditor puts it forward, and it does not seem to me that it would be just to postpone the trial of it by adjournment, because matters may not remain in a condition as favourable to the creditors of this estate if things drift on . . . So it has to be decided now; but, looking at the deed and the affidavit, it is apparent that there is a fatal blot upon the deed, because the affidavit did not conform to the statute."

I am clearly of opinion that that is perfectly sound law. The deed of arrangement cannot be supported as a valid deed, and not being a valid deed it cannot be an answer to the right of the petitioning creditor to have an adjudication. Nor is it a sufficient cause why adjudication in bankruptcy should not be allowed. ROWLATT, J., then deals shortly with the question of estoppel, and says (*ibid.* at p. 1413):

"Then lastly it was also said it was an abuse of the process of the court. That I am bound to say, I do not follow. What really is it? The debtor signed a deed of arrangement with which people were apparently fairly content, but then he came and said: 'It is no good deed at all.' Then one of the creditors said: 'You say the deed of arrangement is not good. I have a debt; if you do not pay it, it is an act of bankruptcy.' It seems to me if there is no deed of arrangement bankruptcy is a remedy which is very applicable to the present state of things, and I cannot see how possibly, if there is no other objection in its way, it can be said to be an abuse of the process of the court."

In my opinion, this is a case in which we ought to say that the county court and the Divisional Court were right, a case in which, although Major Wilson has succeeded for nearly a year and a half in keeping his creditors out of their money, an end ought to be made of that, and a receiving order granted. The trustee in the bankruptcy will be enabled to recover from the trustee under the deed the money which he has in his hands, and which he has been prevented from distributing by the act of the debtor himself. The appeal fails.

PHILLIMORE, L.J.—I agree with the Master of the Rolls as to the point taken under the Courts (Emergency Powers) Act, 1914. The affidavit not having been made by the debtor personally does not comply with the requirements of the Deeds of Arrangement Act, 1914. That being so, the petitioning creditor is not bound by his release, which is conditional upon its being a good deed, and he has got a good judgment debt, on which he issued properly a bankruptcy notice. All that way I go with the petitioning creditor.

Then I am bound, and there are many decisions in the Bankruptcy Court and the Court of Appeal which have made it my duty, to consider s. 7 (3) of the

Bankruptcy Act, 1883, reproduced by s. 5 (3) of the Bankruptcy Act, 1914. That sub-section provides as follows:

“If the court is not satisfied with the proof of the petitioning creditor’s debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the court may dismiss the petition.”

I have got to consider whether there is sufficient cause that no order ought to be made. In *Re Sedgwick, Ex parte Sedgwick* (2) the court thought that there was not sufficient cause. But they laid down fairly clearly where there might be sufficient cause—as I understand it, where the action of the petitioning creditor makes it in a business sense impossible or impracticable. I should like to use the exact words of the Master of the Rolls (5 Mor. at p. 264): “He must have made it so difficult that as a matter of business he could not pay.”

In the present case there is a debt for £1,400 odd, and there is a sum outstanding in circumstances I am going to deal with in a moment belonging to Major Wilson if the deed is bad of between £8,000 and £9,000. If the creditor has anything to do with the money being removed from the major’s control, it may very well be that as a matter of business the creditor has made it so difficult that as a matter of business the major cannot pay. To be quite certain about that might require some careful investigation of all the acts of the major. That discussion has not been suggested, and I assume for this purpose that which I think probably almost certain, that the outstanding fact is this £8,000 or £9,000 being outside the major’s control does make him in a business sense unable to pay these creditors. That leads me to consider how it comes that this sum of money is out of the major’s control, and whether or not the creditor has enough to do with it to make it improper that he should present a bankruptcy petition.

There is much in the major’s conduct which one cannot entirely appreciate or understand. But, on the other hand, if we are to go into outside matters and not matters of dry law, anybody who has been worse served than Major Wilson, not by the creditors but by his own friends and business people, if his statement, uncontradicted, is correct, I cannot well imagine. As he was carrying on business under the name of Wilson & Sons writs could be served at his place of business, and not on him personally, he being abroad on His Majesty’s service. He cannot protect himself, except by getting some faithful friend or agent, against the effect of writs served at his place of business. He put the matter into the hands of a bank manager, who neither entered appearance to the writs nor, as the major swore, let him know about them, or even told him that judgment had been signed under these writs. He was advised by a solicitor, who gave him advice to do that which, under the Deeds of Arrangement Act, 1914, anybody could see was a useless thing to do. However, that is perhaps by the way. On these writs having been issued, or judgment having been obtained, the creditors were convened at the request, it is said, of the solicitor of the debtor, and as the debtor is consulted about it, I presume that in some way he had heard that he was in trouble before the solicitor did convene that meeting. At that meeting the petitioner was present, the solicitor was in the chair, and the only record we have of the meeting is the communication by the major’s solicitor to the major which seems to have been accepted as correct:

“At the adjourned meeting of your creditors held this week it was unanimously decided that you should be asked to execute a deed of assignment for the benefit of your creditors, and if this were not done in seven days some of your creditors who have obtained judgment would file a petition in bankruptcy.”

I take that letter as meaning what it says: “You were unanimously”—that is, by this creditor among others—“asked to execute a deed of assignment,” and

the request was turned into a very imperative demand, because the alternative was: "If you do not, some one of them will file a petition in bankruptcy against you."

I pause for a moment to consider whether the creditors had not a considerable interest in threatening Major Wilson and getting him to sign this deed of assignment. In my view, if he had not signed this deed of assignment they would have had considerable difficulty in getting anything like prompt service of a bankruptcy petition. It is quite true that, under r. 156 of the Bankruptcy Rules, order for service out of the jurisdiction can be made against a debtor who is usually resident in England or is an English subject and is abroad, but leave has to be obtained, and I cannot conceive any court giving leave in these circumstances without a great many conditions—to give a debtor in that position an opportunity to deal with the matter, or a provision that the petition should not take effect until he had leave to enable him to come back to this country, or something of the kind. I can quite understand the creditors being extremely anxious, so to speak, to frighten Major Wilson into executing a deed of assignment. He executed a deed of assignment, which was good as a deed, but bad ultimately, because within the seven days no proper affidavit was obtained. It is not the fault of the creditor; it was the fault of his solicitor that he must bear the brunt of the circumstance that a proper affidavit was not obtained. The trustee proceeded to act under the deed of assignment, with the sanction of and at the request of this self-same creditor, who was one of the committee of inspection, and he realised a great portion of the major's assets, and has between £8,000 and £9,000 of the major's money in his hands. The major, after no doubt—which is against him—approving what had been done, finally elected to take that advantage which the courts allow a man to take of the fact that the deed was a nullity. He took proceedings and they were resisted by the trustee. The proceedings were wrongly taken in bankruptcy, and they failed. He then brought an action against the trustee to have the deed declared void in order that he might recover back the money and get damages for the trespass and mismanagement which there might have been in regard to the sale or anything else under the deed. A meeting of the creditors was held. The petitioning creditor was in the chair, and without saying that he was not committing himself, he without protest put the resolution, which was agreed to by all or the majority of the creditors, that the trustee should be invited to defend the action by Major Wilson and to support the deed. Without protest or saying he dissented in any way, he put the resolution. To my mind he was one of those who supported the trustee, or requested the trustee to defend the action. What was the result? A trustee under a deed, which is a bad deed, is holding a sum of money. I do not want again to decide more against the trustee than I can help. But it seems to me, as regards the claim to have the money back, estoppel is no answer at all. Estoppel, leave and licence, ratification, and all the rest, are excellent defences to any claim for damages. But if A. B. has got C. D.'s property under a void document, and he has received it to the use of C. D., he must hand it back to C. D. upon demand.

It, therefore, seems to me that as regards that part of the case the trustee will have to hand this money back to Major Wilson, or would have to do so if Major Wilson is not meanwhile made bankrupt. If Major Wilson had got that money now which by the action of the trustee in defending the deed he is prevented from getting he probably would have been able to pay this debt. At least there is sufficient probability to warrant our taking that view. Why has not Major Wilson got that money now? Why was that money in the trustee, and why does it remain in the trustee? It was in the trustee because Major Wilson was requested by the creditor, among others, to hand it to the trustee, to assign to the trustee the whole of his property. He said he was not requested to assign it by a valid instrument. I do not care about that. He was requested to assign it, and he has parted with it. He may be able to get it back because the instrument might turn out to be invalid; but by virtue of the instrument the trustee has taken possession,

and has realised, and keeps it at the request of the petitioning creditor. Major Wilson gave the custody in fact to the trustee of his property, and the trustee, having realised the greater portion of that property at the request of the petitioning creditor, among others, declines to give it to Major Wilson. In those circumstances it does not seem to me that we ought not to make any order under s. 7 (3) of the Bankruptcy Act, 1883, in favour of a creditor who induced his debtor to put his property in the hands of a third person to keep that property although he has no right to keep it. In my opinion, this appeal, on that ground, should succeed.

SARGANT, J.—I am of opinion, with the Master of the Rolls, that the appeal should be dismissed.

It seems to me perfectly clear that an affidavit sworn by an attorney is not an affidavit by the debtor so as to comply with the requirements of the Deeds of Arrangement Act, 1914. So far, all the members of this court, and of the Divisional Court, and the judge of the county court have been of the same opinion. The main defence that has been put forward, and the defence which in the opinion of PHILLIMORE, L.J., should succeed, is that the present position of difficulty of the debtor has been brought about by the creditor, and, that being so, the creditor is debarred from attempting to enforce his debt in the ordinary way by means of a bankruptcy petition, because he has involved the debtor in having this money tied up in the hands of a trustee which might otherwise be applicable and sufficient for the payment of the creditor's debts. It seems to me that with regard to that defence two periods have to be considered—first, the execution of the deed of assignment, and, secondly, what has happened since the debtor returned home. As regards the execution of the deed of assignment, I can see no reason at all for considering that the creditors were attempting to put any undue pressure at all upon the debtor. It seems to me that they were acting in a friendly manner and, recognising that his position was such that he could not meet his engagements, were prepared to give him the less stringent alternative of executing a deed of assignment. But, of course, what they desired to have as an alternative to bankruptcy was an administration of the estate under an effective deed of assignment. When the debtor assented to that course he was left by his creditors at liberty to employ such solicitor as he might think fit, and I cannot think that in anything that was done with regard to the execution of that deed the solicitors were acting in any way on behalf of the creditors or otherwise than in the ordinary way as solicitors for the debtor. In that state of things they allowed the deed to be executed by the attorney, which I think was good, but they also allowed the affidavit in support that was to be registered with the deed to be sworn by the attorney, and that was bad.

That was a hidden defect which did not come to light for some considerable time afterwards. It seems to me that that defect was in no sense whatever due to any action on the part of the petitioning creditor, or any other of the creditors. That being so, one has to consider what has taken place since the return of the debtor which has had the effect of keeping the fund in the hands of the trustee, and, therefore, preventing it being applied in payment of the creditors. It seems that that was due primarily and principally, at any rate, to the action of the debtor himself taking steps to repudiate this deed on the ground of this hidden defect. For that purpose the original proceedings were brought on which he succeeded until the Court of Appeal decided that relief could not be given in that particular form of proceeding, and for the same purpose he has brought an action which is still pending, in which he has obtained an undertaking from the trustee which is the equivalent of an injunction that the trustee will not part with the property or the proceeds of sale of the property, pending the hearing of the action. That in itself has necessarily tied up the property and prevented its application in payment of the debtor's debts. What has the creditor done that can compare with this action on the part of the debtor? The action having been

A instituted by the debtor against the trustee, which involved not merely the
declaring of this deed void, but also, I think, as the more substantial and effective
part of the action so far as the trustee was concerned, which involved personal
charges against the trustee, a meeting of the creditors was called by the petition-
ing creditor, and at that meeting a resolution was passed to support the trustee
B in his action. I have no doubt whatever that to a large extent that was for the
purpose of relieving the trustee from the personal liability which he had incurred
for the ends of the creditors. A form of guarantee was settled. That form of
guarantee was not in fact signed by the petitioning creditor, but was signed by
many of the creditors, and the action has since been defended by the trustee.
C That the petitioning creditor ever in fact authorised the trustee to defend the
action in the particular way in which he did defend it I can find no ground for
thinking. No doubt, there is a plea by the trustee that the deed is a good and
effective deed, although there can be very little hope, I should think, of his
succeeding on that particular plea. I cannot see that that which has been done
in this matter by the petitioning creditor has added substantially or at all to the
embarrassment of the trustee, or has really been the *causa causans* by virtue
of which the fund has been retained in his hands and the creditors have escaped
being paid.

D It is said that the hand of the court ought not to fall at present, or it ought
to be stayed on the general view of the case, and particularly in view of the fact
that this action is still pending, and that that is the appropriate tribunal for
determining the question. I feel, however, great doubt myself that if and when
this action comes to hearing that this particular question will ever necessarily
E have to be decided at all.

It seems to me that the defences of leave and licence and so on are such that
it might very well be that, independently altogether of any decision on this
particular question, the court might acquit the trustee. If the trustee succeeded
on that ground it would be necessary to decide the particular point before the
court now.

F But, as regards this particular point, it seems to me that this court at the
present moment is hardly the appropriate tribunal, or that it is the appropriate
moment to decide this question, which affects the whole body of creditors and
determines the status of the debtor. The question is ripe for decision now, and
I agree entirely with the view on that point expressed by ROWLATT, J.

G I must say that, looking at the matter generally, any small inconsistency there
may be, any affirmation or disaffirmation on the part of the petitioning creditor
here is entirely outweighed by the vague and obvious inconsistency in the
attitude of the debtor throughout this matter, an attitude which in fact resulted
in the creditors being unpaid for the space of a year.

H I also feel that, unless this hidden defect had been brought to light at the
instance of the debtor, it is very likely indeed that by the present time a large
distribution on account would have been made among the creditors by the
trustee under the deed. In any case, the whole circumstances of the case do not
appear to me to be such as would justify the court, under the provisions of s. 5 (3)
of the Bankruptcy Act, 1914, in depriving the creditor of the right to which
prima facie he is entitled *ex debito iustitiæ* of having his bankruptcy notice
given effect to in the manner appointed by the Act.

Appeal dismissed.

Solicitors: *Field, Roscoe & Co.*, for *Ansell & Sherwin*, Birmingham; *E. Flux*,
Leadbitter & Neighbour, for *Sprott & Morris*, Shrewsbury.

[*Reported by E. A. SCRATCHLEY, ESQ., Barrister-at-Law.*]

JAMES MORRISON & CO., LTD. v. SHAW, SAVILL AND
ALBION CO., LTD.

[COURT OF APPEAL (Swinfen Eady, Phillimore and Bankes, L.J.J.), July 21, 24, 28, 1916]

[Reported [1916] 2 K.B. 783; 86 L.J.K.B. 97; 115 L.T. 508; 32 T.L.R. 712; 61 Sol. Jo. 9; 13 Asp. M.L.C. 504; 22 Com. Cas. 81]

Shipping—Carriage by sea—Deviation—Matters to be considered—Deviation to port off customary course—Sinking of ship by King's enemies—Liability of owners for loss of cargo.

When considering the true construction and effect of bills of lading it is important to everyone concerned, whether shipper, shipowner, or insurer, that the route by which the ship and goods are to pass should be determined so that the risks may be estimated on that basis. Where parties have agreed on a voyage and have specified that voyage in the bill of lading, the definition of the voyage must, as a matter of business, cut down the general words of the bill of lading to what is fairly applicable to the voyage which has been agreed on and defined. It is impossible to lay down any hard and fast rule by which it may be determined whether any particular port is an "intermediate port" within the meaning of a bill of lading. In construing the document all the surrounding circumstances must be taken into consideration—the size and class of ship, the nature of the voyage, the usual and customary course, the natural or usual ports of call, the nature and position of the port in question. It is a question of fact in each case.

Bills of lading under which shipowners contracted to carry a cargo from New Zealand to London in their steamship the *T.* provided for "direct service between New Zealand and London," and contained the following clause: "With liberty on the way to London to call and stay at any intermediate port or ports to discharge or take on board passengers, cargo, coal, or other supplies . . ." An exception clause excepted the "King's enemies." The vessel kept a direct course from New Zealand to London until she reached the Casquets, when she turned and made for Havre, which was not a port usually and customarily visited by the shipowners' vessels on a voyage from New Zealand to London, to call at which, it being sixty-eight miles from the nearest point of the direct route to London, involved the ship going off that course 107 miles. Before reaching Havre she was sunk by a German submarine. The plaintiffs, indorsees and holders of the bills of lading, brought an action against the defendants claiming damages for the loss of the cargo.

Held: (i) in the circumstances Havre was not an intermediate port on the voyage of the *T.* from New Zealand to London, and in making for that port the *T.* was deviating from her voyage, and, therefore, the defendants were in breach of the contract contained in the bills of lading and could not avail themselves of the exception therein of the "King's enemies"; (ii) in deviating the defendants were in breach of their contract as carriers, and they were unable to show that the loss of the cargo must have occurred in any event and whether they had deviated or not, and, therefore, under the common law, they could not rely on the exception from their liability of the King's enemies; for these reasons the plaintiffs were entitled to succeed.

Decision of BAILHACHE, J., [1916] 1 K.B. 747, affirmed.

Notes. Followed: *Shaw & Co. v. Symmons & Sons*, [1917] 1 K.B. 799. Considered: *Frenkel v. McAndrews & Co., Ltd.*, [1929] All E.R. Rep. 260; *Hain Steamship Co. v. Tate and Lyle, Ltd.*, [1936] 2 All E.R. 597. Referred: *Smith v. R.* (1917), 86 L.J.K.B. 1147; *The Cap Palos*, [1921] All E.R. Rep. 249; *The*

- A *Oscar II, The Bernisze, The Elve*, [1921] P. 174; *United States Shipping Board v. Bunge y Born Society* (1924), 41 T.L.R. 73; *Buerger v. Cunard Steamship Co.*, [1925] 2 K.B. 646; *Akties Steam v. Arcos, Ltd.*, *Akties Bruusgaard v. Arcos, Ltd.* (1933), 39 Com. Cas. 158; *A/S Rendal v. Arcos, Ltd.*, [1937] 3 All E.R. 577; *Reardon Smith Lines, Ltd. v. Black Sea and Baltic General Insurance Co., The Indian City*, [1939] 3 All E.R. 444; *Vsesojuznoje Objediheni Soufracht of Moscow v. Temple Steamship Co.* (1945), 173 L.T. 373.

As to deviation by a carrier, see 4 HALSBURY'S LAWS (3rd Edn.) 139-142 and *ibid.*, 2nd Edn., vol. 30, pp. 293-298. For cases see 29 DIGEST 145 et seq., and 41 DIGEST 483 et seq.

Cases referred to:

- C (1) *Leduc & Co. v. Ward* (1888), 20 Q.B.D. 475; 57 L.J.Q.B. 379; 58 L.T. 908; 36 W.R. 537; 4 T.L.R. 313, C.A.; 41 Digest 485, 3172.
- (2) *Margetson v. Glynn*, [1892] 1 Q.B. 337; 61 L.J.Q.B. 186; 66 L.T. 142; 8 T.L.R. 244; 7 Asp. M.L.C. 148, C.A., affirmed sub nom. *Glynn v. Margetson & Co.*, [1893] A.C. 351; 62 L.J.Q.B. 466; 69 L.T. 1; 9 T.L.R. 437; 7 Asp. M.L.C. 366; 1 R. 193, H.L.; 41 Digest 311, 1715.
- D (3) *Joseph Thorley, Ltd. v. Orchis Steamship Co., Ltd.*, [1907] 1 K.B. 660; 76 L.J.K.B. 595; 96 L.T. 488; 23 T.L.R. 338; 51 Sol. Jo. 289; 10 Asp. M.L.C. 431; 12 Com. Cas. 51, 251, C.A.; 41 Digest 488, 3185.
- (4) *Internationale Guano-en Superphosphaatwerken v. Robert Macandrew & Co.*, [1909] 2 K.B. 360; 78 L.J. K.B. 691; 100 L.T. 850; 25 T.L.R. 529; 53 Sol. Jo. 504; 11 Asp. M.L.C. 271; 14 Com. Bas. 194; 41 Digest 489, 3193.
- E (5) *Davis v. Garrett* (1830), 6 Bing. 716; L. & Welsb. 276; 4 Moo. & P. 540; 8 L.J.O.S.C.P. 253; 130 E.R. 1456; 41 Digest 488, 3188.
- (6) *Parker v. James* (1814), 4 Camp. 112; 171 E.R. 37, N.P.; 41 Digest 555, 3814.
- (7) *Sleat v. Fagg* (1822), 5 B. & Ald. 342; 106 E.R. 1216; 41 Digest 44, 266.
- (8) *Lilley v. Doubleday* (1881), 7 Q.B.D. 510; 51 L.J.Q.B. 310; 44 L.T. 814; 46 J.P. 708; 3 Digest (Repl.) 82, 183.
- F (9) *Evans, Sons & Co. v. Cunard Steamship Co., Ltd.*, (1902), 18 T.L.R. 374; 41 Digest 486, 3175.

Also referred to in argument:

- White v. Oranada Steamship Co., Ltd.* (1896), 13 T.L.R. 1, C.A.; 41 Digest 486, 3174.
- G *The Dunbeth*, [1897] P. 133; 66 L.J.P. 66; 76 L.T. 658; 8 Asp. M.L.C. 284; 41 Digest 489, 3191.
- Balian & Sons v. Joly, Victoria, & Co., Ltd.* (1890), 6 T.L.R. 345, C.A.; 41 Digest 488, 3189.

Appeal by the defendants from a decision of BAILHACHE, J., in an action in which the plaintiffs, consignees and owners of 158 bales of wool shipped from Wellington, New Zealand, in the steamship *Tokomaru*, owned by the defendants, the Shaw, Savill, and Albion Co., Ltd., claimed from the defendants £4,013 agreed damages for loss of the cargo.

The goods were shipped under bills of lading dated Nov. 19, 1914, and headed: "Direct service between New Zealand and London." The bills of lading gave the shipowners extensive liberty to load at any port in New Zealand, and contained these clauses:

"1. . . . and bound (subject to the beforementioned liberties) on finally leaving New Zealand for London and with liberty on the way to London to call and stay at any intermediate port or ports to discharge or take on board passengers, cargo, coal, or other supplies, with permission, if desired, for the vessel to call at Rio de Janeiro and/or Montevideo and/or La Patta. . . . 3. The owners are to be at liberty to carry the said goods to their port of destination by the above or other steamer or steamers, ship or ships, either belonging

to themselves, or to other persons proceeding by any route, and whether directly or indirectly to such port, and in so doing to carry the goods beyond their port of destination, and to tranship or load and store goods either on shore or afloat and reship and forward the same at the owner's expense, but at merchant's risk."

The exceptions clause included "act of God" and the "King's enemies."

Sir Robert Finlay, K.C., Maurice Hill, K.C., and W. N. Raeburn for the defendants.

F. D. MacKinnon, K.C., and R. A. Wright for the plaintiffs.

Cur. adv. vult.

July 28, 1916. The following judgments were read.

SWINFEN EADY, L.J.—The plaintiffs are holders for value of two bills of lading for a quantity of wool shipped at Napier, New Zealand, for London by the defendants' steamship *Tokomaru*. This ship was torpedoed on Jan. 30, 1915, by a German submarine when between seven and eight miles from Havre, and ship and cargo were an actual total loss. The plaintiffs sue for breach of the contract evidenced by the bill of lading. The defendants, while admitting the total loss of the goods, dispute their liability. They say that the loss occurred by an excepted peril, the King's enemies. The plaintiffs contend that the defendants are not entitled to rely upon the exception contained in the bill of lading, as they say the *Tokomaru* was deviating from the contract voyage by leaving the direct course for London and proceeding to Havre when the disaster occurred, and that the liberties contained in the bill of lading did not permit that to be done.

This raises the first question—namely, whether the *Tokomaru* was deviating in proceeding towards Havre. If not deviating, there is an end of the matter, and the shipowners are protected from liability by the bill of lading. If, however, the *Tokomaru* was deviating, the further question arises as to the liability of the defendants as carriers under the circumstances. The defendants contend that they incurred no greater liability than that of common carriers, and are, therefore, not liable for acts of the King's enemies. The bills of lading are dated in November, 1914, and are in the following form: [His LORDSHIP read the words in the margin of the bills of lading, "Direct service between New Zealand and London," and the clause set out above.] Clause 3 of the bills of lading was referred to, but seems to me to have no bearing on the present dispute. There was not any transhipment. The ordinary route for steamers of this line is, outward bound, via Cape of Good Hope to New Zealand; homeward bound, from New Zealand via Cape Horn and west of the Falkland Islands to Montevideo, then to Teneriffe or Madeira, and thence direct to London. Owing to certain instructions given by reason of the war the *Tokomaru* on her last voyage passed east of the Falkland Islands, and when off Pernambuco passed considerably to the east of her ordinary course. But nothing turns in this case upon any such variation, upon Admiralty instructions given by reason of the war. This ship was a cargo boat. Passenger ships of the same line going to and from New Zealand frequently call at Plymouth, but not so cargo boats. So far as appears from the evidence, this was the first time that a vessel of this line coming from New Zealand and bound for London had been instructed to call at Havre. The intended call was brought about in this way. A special arrangement was made to carry some frozen meat to France. At one time it was contemplated calling at Bordeaux to discharge this cargo, and in some of the bills of lading for part cargo of this ship liberty to call at Bordeaux was inserted, but on reaching Teneriffe the captain was instructed by the owners to proceed to Havre and discharge the meat cargo there. On leaving Teneriffe the course, whether for Havre or to London direct, is the same to a point about ten miles off the Casquets. There the routes diverge. From the point of divergence it is 107 miles to Havre and 118 miles Havre to Dover. Thus from the point of divergence to Dover via Havre it is 225

A miles; from the point of divergence to Dover direct it is 171 miles, so by proceeding to Havre the length of the voyage would be increased by fifty-four miles. From Havre to the nearest point of the ship's ordinary route to Dover is a distance of sixty-eight miles. The direct service between New Zealand and London by the Shaw, Savill, and Albion Line has been long established and is well known, and the boats always follow substantially the same route outwards
B or homewards, as the case may be.

The first question is: Can it be said that the ship had liberty to go to Havre to discharge cargo by reason of the

“liberty on the way to London to call and stay at any immediate port or ports to discharge or take on board passengers, cargo, coal, or other supplies?”

C It must be borne in mind when considering the true construction and effect of bills of lading that it is important to everyone concerned in the carriage of goods by sea—whether shipper, shipowner, or insurer—that the route by which the ship and goods are to pass should be determined so that the risks may be estimated on that basis. LORD ESHER said in *Leduc & Co. v. Ward* (1), (20 Q.B.D. at p. 481):

D “It is obviously a most important part of the contract of carriage by sea that the route by which the goods are to be brought should be determined,”

and he has referred just previously to the difficulty of insuring the goods if it is not known for what voyage they were to be insured. BOWEN, L.J., in *Margetson v. Glynn* (2) and COZENS-HARDY, L.J., in *Joseph Thorley, Ltd. v. Orchis Steamship Co., Ltd.* (3), regarded the matter from the same point of view. Again, where parties have agreed upon a voyage and have specified that voyage in the bill of lading,
E the definition of the voyage must, as a matter of business, cut down the general words of the bill of lading to what is fairly applicable to the voyage which has been agreed upon and defined. Any other construction would make business impossible: *Margetson v. Glynn* (2). In the same case in the House of Lords LORD HERSCHELL referred to the necessity of construing a bill of lading from a business point of view and in limiting general words by the main object and intent of the contract.
F He said ([1893] A.C. at pp. 355, 356):

“The ports a visit to which would be justified under this contract would, no doubt, differ according to the particular voyage stipulated for between the shipper and the shipowner; but it must, in my view, be a liberty consistent with the main object of the contract—a liberty only to proceed to and stay at the ports which are in the course of the voyage. In saying that I am, of
G course, speaking in a business sense. It may be said that no port is directly in the course of the voyage (indeed that was argued by the learned counsel for the appellants) inasmuch as in merely entering a port or approaching it nearly you deviate from the direct course between the port of shipment and the ultimate port of destination. That is perfectly true; but in a business sense it would be perfectly well understood to say that there were certain
H ports on the way between Malaga and Liverpool, and those are the ports at which I think the right to touch and stay is given.”

In the bill of lading in question in this action there is given a very wide liberty to proceed backwards and forwards to ports and places in New Zealand, notwithstanding that such ports or places are out of or away from the customary or geographical route to the port of discharge. This gives the shipowners wide
I facilities for taking in cargo in New Zealand, but after having done so the ship is “bound (subject to the before-mentioned liberties) on finally leaving New Zealand to London.” This is the main object of the voyage. It is a voyage from New Zealand to London. Then follows the liberty “on the way to London” to call and stay at any intermediate port or ports, and then with permission to call at three named places in South America, but for a limited purpose only—taking on board coal, supplies, and/or cargo, and/or live stock. There is no liberty to call there for discharging cargo. The ships of this line habitually avail themselves

of the liberty "on the way to London" to call at any intermediate port or ports by calling at Teneriffe or Madeira, where they coal. That port lies on the route which they habitually take "on the way to London." But can it be said that Havre is an intermediate port in any proper sense of the term, as used in the bill of lading? It is distant sixty-eight miles from the nearest point of the route to London, and in order to reach it involves the vessel going off her course in one direction 107 miles. It is not shown to be a usual or customary port for vessels of this size and class coming from New Zealand to enter. In this particular case it was only for a special purpose, and by reason of a special bargain made after the plaintiffs' goods were shipped, that the captain was instructed to go to Havre. If the question be put, as in *Leduc & Co. v. Ward* (1): Is Havre substantially a port which will be passed on the named voyage, New Zealand to London?, the answer must be in the negative. If the question be put: Is Havre a port which would naturally and usually be a port of call on the named voyage?, the answer must be certainly not. If the question suggested by LORD ESHER's judgment in *Margetson v. Glynn* (2) be put: Is Havre a port in the course of the voyage, in the sense that it may be reached by the ship going slightly out of her course?, the answer must again be in the negative. By slightly out of her course is meant, does the ship on her course go fairly close to the port, and in order to enter the port, or call off it, would she only have to go a very short distance out of her course? Whether you take the distance in the present case as 107 miles or as sixty-eight miles only, the departure from the course of the voyage is quite substantial, and not slight. Again, the liberty is to call and stay at any intermediate port or ports, and if this liberty extends to Havre it seems to follow that almost any port in the English Channel available for a steamer of this size and draught, and on either the French or English coast, would be within the liberty, which certainly cannot have been intended or contemplated by the parties. The defendants take advantage of the liberty by calling at Teneriffe or Madeira, which are intermediate ports, but, in my judgment, Havre is not such port within the meaning of this bill of lading. The defendants' letter to Mr. Findlay dated Jan. 8, 1915, shows that they themselves correctly appreciated the risk they would run in departing from their accustomed route.

I am of opinion that it is impossible to lay down any hard and fast rule by which it may be determined whether any particular port is an "intermediate port" within the meaning of a bill of lading. In construing the document all the surrounding circumstances must be taken into consideration. The size and class of ship, the nature of the voyage, the usual and customary course, the natural or usual ports of call, the nature and position of the port in question. It is a question of fact in each case, and, in my judgment, BAILHACHE, J., was right in deciding that Havre was not an intermediate port on the voyage of this vessel from New Zealand to London, that the *Tokomaru* in making for that port was deviating from her voyage, and that the defendants thereby lost the benefit of the exceptions in the bill of lading: *Joseph Thorley, Ltd. v. Orchis Steamship Co., Ltd.* (3); *Internationale Guano-en Superphosphaatwerken v. Robert MacAndrew & Co.* (4).

If that be so, the remaining question is whether the defendants are protected from liability as carriers by the fact that the loss occurred through the King's enemies. If they, as carriers, were duly performing their contract of carriage, they would not be liable for loss occasioned by the King's enemies. But they are breaking their contract. They are quite unable to show that the loss must have occurred in any event, and whether they had deviated or not. True it is that there had been no previous warning of danger from submarines and that the event which occasioned the loss was wholly unexpected, but this does not assist the defendants. The answer to the argument of the defendants on this point is that given by TINDAL, C.J., in *Davis v. Garrett* (5) (6 Bing. at p. 724):

"But we think the real answer to the objection is that no wrongdoer can be allowed to apportion or qualify his own wrong; and that as a loss has

A actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss if his wrongful act had never been done. It might admit of a different construction if he could show, not only that the same loss might have happened, but that it must have happened if the act complained of had not been done; but there is no evidence to that extent in the present case.”

B In *Parker v. James* (6) the loss occurred from capture by the King's enemies while the vessel was deviating, and LORD ELLENBOROUGH held that the plaintiffs were entitled to recover the value of their goods on board the ship at the time she was captured by reason of the deviation. *Sleat v. Fagg* (7) and *Lilley v. Doubleday* (8) are also authorities against the defendants' contention. In my judgment the

C appeal fails and should be dismissed.

PHILLIMORE, L.J.—The plaintiff company, owners of two parcels of goods shipped on board the *Tokomaru*, a vessel belonging to the defendant company, complains of the loss of these goods, which were sunk with the ship when she, being on a course for Havre and not far from that port, was torpedoed by a

D German submarine. The plaintiff company complains that it had shipped the goods for a voyage from New Zealand to London, and that the ship was deviating from her course and on a deviated course when she was lost.

This makes it necessary to determine, first, what was the course of the voyage, and, secondly, if there was a departure from that course, whether it was justified by the liberties given by the bill of lading. [His LORDSHIP read cl. 1 of the bills of lading.] I do not think it necessary to dwell upon cl. 3, although it was relied on by the shipowners. The course adopted by the ships of this line (not being mail boats) is to come round the Horn, then put into one of the three named ports on the east coast of South America, then make a call at one of the coaling ports in the Atlantic islands, generally Teneriffe, and thence proceed straight to London. This is the usual course, and (except in respect of the South American ports)

F needs, I think, no use of any of the liberties or permissions to justify it. It was suggested that the call at the coaling port could only be justified under the liberty to call at intermediate ports. I do not think so. This call is one of the incidents of the voyage and is no departure. There are many similar instances, such as calling at weather stations to inquire about ice, or going to some station for a government pass through territorial waters, or to pick up a pilot, or calling at a

G preliminary port to lighten the ship in order that she may finish the voyage with a less draught. These are not, in my view, departures from the usual and customary course of the voyage. It is possible to carry the rule as to acceptance of that which is customary even further. It may be, if it is customary for the line to which the ship belongs, and of which the shipper knows, to touch at some intermediate port, not mentioned in the bill of lading, that touching at this port

H may be regarded as part of the customary course of navigation. For instance, it is possible that the practice of the mail boats of this line to call at Plymouth might be justified even without having recourse to the liberty to call at intermediate ports. *Evans, Sons & Co. v. Cunard Steamship Co., Ltd.* (9), seems to support this. I only mention this suggestion to show that I have not forgotten it, but I do not want to pronounce any opinion upon it.

I I now come to the liberty clause. BAILHACHE, J., seems to give no effect to this liberty, or only to give it effect as enforcing the proposition that such departures from the direct geographical route as are incidental to the navigation may be made—that is, to justify that which I think needs no justification. In this I cannot agree with him. LORD ESHER in *Leduc & Co. v. Ward* (1) and LORD HERSCHELL in *Glynn v. Margetson & Co.* (2) treat the clause as having a meaning and one to which effect must be given. I will quote the passages. LORD ESHER, in *Leduc & Co. v. Ward* (1) says (20 Q.B.D. at p. 482):

"Here again it is a question of the construction of a mercantile expression used in a mercantile document, and I think that as such the term can have but one meaning—namely, that the ports, liberty to call at which is intended to be given, must be ports which are substantially ports which will be passed on the named voyage. Of course such a term must entitle the vessel to go somewhat out of the ordinary track by sea of the named voyage, for going into the port of call in itself would involve that. To 'call' at a port is a well-known sea term; it means to call for the purposes of business, generally to take in or unload cargo, or to receive orders; it must mean that the vessel may stop at the port of call for a time, or else the liberty to call would be idle. I believe the term has always been interpreted to mean that the ship may call at such ports as would naturally and usually be ports of call on the voyage named."

In *Glynn v. Margetson & Co.* (2) LORD HERSCHELL said ([1893] A.C. at pp. 355, 356):

"There is no difficulty in construing this clause to apply to a liberty in the performance of the stipulated voyage to call at a particular port or ports in the course of the voyage. That port or those ports would differ according to what the stipulated voyage was, inasmuch as at the time when this document was framed the parties who framed it did not know what the particular voyage would be, and intended it to be equally used whatever that voyage is. The ports a visit to which would be justified under this contract would, no doubt, differ according to the particular voyage stipulated for between the shipper and the shipowner; but it must, in my view, be a liberty consistent with the main object of the contract—a liberty only to proceed to and stay at the ports which are in the course of the voyage. In saying that I am, of course, speaking in a business sense. It may be said that no port is directly in the course of the voyage (indeed that was argued by the learned counsel for the appellants) inasmuch as in merely entering a port or approaching it nearly you deviate from the direct course between the port of shipment and the ultimate port of destination. That is perfectly true; but in a business sense it would be perfectly well understood to say that there were certain ports on the way between Malaga and Liverpool, and those are the ports at which I think the right to touch and stay is given."

On the other hand, the words, however large, do not warrant more than a limited extent of departure. This is well settled.

None, however, of the cases cited comes close to this one. They are all cases where either the ship went back on her track or made an enormous change of voyage, bringing her when at the so-called intermediate port no nearer her port of destination than she had been at the beginning of her deviation. Some guide, I think, can be got from the limited permission to use the three named ports in South America. This is evidence that the parties did not contemplate an unspecified departure from the course which would be as great as that involved in touching at these ports. But the alteration of course necessary for going to Havre is less than the alteration for the nearest of those named ports. It is very difficult to draw the line, and the question is largely one of degree, but, on the whole, I think that the degree has been exceeded in this case.

There is another ground which seems to me a safer one for affirming this decision. LORD ESHER indicates—and I think rightly indicates—that there is a necessary condition which must be present to make a port an intermediate port. It must be one which "would naturally and usually be a port of call on the voyage." By this he does not mean so much as "customary." What he means is that as a matter of commerce and business ships are frequently sent upon an adventure which includes touching at these intermediate ports. If, for instance, it was common for vessels dispatched to Rouen to call at Havre, or dispatched to Malaga to call at Cadiz, to this extent Havre and Cadiz would be intermediate

A ports. Now, as BAILHACHE, J., points out, no evidence was given to show that it was usual for New Zealand vessels, or, I may add, vessels from South America, bound for London to call at Havre. It is indeed true that the *Ikaria* was bound from the South American coast to London via Havre, but this one instance is not enough. It is not, as far as we are informed, a known or usual voyage for vessels bound from New Zealand, or even from South America, to call at Havre on the way to London. I may add that the burden is on the shipowner to bring himself within the liberty.

B As to the second point in the case, I can deal with it shortly. *Davis v. Garrett* (5) and *Lilley v. Doubleday* (6) lay down the true principle. As the accident occurred at the time and place when it did, the ship being then on her deviating course, the shipowner is responsible unless he can show that the loss or damage would have occurred if she had been on her proper course for London. There are circumstances in which conceivably this could be proved, but it could not be and was not proved in this case. Therefore, the judgment is right and must be affirmed.

C **BANKES, L.J.**—It is well settled that where in a printed form of charterparty or bill of lading general words are found giving liberty to deviate those words must be construed in reference to the main intent and object of the contract. In *Glynn v. Margetson & Co.* (2) both in the Court of Appeal and in the House of Lords, and in *Leduc & Co. v. Ward* (1) some rules will be found indicating some necessary limitations upon such general words. In the last of these cases LORD ESHER speaks of the liberty as extending only to putting into a port which is substantially on the course of the voyage. In *Glynn v. Margetson & Co.* (2) in the House of Lords, LORD HERSCHELL restricts the liberty to a port which is in a business sense on the way to the port of destination. In the same case in the Court of Appeal. LORD ESHER speaks of what is permissible as a going slightly out of the sea course which the ship would take on the way to her destination. In the absence of any special considerations arising out of the terms or the subject-matter of any particular contract the question of what is or is not permissible under a general liberty to deviate must resolve itself largely into a question of fact, in which the geographical position of the port visited in relation to that of the port of destination and the additional distance to be covered as the result of departing from the direct or customary course will be material, but not necessarily the only material, matters for consideration.

E There may, however, be cases where as a matter of construction of the contract it may be necessary to give a much wider limitation to the general words than those indicated above in order to give effect to the manifest object and intention of the contract: see per LORD HERSCHELL in *Glynn v. Margetson*. This, as I understand his decision, is the principle upon which BAILHACHE, J., has acted in the present case. The bill of lading describes the service provided by the defendants' fleet of steamers as a "Direct service between New Zealand and London." It describes the course to be taken by the steamers as "the customary or geographical route to the port of discharge." It confines the liberty to call at "intermediate ports on the way to London." BAILHACHE, J., treats the subject-matter of the agreement between the parties as a contract to carry wool from New Zealand to London by one of this regular line of steamers trading between London and New Zealand ports, and having a recognised route and recognised ports of call both out and home. To such ports the liberty to call will naturally apply; but it seems obvious that in such a contract some limitation must be placed upon the number of ports at which it is permissible to call, even though they may come within the description of being "intermediate ports on the way" to London, otherwise, from a business point of view, the manifest object and intention of shipping goods by such a line of steamers as those in question would appear to be defeated.

I If some limitation is to be placed upon the number, then where is the line to be drawn? It must be a question of degree. The circumstances may be such that,

from a business point of view, any exercise of the liberty, even to a single port outside the recognised ports of call, must, except in cases of emergency, be considered as beyond the contemplation of the parties, and, therefore, as defeating the object and intention of the contract. That, I take it, is the view adopted by BAILHACHE, J., who had evidence before him as to the regular route and ports of call of this line of steamers, and who had also the evidence of the owners as contained in their letter in reference to the course of business as between themselves and shippers by their line of steamers. This view is strengthened and confirmed by the special liberty inserted in the bill of lading to call at Rio de Janeiro, Montevideo, or La Plata for limited purposes only, a provision which would not have been necessary had the intention been to give full effect to the general words. The owners in their letter to which I have already referred emphasise this point when they ask that in future liberty shall be inserted in the bill of lading to call at French ports. In my opinion, BAILHACHE, J., took a view which was quite justified by the evidence before him, and I am certainly not prepared to differ from him upon it.

With regard to the defendants' second point that they can only be made responsible for such results of the deviation as could have been reasonably anticipated, I can see no ground derived either from principle or from authority in support of it. On the contrary, I think that the authorities to which reference has been already made are distinctly against it. I agree that the appeal fails.

Appeal dismissed.

Solicitors: *Parker, Garrett & Co.; Ince, Colt, Ince & Roscoe.*

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

LOUGHER v. MOLYNEUX

[KING'S BENCH DIVISION (Low, J.), February 8, 1916.]

[Reported [1916] 1 K.B. 718; 85 L.J.K.B. 911; 114 L.T. 696;
60 Sol. Jo. 605]

Friendly Society—Loans to members—Loan in excess of rules—Illegality—Repayment guaranteed by defendant—Right of society to recover unpaid balance from defendant—Friendly Societies Act, 1896 (59 & 60 Vict., c. 25), s. 46.

The plaintiffs, trustees of a registered friendly society, lent £200 to a member of the society who gave a promissory note to secure repayment which was guaranteed by the defendant. The rules of the society provided that a loan should not be made to a member in excess of £50.

Held: the loan was illegal as being expressly prohibited by s. 46 of the Friendly Societies Act, 1896; where a guaranteed debt is illegal it cannot be recovered from the surety under his guarantee; and, therefore, the loan was not recoverable by the trustees from the defendant.

Semble: if the transaction had been within s. 44 the transaction would have been valid.

Notes. An additional power to invest under s. 44 of the Friendly Societies Act, 1896, was given by the Friendly Societies Act, 1955, s. 2, see 35 HALSBURY'S STATUTES (2nd Edn.) 247.

As to the power of Friendly Societies to lend and as to a guarantee of an illegal debt see 18 HALSBURY'S LAWS (3rd Edn.) 78, 422, and for cases, see 25 DIGEST 317-318 and 26 DIGEST (Repl.) 99, 100. For the Friendly Societies Act, 1896, see 10 HALSBURY'S STATUTES (2nd Edn.) 531.

A Cases referred to:

(1) *Fergusson v. Norman* (1838), 5 Bing. N.C. 76; 1 Arn. 418; 6 Scott 794; 8 L.J.C.P. 3; 2 J.P. 809; 3 Jur. 10; 132 E.R. 1034; 12 Digest (Repl.) 305, 2344.

(2) *Bensley v. Bignold* (1822), 5 B. & Ald. 335; 106 E.R. 1214; 12 Digest (Repl.) 305, 2341.

B (3) *Cope v. Rowlands* (1836), 2 M. & W. 149; 2 Gale 231; 6 L.J.Ex. 63; 150 E.R. 707; 12 Digest (Repl.) 305, 2345.

(4) *Victorian Daylesford Syndicate, Ltd. v. Dott*, [1905] 2 Ch. 624; 74 L.J.Ch. 673; 93 L.T. 627; 54 W.R. 231; 21 T.L.R. 742; 49 Sol. Jo. 725; on appeal, [1906] 1 Ch. 747, n., C.A.; 35 Digest 204, 301.

(5) *Bonnard v. Dott*, [1906] 1 Ch. 740; 75 L.J.Ch. 446; 94 L.T. 656; 22 T.L.R. 399, C.A.; 35 Digest 204, 302.

C (6) *Re Coltman, Coltman v. Coltman* (1881), 19 Ch.D. 64; 51 L.J.Ch. 3; 45 L.T. 392; 30 W.T. 342, C.A.; 25 Digest 317, 204.

Action by the plaintiffs, trustees of a registered friendly society, in which they claimed from the defendant the sum of £130, being the balance due upon a promissory note in respect of which the defendant had acted as surety. The plaintiffs lent £200 from the society's loan fund to a member of the Society who deposited a policy of life insurance and gave the promissory note to secure the repayment of the loan. By r. 17 of the rules of the Society: "The committee shall not make any loan to a member on personal security beyond £50, nor any loan which, together with any moneys for the time being owing by a member of the Society, shall exceed £50."

E By s. 44 of the Friendly Societies Act, 1896:

"(1) The trustees of a registered society or branch may, with the consent of the committee or of a majority of the members present and entitled to vote in general meeting, invest the funds of the society or branch, or any part thereof, to any amount in any of the following ways . . . (e) upon any security expressly directed by the rules of the society or branch, not being personal security, except as in this Act authorised with respect to loans."

F

By s. 46, of the Act:

"A registered society may, out of any separate loan fund to be formed by contributions or deposits of its members, make loans to members on their personal security, with or without sureties, as may be provided by the rules, subject to the following restrictions: . . . (c) A society shall not make any loan to a member on personal security beyond the amount fixed by the rules, or make any loan which, together with any money owing by a member to the society, exceeds £50."

G

By s. 84 of the Act:

H

"It shall be an offence under this Act if . . . (b) a registered society . . . does anything forbidden by this Act."

Lincoln Reed for the plaintiffs.

Rayner Goddard for the defendant.

I

LOW, J.—This is an action by the trustees of a friendly society against the defendant, who as a surety was one of the makers of a joint and several promissory note. The claim is to recover the balance due upon the note. The defence set up is that the transaction is one which is prohibited by statute under a penalty and is altogether illegal, and that therefore the contract cannot be enforced. Now, the Friendly Societies Act, 1896, provides: [His LORDSHIP read ss. 46, 84, and 89, and continued:] All the material evidence is documentary. There are two rules regulating the investment of the society's funds. Rule 4 deals with the investment of surplus funds, and r. 17 with loans to members. There is no doubt, in my opinion, that this was a transaction under r. 17 and not under r. 4, and it

was a loan far in excess of the limit of £50 allowed by the statute for loans to members on their personal security. A

It is contended for the defendants that, if the society lends more than £50 to a member, it commits an offence under the statute, and that, therefore, such a loan is irrecoverable. The authorities cited in support of that contention cover a good deal of ground. In *Fergusson v. Norman* (1) it was held that a pawnbroker who did not comply with the provisions of the statute 39 & 40 Geo. 3, c. 99, s. 6, B acquired no property in the article pledged and could not retain it. Then in *Bensley v. Bignold* (2) it was decided that a printer could not recover the cost of printing any work if he had not affixed his name to it pursuant to the statute 39 Geo. 3, c. 79, s. 27; and in *Cope v. Rowlands* (3) an unlicensed stockbroker was held not to be entitled to recover his commission or any reward for his work and labour. The cases, however, most relied on are the more recent ones of *Victorian C Daylesford Syndicate v. Dott* (4) and *Bonnard v. Dott* (5), which arose under the Moneylenders Act, 1900. In those cases it was decided that a moneylender who had not complied with the regulations under the Act as to registration could not recover money which he had lent, nor retain securities given for the loan, because the transaction was illegal and void. In the earlier case *BUCKLEY, J.*, said ([1905] 2 Ch. at p. 629): D

"The next question is whether the Act is so expressed that the contract is prohibited so as to be rendered illegal. There is no question that a contract which is prohibited, whether expressly or by implication, by a statute is illegal and cannot be enforced. I have to see whether the contract is in this case prohibited expressly or by implication,"

and he decided that the contract in that case was an illegal contract and could not be enforced. E

I have to apply these doctrines to the present case. It is said that I ought not to decide against the plaintiffs because the defence is not meritorious, but I have nothing to do with that. Giving the best consideration that I can to the authorities cited and to the able arguments on either side, I am unable to see anything in this transaction to take it out of the operation of the principles established by the authorities to which I have referred. In this case the lending of more than £50 to a member is expressly prohibited. The prohibition is clear and express, and though perhaps it is strengthened by the addition of a penalty, I cannot see how, even if there were no penalty, the plaintiffs could, in the face of the authorities, recover money lent in direct contravention of the statutory prohibition. The only authority which could be relied on at all for the plaintiffs was *Re Coltman* (6). F G There the transaction was within s. 16 of the Friendly Societies Act, 1875, corresponding with s. 44 of the present Act. That was a merely enabling section containing nothing in the nature of a prohibition. If this transaction had been within s. 44 of the present Act no difficulty would have arisen, but it is within s. 46, and, therefore, that case does not apply. Consequently there must be judgment for the defendant. H

Judgment for defendant.

Solicitors: *Rawson & Stevens*, for *W. H. Davies*, Cardiff; *J. T. Lewis & Woods*, for *William Thomas*, Cardiff.

[Reported by *L. H. BARNES, ESQ., Barrister-at-Law.*]

Re UNIONE STEARINERIE LANZA AND WEINER

[KING'S BENCH DIVISION (Viscount Reading, C.J., Avory and Shearman, J.J.), May 23, 1917]

[Reported [1917] 2 K.B. 558; 86 L.J.K.B. 1236; 117 L.T. 337; 61 Sol. Jo. 526]

Arbitration—Security for costs—Power of arbitrator to order—Arbitration Act, 1889 (52 & 53 Vict., c. 49), Sched. 1 (f) (i).

In the absence of express agreement between the parties to a reference the arbitrator has no power to make an order for security for costs.

Notes. Considered: *Kursall v. Timber Operators and Contractors*, [1923] 2 K.B. 202.

As to the powers of an arbitrator in the conduct of an arbitration see 2 HALSBURY'S LAWS (3rd Edn.) 31 et seq. For cases see 2 DIGEST (Repl.) 553 et seq.

Case referred to:

(1) *Crighton v. Law Car and General Insurance Corpn., Ltd.*, [1910] 2 K.B. 738; 80 L.J.K.B. 49; 103 L.T. 62; 2 Digest (Repl.) 575, 1078.

Also referred to in argument:

Re Pretoria Pietersburg Rail. Co. (No. 2), [1904] 2 Ch. 359; 73 L.J.Ch. 704; 91 L.T. 285; 53 W.R. 74; 48 Sol. Jo. 605; 10 Digest (Repl.) 1059, 7355.

Re Enoch and Zaretsky, Bock & Co., [1910] 1 K.B. 327; 79 L.J.K.B. 363; 101 L.T. 801, C.A.; 2 Digest (Repl.) 556, 910.

Special Case for the opinion of the court stated by an arbitrator pursuant to s. 19 of the Arbitration Act, 1889.

By an agreement made between Unione Stearinerie Lanza, of Torino and Genoa, Italy, incorporated according to the law of Italy (therein and hereafter called "the buyers"), and Robert Otto Wiener, carrying on business in the name of Robert O. Wiener & Co., in the city of London (therein and hereafter called "the seller"), disputes regarding the alleged failure of the seller to perform a contract for the sale of 400 barrels of animal fat were agreed to be referred to an arbitrator sitting alone. Points of claim on behalf of the buyers claiming £794 9s. 6d. as damages by reason of the alleged failure of the seller to deliver the fat and points of defence thereto by the seller denying all liability having been delivered, an application was made on behalf of the seller to the arbitrator to direct that the buyers should give security for the costs of the seller in the arbitration. The application was supported by a statutory declaration by the seller which stated that the buyers were a company incorporated according to the laws of Italy, and that they carried on business in Torino and Genoa in the said kingdom as candle and soap manufacturers, had no branch in this country, and did not possess any assets within the jurisdiction of the English courts. The said declaration further stated that the seller was advised and believed that he had a good defence to the claim, and that he had had and would have to incur heavy expenses in conducting his defence and obtaining evidence, and that the buyers had refused to give security for costs. The application was opposed by the buyers on the ground that the arbitrator had no power to direct them to give such security. The question of law for the opinion of the court was whether the arbitrator had power to order the buyers to give security for the costs of the seller in the arbitration.

By the Arbitration Act, 1889, Sched. I (i) [see now Arbitration Act, 1950, s. 18 (1): 29 HALSBURY'S STATUTES (2nd Edn.) 89]:

"The costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may tax or settle the

amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client."

Greer, K.C., and *Caradoc Rees* for the seller.

R. A. Wright for the buyers.

VISCOUNT READING, C.J.—The sole question before the court is whether an arbitrator, under an agreement to submit the differences between parties to arbitration, has power to order a person in the position of the plaintiffs to give security for costs to the defendant.

This was a case in which the claimants were a foreign corporation, which, in the ordinary course of an action, would have been ordered, on the defendant's application, to give security for costs, and the proceedings would have been stayed until the order of the court to that effect had been complied with. The arbitrator doubted whether he had the power to make the order, and, in fact we are told that he himself thought that he had not the power. I think that he, was right, for I am of opinion that there is no such power in an arbitrator. He could always have been granted such power by express agreement between the parties, but it is not suggested that there was any agreement to that effect. It is said that this is to be gathered from the terms of s. 2 of the Arbitration Act, 1889, and from Sched. I to that Act. Under cl. (f) of that schedule [see s. 12 of Act of 1950] it is provided that the parties to the reference shall submit to be examined by the arbitrator or umpire, shall produce all documents within their power, and at the end of the clause there are these words:

"and do all other things which during the proceedings on the reference the arbitrator or umpire may require."

It has been held in *Crichton v. Law Car and General Insurance Corpn., Ltd.* (1) that an arbitrator has a discretion to allow an amendment of pleadings delivered by the parties in compliance with a direction given to them by him, and reliance is placed upon that decision because of some words used by SCRUTTON, J., in giving judgment in that case. These are his words:

"A dispute or difference having arisen, a member of the Bar was appointed arbitrator, and he ordered the parties to define the difference by delivering to each other points of claim and defence. In my view he had a right to do that, both by his inherent powers as a judicial officer and under s. 2, coupled with the first schedule, cl. (f), of the Arbitration Act, 1889."

I merely refer to that passage because we have been pressed by counsel on behalf of the seller, with reference to the "inherent powers" of an arbitrator "as a judicial officer." I cannot think, and I do not think, that Scrutton, J., meant by those words to imply that an arbitrator under a submission by agreement was in the same position as a judge, and had all the powers of a judge. I think that what SCRUTTON, J., meant was that he had power under cl. (f) to order points of claim to be given to him, and, that being so, that he must have the power also, sitting as the person to decide the questions, to allow an amendment. I do not think that the words meant anything more than that.

The words in cl. (f) of the first schedule, upon which so much reliance has been placed in this case, do not, in my opinion, give the power to order a stay of proceedings pending the giving of security for costs. I think that they are words of general import, giving to the arbitrator the power to do anything which he may require for the purpose of ascertaining the facts or the law in order that he may decide the dispute. It would be a very wide extension of them, in my opinion, if it went further and said that he had the powers of a judge as to staying proceedings pending the giving of security for costs. I do not think that that would be a reasonable construction of the language of the clause. Obviously the words cannot mean that the arbitrator has all the powers of a judge, because otherwise he would have the power to commit for contempt of court in his presence, or he would have the power to issue a writ of attachment

A for default in compliance with an order which he had made. Counsel says that he does not contend that any such powers exist in the arbitrator. Of course, they do not. Consequently, it is apparent that these words of cl. (f) cannot be read as if they gave to the arbitrator the powers of a judge. Therefore, they must be read subject to some limitation, and that limitation, in my opinion is that the arbitrator may order the parties to do all such things as he may

B require to be done in order to assist him at arriving at a determination of the dispute before him. The dispute obviously will be, or can be, determined one way or the other, whether security for costs is given or not. The object of the application for security for costs is not to enable the proceedings to continue and for it to be determined by the reference whether there is a valid claim by the plaintiffs, but it is to put an obstacle in the way of the plaintiffs proceeding

C until they have secured the defendant, so that, should the defendant obtain an order for costs, there would be some security to him that the amount would be paid. That has nothing whatever to do with the arbitrator ascertaining the true position between the parties in order to determine the case.

The only other ground upon which it is suggested that the arbitrator possesses this power is that it is given under cl. (i) of Sched. 1, coupled with s. 2. It is

D sufficient for me to say that that clause deals with the costs which are to be paid, and gives the arbitrator full discretionary power with regard to those costs. The words relied upon on behalf of the seller are:

“The costs of the reference shall be in the discretion of the arbitrator or umpire, who may direct in what manner those costs or any part thereof shall be paid.”

E To order a stay of proceedings pending the giving of security for costs clearly is not an order directing how the costs are to be paid, but, on the contrary, it is something which precedes at the very outset of the reference the ascertainment of the facts upon which the arbitrator would exercise his discretion. I am clearly of opinion that s. 2, coupled with cl. (i), does not give the power, and that there is nothing in the Arbitration Act, 1889, which confers it, and

F that this is a power which is in the inherent jurisdiction of a judge of the High Court, but does not extend to an arbitrator. For these reasons I think that the question put by the learned arbitrator is to be answered in the negative.

AVORY, J.—I am of the same opinion. In my judgment, unless this power can be found in cl. (f) of Sched. 1, coupled with s. 2 of the Arbitration Act, 1889,

G I think that it is clear that it does not exist, and the words upon which counsel for the seller relies: “do all other things which during the proceedings or the reference the arbitrators or umpire may require,” are qualified by the words “subject to any legal objection,” which occur earlier in that paragraph. It is obviously a legal objection to the arbitrator making this requirement that he has no power to do it. I am of opinion that he has no such power, and

H therefore, that cl. (f) does not assist the seller.

SHEARMAN, J.—I am of the same opinion.

Question answered in the negative.

Solicitors: *Hyman Isaacs, Lewis & Mills; Parker, Garrett & Co.*

[Reported by J. A. SLATER, ESQ., Barrister-at-Law.]

McVITTIE v. MARSDEN

[COURT OF APPEAL (Swinfen Eady and Bankes, L.J.J., and Lush, J.),
February 15, 1917]

[Reported [1917] 2 K.B. 878; 86 L.J.K.B. 653; 116 L.T. 629;
81 J.P. 109; 15 L.G.R. 249]

Justices—Protection—Conviction confirmed by quarter sessions—Distress warrants issued by justice—Conviction quashed by High Court—Action against justice for illegal distress—Justices Protection Act, 1848 (11 & 12 Vict., c. 44), s. 6.

By the Justices Protection Act, 1848, s. 6: "In all cases where a warrant of distress or warrant of commitment shall be granted by a justice of the peace upon any conviction or order which, either before or after the granting of such warrant, shall have been or shall be confirmed upon appeal, no action shall be brought against such justice who so granted such warrant for anything which may have been done under the same by reason of any defect in such conviction or order."

The plaintiff was summarily convicted of offences under the Cinematograph Act, 1909, and fined, and on appeal to quarter sessions, the conviction was confirmed. The defendant, a justice of the peace, then issued distress warrants in respect of the convictions. Subsequently, the High Court made absolute rules nisi for certiorari to quash the convictions on the ground that the summonses charging the offences had not been properly served on the plaintiff. The plaintiff claimed damages for illegal distress against the defendant.

Held: the defendant was protected by the Justices Protection Act, 1848, s. 6, and the action did not lie.

Notes. As to protection of justices of the peace, see 30 HALSBURY'S LAWS (3rd Edn.) 714-716; and for cases see 38 DIGEST (Repl.) 89 et seq. For the Justices Protection Act, 1848, s. 6, see 14 HALSBURY'S STATUTES (2nd Edn.) 804.

Appeal from a decision of Low, J., at Manchester Assizes. The plaintiff claimed special and general damages.

On the facts as stated in the headnote Low, J., said that it seemed to him that the real intention of the statute was to protect justices in circumstances in which they themselves were not the adjudicating authority, and to say that, if they acted with an actual confirmation before them by the court of quarter sessions of a conviction they should be absolutely protected. He, therefore, held that there was no case to go to the jury and gave judgment for the defendant with costs. The plaintiff appealed.

G. C. Kingsbury for the plaintiff.

Cyril Atkinson, K.C., and Barrington Ward for the defendant.

SWINFEN EADY, L.J.—This is an appeal by the plaintiff against an order made by Low, J., where the learned judge, having held that there was no case to go to the jury, gave judgment for the defendant. [His LORDSHIP stated the facts, and continued:] The first question is this: Can the plaintiff maintain the action having regard to s. 6 of the Justices Protection Act, 1848? That section provides:

"In all cases where a warrant of distress . . . shall be granted by a justice of the peace upon any conviction . . . which, either before or after the granting of such warrant, shall have been or shall be confirmed upon appeal . . ."

That is this case. The warrant of distress was granted by the justice on the conviction, which, before the granting of the warrant, had been confirmed on appeal. Then the section continues:

A "... no action shall be brought against such justice who so granted such warrant for anything that may have been done under the same by reason of any defect in such conviction or order."

B The plaintiff is complaining of the defect in the conviction before the justices, the defect being that he was not duly served, and he is complaining of that although his conviction was confirmed on appeal. That is the very matter that s. 6 says shall not be done. In those circumstances, I am of opinion that the case is directly covered by s. 6 of the Act of 1848, for the reasons which the learned judge below gave.

C It is said that the conviction before the justices was quashed, and also that the order of quarter sessions was quashed for want of jurisdiction, and, therefore, it must be treated as if there was no conviction, although the conviction had been confirmed on appeal. In my opinion, that argument is not well founded; there was jurisdiction in the quarter sessions to entertain the appeal. It could have quashed the conviction. Section 2 of the same statute contemplates that there may be an appeal to quarter sessions from a conviction which may be quashed on appeal, and it uses the words:

D "... provided, nevertheless, that no such action shall be brought for anything done under such conviction or order until after such conviction shall have been quashed, either upon appeal or upon application to Her Majesty's Court of Queen's Bench."

E So it contemplates that the appeal may be allowed and the conviction quashed; and it can hardly be argued that the plaintiff was not entitled to appeal or that having gone to the quarter sessions by way of appeal and raised this point on his appeal, he had not been duly served. It is not open to argument that the court had not full jurisdiction to deal with the matter on that footing and, if it thought fit, to say, "It is a fatal objection to conviction, and on that ground the conviction is quashed." It had full jurisdiction to entertain the matter of the appeal, and the ground on which its order was quashed was not on the ground that it had no jurisdiction to deal with the matter, but merely because the conviction before the justices having been brought up to be quashed it would not be right to leave the order of quarter sessions standing, which, confirming the conviction, would appear to leave the conviction still standing. Therefore, it was thought better to bring up the order of quarter sessions to be quashed as well as to bring up the conviction itself. Therefore, the position was simply this: there was a conviction by the justices, it was confirmed on appeal and, that being so, no action can be brought for anything done under it by reason of any defect in the conviction. For these reasons, I am of opinion that the appeal fails and should be dismissed.

BANKES, L.J.—I agree.

LUSH, J.—I agree.

Appeal dismissed.

Solicitors: *Hargrave, Son & Barrett; Field, Roscoe & Co., for Wrigley, Claydon & Tristram, Oldham.*

[*Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.*]

ARMEMENT ADOLF DEPPE *v.* JOHN ROBINSON & CO., LTD.

[COURT OF APPEAL (Swinfen Eady, Bankes and Scrutton, L.J.J.), February 9, 26, 1917]

[Reported [1917] 2 K.B. 204; 86 L.J.K.B. 1103; 116 L.T. 664;
14 Asp. M.L.C. 84; 22 Com. Cas. 300]

Shipping—Demurrage—Delivery of cargo at named port—No stipulation for delivery at berth “as ordered”—Arrival of ship at port—No discharging berth available at quay—Ship moored to buoys—Readiness to discharge at buoys—Beginning of lay days.

A berth contract, the terms and conditions of which were incorporated in bills of lading relating to a cargo of grain to be carried to the port of A. and there delivered in accordance with the custom of the port, provided for a rate of discharge the effect of which was that the cargo should be discharged in six days. There was no express provision for delivery at a berth “as ordered”. The ship reached the port of A. on Oct. 28, 1915, having passed the Customs and quarantine, and was made fast to mooring buoys, there being no discharging berth at the quay available for her. On Nov. 2 she was berthed at the quay and discharge began which was finished on Nov. 11.

Held: (i) on Oct. 28 the ship was an “arrived ship”: *Leonis Steamship Co., Ltd. v. Rank, Ltd.* (1), [1908] 1 K.B. 499, applied; (ii) lay days began on Oct. 28 when the ship was ready to proceed to her actual discharging berth or to discharge at the buoys; and, therefore, the shipowners were entitled to eight, and not merely three, days’ demurrage.

Notes. Considered: *Cantiere Navale Triestina v. Russian Soviet Naphtha Export Agency*, [1925] All E.R. Rep. 530; *Noemijulia Steamship Co., Ltd. v. Minister of Food*, [1950] 2 All E.R. 699. Referred: *Sociedad Financiera de Bienes Raices S.A. v. Agrimpex Hungarian Trading Co.*, [1960] 2 All E.R. 578.

As to arrival of ship for unloading, see 30 HALSBURY’S LAWS (2nd Edn.) 515-527, and for cases see 41 DIGEST 517 et seq.

Cases referred to:

(1) *Leonis Steamship Co., Ltd. v. Rank, Ltd.*, [1908] 1 K.B. 499; 77 L.J.K.B. 224; 24 T.L.R. 128; 52 Sol. Jo. 94; 13 Com. Cas. 136, C.A.; 41 Digest 569, 3937.

(2) *The Felix* (1868), L.R. 2 A. & E. 273; 37 L.J.Adm. 48; 18 L.T. 587; 17 W.R. 102; 3 Mar. L.C. 100; 41 Digest 525, 3538.

(3) *Budgett & Co. v. Binnington & Co.* (1890), 25 Q.B.D. 320; 60 L.J.Q.B. 1; 39 W.R. 13; 6 T.L.R. 403; affirmed [1891] 1 Q.B. 35; 60 L.J.Q.B. 1; 63 L.T. 742; 39 W.R. 131; 7 T.L.R. 15; 6 Asp. M.L.C. 592, C.A.; 41 Digest 533, 3609.

(4) *Sailing Ship Lyderhorn Co., Ltd. v. Duncan Fox & Co.*, [1909] 2 K.B. 929; 79 L.J.K.B. 105; 101 L.T. 295; 25 T.L.R. 739; 11 Asp. M.L.C. 291; 14 Com. Cas. 293, C.A.; 41 Digest 448, 2810.

(5) *Tapscott v. Balfour* (1872), L.R. 8 C.P. 46; 42 L.J.C.P. 16; 27 L.T. 710; 21 W.R. 245; 1 Asp. M.L.C. 501; 41 Digest 559, 3851.

Also referred to in argument:

Vaughan v. Campbell, Heatley & Co. (1885), 2 T.L.R. 33, C.A.; 41 Digest 448, 2805.

Grampian Steamship Co., Ltd. v. Carver & Co. (1893), 9 T.L.R. 210; 41 Digest 448, 2807.

Appeal by the plaintiffs, the shipowners, from a decision of BRAY, J., in an action tried by him without a jury.

A The plaintiffs, owners of the steamship *Elizabeth van Belgie*, claimed against the defendants, indorsees of bills of lading and receivers of cargo, eight days' demurrage for the detention of the ship at Avonmouth. The bills of lading incorporated the terms and conditions of a berth contract, dated Sept. 13, 1915. The cargo consisted of grain in bulk, and linseed and pollards in bags; the ship was to proceed to

B "Avonmouth and Sharpness (two ports) or as near thereunto as she can safely get, always afloat, and deliver the cargo in accordance with the custom of the port for steamers, unless otherwise provided for as per cl. 25, on being paid freight . . ."

C Clause 25 dealt with the time for discharging, and provided that for grain cargoes, without fixed lay days, the rate of discharge at Avonmouth should be 600 tons a day based on bill of lading quantities, reporting day not to count. Demurrage was at rate of 3d. per gross registered ton per running day for steamers of over 4,000 tons dead weight cargo capacity. The bill of lading quantities for Avonmouth were 2,059, and at the before-mentioned rate of discharge this quantity should have been discharged in six lay days. The ship arrived at Walton Bay from Buenos Aires on Oct. 24, 1915, was entered at the Custom House on Oct. 26, and on Oct. 28 at 11 a.m. was permitted to pass into the docks at Avonmouth, where she was made fast to some mooring buoys, as there was not then any discharging berth at the quay available for her. Of this she was informed before entering the docks. On Nov. 2 she was berthed at the quay and discharge began, and it was finished on Nov. 11 at 7. p.m. BRAY, J., held that the six lay days expired on Nov. 8 and allowed demurrage for the three days to Nov. 11. He did not allow the plaintiffs' claim in respect of the four days between Oct. 28 and Nov. 2 which were the subject of this appeal, on the ground that the ship, although an "arrived ship" on Oct. 28, was not "ready to discharge" her cargo until Nov. 2.

E *Leck, K.C.*, and *W. N. Raeburn* for the shipowners.

F *MacKinnon, K.C.*, and *R. A. Wright* for the defendants.

Cur. adv. vult.

Feb. 26, 1917. The following judgments were read.

G SWINFEN EADY, L.J. [after stating the facts as above set out:]—Having regard to the decision in *Leonis Steamship Co., Ltd. v. Rank, Ltd.* (1), it is not open to dispute that on Oct. 28 the ship was an "arrived ship." Her destination was Avonmouth, and she had reached that place and entered the dock there and was safely moored at the buoys. The charterers were entitled, in accordance with the decision in *The Felix* (2) to indicate the discharging berth; but as the charterparty did not contain any express words empowering the charterer to name the berth, and the cargo was not for delivery "at a berth as ordered," H the lay days would commence if "ready to discharge" although the vessel was not in her discharging berth. Discharge could have been effected at the buoys, although not usual, and the consignees of the cargo did not desire it. BRAY, J., states in his judgment that nobody really thought that there was going to be a discharge at the buoys, but he held that the defendants were at liberty to take advantage of what he said was a technical point, but a technical defect in the plaintiffs' case, that the plaintiffs had not proved that the ship I was "ready to discharge" until Nov. 2.

The question raised by this appeal is whether on the facts not in dispute the ship was ready to discharge cargo when moored at the buoys. The hatches had not been taken off while the vessel was at the buoys, nor did the owners' stevedores bring all their discharging gear on board then. On the other hand, the receivers' stevedores did not bring any of their gear on board until the vessel arrived at the quay; they had to provide cables and weighing machines and planks, and also to provide the gear for lowering into barges any cargo so

taken, and the evidence of the owners' stevedores was that as a rule they were able to get the gear which the ship had to provide on board quicker than the merchants' stevedores could get theirs. The plaintiffs' contention is that the ship was ready to discharge when at the buoys; that, if the merchants had been willing to take delivery there, the owners would have rigged up their tackle, and opened the hatches and been ready to commence actual delivery, as soon as or sooner than the merchants would have been ready to accept delivery; and that the only reason why these preparations were not made was that the merchants did not desire delivery at the buoys, but preferred to wait until the vessel was alongside the quay. It is the duty of the merchants to co-operate with the owners in the receipt of the cargo, and upon the facts I am satisfied that the only reason why the ship did not take on board the gang and rig the gear to fulfil the owners' duty in discharging was that the receivers were not desirous of receiving the cargo at the buoys, and so were not willing to co-operate in her discharge there and made no preparations for doing so. The ship was lying at a waiting berth, her voyage being ended; it would have been an idle form to take on board men and open hatches and make other preparations at the buoys when there was no desire or intention of the merchants to receive cargo until the ship was berthed at the quay. The ship was ready to discharge in a business and mercantile sense, and the idle formality of incurring useless expense was not necessary as a condition precedent to the commencement of the lay days.

Where a charterparty does not contain any express provisions to name a berth, and does not provide for delivery at a berth "as ordered" and the ship arrives at the end of the voyage specified in the charterparty, and is anchored or moored waiting for orders, and is ready to discharge in the sense that there is nothing to prevent her being made ready at once, if desired, the lay days commence to run. In my opinion this appeal should be allowed, and the plaintiffs should have judgment for the four additional days' demurrage.

BANKES, L.J.—This is an appeal from a decision of **BRAY, J.**, refusing to allow the plaintiffs' claim for demurrage in respect of any of the days during which the plaintiffs' vessel was moored to the buoys in Avonmouth Dock before she reached a berth at the quay. The vessel was in fact admitted into the dock and moored to the buoys at 11 a.m. on Oct. 28. There was at that time no berth vacant for her and she was not in fact berthed until Nov. 2. The vessel had passed the Customs before she entered the dock, and while lying at the buoys there was nothing to prevent the discharge of the cargo into lighters had the consignees and the shipowners co-operated to discharge the vessel in that manner. The point in dispute between the parties was whether the vessel was ready to discharge when she was moored to the buoys and while she remained there. For the owners it was contended that she was; for the consignees that she was not. Questions both of fact and of law were raised in the court below and in this court. For the consignees it was contended that the vessel must be actually ready to discharge in order to entitle the owners to claim demurrage, and that this vessel was not ready at any time while she lay at the buoys. For the owners it was contended that, as the obligation upon consignees was to discharge in a fixed number of days, it was not necessary for them to prove a readiness and willingness on the part of the master to discharge, but the consignees must show that they were prevented from taking delivery by some act of the master or those for whom he was responsible. For the latter contention the owners relied upon *Budgett & Co. v. Binnington & Co.* (3) and particularly upon the judgment of **VAUGHAN WILLIAMS, L.J.** (25 Q.B.D. at p. 326) in the report of the case in the court of first instance. The defendants, on the other hand relied upon the decision in *Leonis Steamship Co., Ltd. v. Rank, Ltd.* (1), and particularly upon a passage in the judgment of **KENNEDY, L.J.** ([1908] 1 K.B.

A at pp. 517, 518). BRAY, J., accepted the contentions of the defendants both upon the facts and the law.

It is not necessary to express any opinion upon the question of law as I do not agree with the learned judge's conclusion upon the facts, with regard to which appears to me that there was really no dispute upon the point which for the present purpose is the only material one. [HIS LORDSHIP referred to the evidence, B said that it appeared to him quite clear upon the evidence that all parties concerned—namely, the dock officials, the consignees, and the representatives of the ship—were all of one mind, and that no one either desired or required the discharge to commence until the vessel arrived at her berth and it was a matter of mutual arrangement, or understanding, that the discharge should not commence at the buoys, and concluded:] Under these circumstances, whatever C the exact legal obligation of the shipowner may be with regard to the readiness of his vessel, in the present case I think that it does not lie in the defendants' mouth to say that the ship was not ready, and on these grounds I think that the appeal succeeds.

SCRUTTON, L.J. [having stated the facts:] The phrase that the ship must be "ready to load" or "ready to discharge" before her time for loading or D discharge can begin has been frequently used by the court and text-writers. In *Sailing Ship Lyderhorn Co., Ltd. v. Duncan Fox & Co.* (4) the Court of Appeal adopted as to "readiness to load" the language of MR. CARVER'S work (CARRIAGE OF GOODS BY SEA) at s. 221, that a vessel is not ready to load unless she is discharged and ready in all her holds so as to give the charterers complete E control of every portion of the ship available for cargo. But this does not give much assistance as to "readiness to discharge." In particular I cannot find that the meaning of that phrase has ever been considered in those cases where the place where time begins is a place where ships wait to go to a berth, and not a place where ships usually discharge. Up to 1908 this position would arise in cases where the ship was chartered to discharge in a dock, such as *Tapscott v. Balfour* (5) and where time began when she got into the dock, although owing to F the crowded state of the dock she could not get to her discharging berth. I should be surprised to find that in practice it was ever thought necessary for the ship as soon as she entered the dock to rig her discharging gear, and get men to do her part of the discharging on board, before her time could begin to run, though it was well known that, at the place where she was, discharging G would not take place. Such a requirement would be quite unbusinesslike. The question assumed a much wider aspect when in 1907 the decision of the Court of Appeal in *Leonis Steamship Co., Ltd. v. Rank, Ltd.* (1) introduced some certainty into a law at that time confused by a number of very contradictory decisions.

The practical question of business was on whom should the risk of losing H time, in waiting till a berth was ready, fall—on the goods owner or the shipowner. When the charter was to a dock, time began when the ship got into the dock though she had to wait for a berth, and the risk of loss of time was placed on the goods owner. When the charter was to a "berth as ordered," time did not begin till the vessel reached the berth though the goods owner ordered a berth which the shipowner could not reach at once, and the risk of I loss of time was placed on the shipowner. On whom did the risk fall when the ship was chartered to a port and the goods owner had the right to name the berth in the port to which the ship should go? The Court of Appeal in *Leonis Steamship Co., Ltd. v. Rank, Ltd.* (1) held that the time began when the ship had reached the port in the commercial sense, where she was at the disposal of the charterer "as a ship ready as far as she is concerned to discharge," though not at the discharging berth: per BUCKLEY, L.J., [1908] 1 K.B. at p. 511. This decision at once added largely to the number of cases where time would begin before the ship was at her discharging berth, and I cannot bring myself

to hold that it was necessary for such a ship before her time would begin—that is, when the risk of loss of time is transferred to the goods owner—to make preparations for discharging at a place where on the hypothesis discharging will not take place. In *Leonis Steamship Co., Ltd. v. Rank, Ltd.* (1) time began while the vessel was lying in the river Parana, where ships were usually loaded when they got alongside quays and piers. I do not think any court containing judges so conversant with commercial matters, as LORD ALVERSTONE and KENNEDY, L.J., would have held the ship, when her time began in the river, was required to have her derricks rigged and men on board to do work which could not be required till she got alongside the pier. Where time begins at a usual discharging place I think it may well be that the ship must then be ready for a state of things which may at once happen. But when the ship's time begins at a place which is not a usual discharging berth (and she cannot be required to discharge at any other place) I think her obligation to be ready to discharge is fulfilled if she is free from Customs or quarantine restrictions and ready to proceed to her actual discharging berth and to be ready to discharge when she reaches it. If this is so, unless the buoys in Avonmouth dock were a usual discharging place, the ship was not bound to rig her stevedores gear and have her stevedores on board for her work while lying there in order that her time should begin. The risk of loss of time while waiting there for a discharging berth would under the decision in *Leonis Steamship Co., Ltd. v. Rank, Ltd.* (1) be on the goods owners.

As to the receivers of grain, I am clear that they did not intend to take delivery at the buoys, or treat the buoys as a discharging berth, however ready the ship was. They had placed their share of the discharge in the hands of the dock authorities, and those authorities, who were trying to set up a custom that time did not begin till the vessel reached the quay, wrote on Nov. 3:

“We cannot depart from the principle that the steamer's time, so far as the dock committee is concerned, commences from the time that the steamer is in berth and ready to deliver. This was not till the morning of Nov. 3.”

The case of the linseed is more difficult, as the linseed was going into lighters; and the receiver of the linseed gave very contradictory evidence. “The stevedores had not put in their gear. If they had we should have taken delivery at the buoys . . . We arranged we could not work at the buoys; neither of us could . . . I did not mean we were ready to have taken delivery at the buoys.” It is clear, however, that the linseed receivers never asked for delivery at the buoys, or sent to take delivery; and I am not satisfied on the evidence that the buoys were a usual place of discharge for linseed. I think, therefore, time began to run when the ship reached the buoys, and the ship was ready to discharge, in the sense explained, but as it would take half a day to rig the stevedore's gear I think the amount recovered should only be seven days' demurrage, or £371 ls. 9d., for which sum judgment should be entered for the plaintiffs with costs here and below. It was argued that the principle of *Budgett & Co. v. Binnington & Co.* (3) that in a fixed time charter the goods owner is not excused by the inability of the shipowner to perform his work when the time has begun to run, unless such inability arises from the default of the shipowner or his servants and prevents the goods owner from fulfilling his part of the work, applies also when the shipowner's inability is in existence at the commencement of the lay days. It is not necessary to decide this point now, though it and the effect of the decision in *Budgett & Co. v. Binnington & Co.* (3) may require consideration on some future occasion. The appeal must be allowed.

Appeal allowed.

Solicitors: *Holman, Fenwick & Willan; Downing, Handcock & Co.*

[Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.]

CHAPRONIERE v. LAMBERT

[COURT OF APPEAL (Swinfen Eady, Bankes and Warrington, L.J.J.), June 27, 28, 1917]

[Reported [1917] 2 Ch. 356; 86 L.J.Ch. 726; 117 L.T. 353;
33 T.L.R. 485; 61 Sol. Jo. 592]

Landlord and Tenant—Lease—Agreement for—Part performance—Payment of rent in advance—Statute of Frauds (1677) (29 Car. 2, c. 3), s. 4.

Payment of rent in advance under an oral agreement for a lease is not such an act of part performance as to take the case out of the operation of s. 4 of the Statute of Frauds and enable the court to enforce the contract.

Thursby v. Eccles (1) (1900), 49 W.R. 281, applied.

Notes. The relevant part of s. 4 of the Statute of Frauds has been replaced by s. 40 of the Law of Property Act, 1925.

As to memorandum of a contract for a lease, see 23 HALSBURY'S LAWS (3rd Edn.) 444 et seq.; and for cases see 30 DIGEST (Repl.) 397 et seq. For the Law of Property Act, 1925, s. 40, see 20 HALSBURY'S STATUTES (2nd Edn.) 500.

Cases referred to:

- (1) *Thursby v. Eccles* (1900), 70 L.J.Q.B. 91; 49 W.R. 281; 17 T.L.R. 130; 45 Sol. Jo. 120; 30 Digest (Repl.) 408, 513.
- (2) *Studds v. Watson* (1884), 28 Ch.D. 305; 54 L.J.Ch. 626; 52 L.T. 129; 33 W.R. 118; 1 T.L.R. 83; 40 Digest (Repl.) 24, 101.
- (3) *Pearce v. Gardner*, [1897] 1 Q.B. 688; 66 L.J.Q.B. 457; 76 L.T. 441; 45 W.R. 518; 13 T.L.R. 349, C.A.; 40 Digest (Repl.) 25, 111.
- (4) *Maddison v. Alderson* (1883), 8 App. Cas. 467; 52 L.J.Q.B. 737; 49 L.T. 303; 47 J.P. 821; 31 W.R. 820, H.L.; 40 Digest (Repl.) 38, 210.
- (5) *Nunn v. Fabian* (1865), 1 Ch. App. 35; 35 L.J.Ch. 140; 13 L.T. 343; 29 J.P. 758; 11 Jur. N.S. 868, L.C.; 30 Digest (Repl.) 409, 534.

Also referred to in argument:

Miller and Aldworth, Ltd. v. Sharp, [1899] 1 Ch. 622; 68 L.J.Ch. 322; 80 L.T. 77; 47 W.R. 268; 43 Sol. Jo. 245; 30 Digest (Repl.) 409, 535.

Appeal by the plaintiff from a decision of EVE, J.

By his statement of claim, the plaintiff alleged that, by an agreement made orally at an interview on or about April 22, 1916, the defendant agreed to grant to the plaintiff a lease of Limbourne Farm, Mundon, Essex, for three, seven or fourteen years (at the plaintiff's option), with the option to the plaintiff of the purchase of the fee simply of the farm at the price of £2,100, the plaintiff to take certain fixtures to be subsequently agreed. The lease was to be completed on June 24, 1916. The plaintiff also alleged that the agreement so entered into had been part performed as follows: (a) by the defendant writing a memorandum of the terms and handing the same to the plaintiff for the latter to copy; (b) by the plaintiff making and the defendant accepting payment of the rent from June 24, 1916, to Sept. 29, 1916; (c) by the defendant writing and signing a list of the fixtures and certain fittings, and by the plaintiff and the defendant going through the same and agreeing the prices therefor on or about April 26, 1916; (d) by the plaintiff making, and the defendant accepting, payment for the fixtures and fittings, and by the defendant orally undertaking to hold the same on the plaintiff's behalf pending the aforesaid completion; and (e) by the submission to the plaintiff's solicitor by the defendant's solicitor of a draft lease. The plaintiff further alleged that, by reason of the matters above set out and by his conduct in relation thereto, the defendant was estopped from denying the existence of the agreement. In these circumstances, the plaintiff claimed a declaration that he was entitled to specific performance of the agreement; an injunction restraining the defendant, his servants, and agents from selling,

letting, or otherwise dealing with the farm contrary to such agreement; and that the defendant might be ordered to execute a proper lease of the farm to the plaintiff in accordance with the agreement. Further and alternatively the plaintiff claimed damages. By his defence, the defendant, while denying that he had made any agreement with the plaintiff as alleged by him, and that there had been any part performance by the plaintiff, or by the defendant of any agreement between them, and that no memorandum of any terms of agreement between the plaintiff and defendant was written by the defendant, stated that a cheque for £25 which was given by the plaintiff on April 22, 1916, to the defendant was not a payment of or on account of any agreed rent, but was paid to be held by the defendant on account of the rent of the farm in case an agreement should be come to by which the defendant would agree to let the farm to the plaintiff. The defendant alleged that no such agreement was come to or arrived at, and that he held the sum of £25 to the use of the plaintiff. The defendant admitted that, on or about April 26, 1916, he prepared a list of certain chattels, and that in such list he wrote against each item thereof the price at which he was willing to sell such chattels; and he stated that the plaintiff on that date agreed orally with the defendant that, if an agreement to take a lease from the defendant was arrived at, the plaintiff should be at liberty to purchase such of the chattels mentioned in the list as he should select at the prices therein fixed as aforesaid, and that none of the items specified in the list were fixtures. The defendant alleged that the plaintiff paid to the defendant on April 26, 1916, £30 on account of the price of such of the chattels as, if the agreement to let was arrived at, the plaintiff should select. The defendant also alleged that, on May 23, 1916, the plaintiff removed from the defendant's premises certain of the chattels mentioned in the list. The defendant submitted that the plaintiff ought to be taken as having purchased the last-mentioned chattels at the prices thereof ascertained in the list, amounting to £24 10s., or alternatively at a reasonable price, and that the defendant held the balance of the sum of £30—viz., £5 10s.—to the use of the plaintiff. The defendant denied that he was estopped either at law or in equity from denying that any agreement alleged by the plaintiff to have been entered into between them was entered into or made, and pleaded that the requirements of the Statute of Frauds had not been complied with.

EVE, J., accepted the plaintiff's account of the transaction, but held that there did not exist a memorandum of the agreement within the Statute of Frauds and that the payment of rent in advance did not constitute an act of part performance of the agreement. The plaintiff appealed.

Cox-Sinclair and *William A. Wardley* for the plaintiff.

Micklem, K.C., and *Johnston Edwards* for the defendant.

SWINFEN EADY, L.J.—In my judgment this appeal fails. [HIS LORDSHIP stated the facts, held that there was no note or memorandum signed by the party to charge therewith, and continued:] It is said that evidence can be adduced to connect these two documents, and, as authority for that, *Studds v. Watson* (2) has been pressed on us. But there the two documents referred to one another sufficiently to enable them to be read together, and obviously amounted to a memorandum. *Pearce v. Gardner* (3) was also relied on, but the only evidence produced was to identify a letter as having been inclosed in an envelope which might then be used to supply the name of one of the parties. In this case there is no note or memorandum whatever. It is said that the payment of rent amounts to part performance of the contract, so as to take the case out of s. 4 of the Statute of Frauds. But the mere payment of such rent is not such part performance to take the case out of the statute. And even the payment of the whole of the purchase money has been held not to be sufficient to take the case out of the statute. The ground on which the court enforces specific performance of contracts with respect to land is that the defendant is charged,

A not on the contract itself, but on equities arising out of the acts of the parties, which have caused a change in their positions. For instance, in *Maddison v. Alderson* (4) the EARL OF SELBORNE, L.C., said (8 App. Cas. at p. 475):

B "In a suit founded on such part performance the defendant is really 'charged' upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself."

And farther on he said (*ibid.* at p. 478):

C "It is not enough that an act done should be a condition of, or good consideration for, a contract, unless it is, as between the parties, such a part execution as to change their relative positions as to the subject-matter of the contract."

Mere payment of money does not so change their position. LORD BLACKBURN, though reluctantly accepting the proposition, said (*ibid.* at p. 489): "If it was originally an error it is now I think communis error, and so makes the law." And farther on:

D "But I do not think this anomaly should be extended; and it is not a little remarkable that there is no case, at least none was cited, and I have found none, in which there has not been a change in the possession of the land, or, in the case where the purchaser was a tenant already in possession, a change in the nature of his tenure, which, rightly or wrongly, was held equivalent to a change in the position."

E In this case there has, of course, been no change in the possession of this farm or anything of the sort.

F *Nunn v. Fabian* (5) was relied on, but there the tenant had spent a considerable sum of money on the premises in addition to the payment of increased rent. In *Thursby v. Eccles* (1) BINGHAM, J., in terms decided the point that payment of rent in advance is not such a part performance as to take the case out of the Statute of Frauds, and said (49 W.R. at p. 282) that

"when the Court of Chancery gives relief from the operation of the statute it does so upon the equities which have arisen out of the acts of the parties. Payment of money in such a case as this raises no equity except possibly a right to recover it back."

G In my judgment, that case was well decided. Here there is no memorandum sufficient to comply with s. 4 of the Statute of Frauds, or anything which can be relied on as part performance so as to take it out of that statute, or which gives any equity to the plaintiff by which he can charge the defendant and, therefore, the appeal must be dismissed.

H BANKES, L.J.—I agree. There is nothing in this case which in any way connects these two documents so as to enable them to be read as one document. And the contention of part performance by payment of rent is not open to the plaintiff on the authorities.

I WARRINGTON, L.J.—I am of the same opinion. The question as to the application of the doctrine of part performance to oral agreements is of some general importance. We are here asked in effect to overrule the decision in *Thursby v. Eccles* (1), and also to impliedly overrule a whole series of cases by which it was settled, as was said in *Maddison v. Alderson* (4), that mere payment of purchase money is not such an act of part performance as to enable the court to enforce the contract. It is necessary to inquire on what the doctrine under which the court enforces oral agreements for the sale of land notwithstanding the provisions of s. 4 of the Statute of Frauds is founded. There is no question that a decree in such a case did not have the effect of charging the defendant on the contract itself, but, to use the words of the EARL OF

SELBORNE L.C. (8 App. Cas. at p. 475), "upon the equities resulting from the acts done in execution of the contract."

The matter is well summarised in *FRY ON SPECIFIC PERFORMANCE* (5th Edn.) p. 283, in which it is said:

"Courts of equity hold that, notwithstanding the express language of the statute, a case may be taken out of its operation by any one of the following circumstances . . ."

and there are then stated four of such circumstances, the first three of which are immaterial to the facts of this case, but the fourth is

"by a parol contract and part performance, which is, as we shall see, but a particular case of fraud."

Then, on p. 290, referring to this same fourthly stated circumstance as a reason for enforcing specific performance, the learned author says:

"This exception seems to be based on the view that if a man have made a bargain with another, and allowed that other to act upon it, he may have created an equity against himself which he cannot resist by setting up the want of a formality in the evidence of the contract out of which the equity in part arose."

And then comes an important passage:

"In order thus to withdraw a contract from the operation of the statute, several circumstances must concur: First, the acts of part performance must be such as not only to be referable to a contract such as that alleged, but to be referable to no other title; secondly, they must be such as to render it a fraud in the defendant to take advantage of the contract not being in writing; thirdly, the contract to which they refer must be such as in its own nature is enforceable by the court; and fourthly, there must be proper parol evidence of the contract which is let in by the acts of part performance."

Every one of those four headings is essential to the act relied on, and, treated as part performance, it is not enough to show that the act is referable to the contract if that act is such as not to amount to a fraud of the defendant in taking advantage of the contract not being in writing. Therefore, the payment of purchase money is not sufficient of itself to amount to an act of part performance. If, on the other hand, the possession of the property is changed, the relation of the parties is changed, and the defendant cannot set up the want of a memorandum sufficient to satisfy the statute for the reason that he has allowed an act to be performed which he cannot reverse, and could only do so in equity by indemnifying the plaintiff against any money expended or any liability incurred by him in consequence of such act.

In my opinion, the judgment of EVE, J., is right, and there can be no distinction between the payment of rent and the payment of purchase money. With regard to there being any connection between the two documents, I have nothing to add to what has already been said by SWINFEN EADY, L.J.

Appeal dismissed.

Solicitors: *Chaproniere & Co.; R. G. Harrison.*

[Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.]

SHAW & CO. v. SYMMONS & SONS

[KING'S BENCH DIVISION (Avory, J.), February 26, March 2, 1917]

[Reported [1917] 1 K.B. 799; 86 L.J.K.B. 549; 117 L.T. 91;
33 L.T.R. 239]

*Bailee—Liability—Loss of goods while bailee in breach of contract of bailment—
Fires Prevention (Metropolis) Act, 1774 (14 Geo. 3 c. 78), s. 86.*

The plaintiffs, publishers, entrusted books to the defendants, book-binders, for the books to be bound, and, when bound, to be delivered to the plaintiffs as and when required by the plaintiffs. There being no time specified for delivery, the learned judge held that the defendants were bound to deliver within a reasonable time after a request by the plaintiffs for the delivery to them of all the bound books then in stock, and that a reasonable time for delivery had expired on Jan. 20, 1916, when a fire occurred accidentally and not through negligence of the defendants on the defendants' premises and resulted in the books being wholly or partially damaged or destroyed. On the defendants' invoices and letter paper there was a printed notice stating that they would not be liable for loss or damage by fire on their premises.

Held: the books not having been delivered within the time found to be a reasonable time after the request for delivery, they were lost or damaged when the defendants were in breach of contract, and, therefore, the defendants were liable to the plaintiffs as insurers and were not protected by the notice on their invoice and letter paper, nor by s. 86 of the Fires Prevention (Metropolis) Act, 1774.

Per AVORY, J.: Section 86 was probably intended only to exempt the occupier of a building in the case of an accidental fire from any liability at common law to his landlord or to his neighbour in the event of the fire spreading.

Notes. As to the obligations of a bailee in custody of goods on which he has contracted to do work, see 2 HALSBURY'S LAWS (3rd Edn.) 127–133, and for cases see 3 DIGEST (Repl.) 101–104. For Fires Prevention (Metropolis) Act, 17–74, see 13 HALSBURY'S STATUTES (2nd Edn.) 10.

Cases referred to:

- (1) *Davis v. Garrett* (1830), 6 Bing. 716; L. & Welsb. 276; 4 Moo. & P. 540; 8 L.J.O.S.C.P. 253; 130 E.R. 1456; 8 Digest (Repl.) 14, 65.
- (2) *Lilley v. Doubleday* (1881), 7 Q.B.D. 510; 51 L.J.Q.B. 310; 44 L.T. 814; 46 J.P. 708; 3 Digest (Repl.) 82, 183.
- (3) *Royal Exchange Shipping Co. v. Dixon* (1886), 12 App. Cas. 11; 56 L.J.Q.B. 266; 56 L.T. 206; 35 W.R. 461; 3 T.L.R. 172; 6 Asp. M.L.C. 92, H.L.; 41 Digest 468, 2995.
- (4) *James Morrison & Co., Ltd. v. Shaw, Savill and Albion Co., Ltd.*, ante p. 1068; [1916] 2 K.B. 783; 86 L.J.K.B. 97; 115 L.T. 508; 32 T.L.R. 712; 61 Sol. Jo. 9; 13 Asp. M.L.C. 504; C.A.; 8 Digest (Repl.) 22, 123.

Also referred to in argument:

- Maving v. Todd* (1815), 1 Stark. 72; 4 Camp. 225; 3 Digest (Repl.) 84, 195.
Syred v. Carruthers (1858), E.B. & E. 469; 27 L.J.M.C. 273; 31 L.T.O.S. 178; 23 J.P. 37; 4 Jur. N.S. 949; 6 W.R. 595; 120 E.R. 584; 37 Digest 25, 200.
Sharp v. Powell (1872), L.R. 7 C.P. 253; 41 L.J.C.P. 95; 26 L.T. 436; 20 W.R. 584; 36 Digest (Repl.) 36, 173.
Walker v. Maitland (1821), 5 B. & Ald. 171; 106 E.R. 1155; 29 Digest 206, 1654.

- Romney Marsh (Lords Bailiff-Jurats) v. Trinity House Corpn.* (1870), L.R. 5 Exch. 204; affirmed (1872), L.R. 7 Exch. 247; 41 L.J.Ex. 106; 20 W.R. 952, Ex.Ch.; 36 Digest (Repl.) 39, 193. A
- Vaughan v. Taff Vale Rail. Co.* (1860), 5 H. & N. 679; 29 L.J.Ex. 427; 2 L.T. 394; 24 J.P. 453; 6 Jur. N.S. 899; 8 W.R. 549; 157 E.R. 1351, Ex. Ch.; 36 Digest (Repl.) 6, 8.
- Briddon v. Great Northern Rail. Co.* (1858), 28 L.J.Ex. 51; 32 L.T.O.S. 94; 8 Digest (Repl.) 26, 156. B
- Taylor v. Great Northern Rail. Co.* (1866), L.R. 1 C.P. 385; sub nom. *Great Northern Rail. Co. v. Taylor*, Mar. & Ruth 471; 35 L.J.C.P. 210; 14 L.T. 363; 12 Jur. N.S. 372; 14 W.R. 639; 8 Digest (Repl.) 26, 154.
- Filliter v. Phippard* (1847), 11 Q.B. 347; 17 L.J.Q.B. 89; 10 L.T.O.S. 225; 11 J.P. 903; 12 Jur. 202; 116 E.R. 506; 36 Digest (Repl.) 76, 407. C
- Nitro-Phosphate and Odan's Chemical Manure Co. v. London and St. Katherine Docks Co.* (1878), 9 Ch.D. 503; 39 L.T. 433; 27 W.R. 267, C.A.; 36 Digest (Repl.) 161, 856.
- Lepla v. Rogers*, [1893] 1 Q.B. 31; 68 L.T. 584; 57 J.P. 55; 9 T.L.R. 23; 37 Sol. Jo. 11; 5 R. 57; 17 Digest (Repl.) 120, 313.
- The Notting Hill* (1884), 9 P.D. 105; 53 L.J.P. 56; 51 L.T. 66; 32 W.R. 764; 5 Asp. M.L.C. 241, C.A.; 17 Digest (Repl.) 114, 272. D

Action for damages for breach of contract tried before AVORY, J., without a jury.

By s. 86 of the Fires Prevention (Metropolis) Act, 1774:

"No action, suit, or process whatever shall be had, maintained, or prosecuted against any person in whose house, chamber, stable, barn, or any other building, or on whose estate any fire shall . . . accidentally begin, nor shall any recompense be made by such person for any damage suffered thereby; any law, usage, or custom to the contrary notwithstanding: And in such case, if any action be brought, the defendant may plead the general issue and give this Act and the special matter in evidence at any trial thereupon to be had: And in case the plaintiff become non-suited, or discontinue his action or suit, or if a verdict pass against him, the defendant shall recover treble costs; provided that no contract or agreement made between landlord and tenant shall be hereby defeated or made void."

E. Pollock, K.C., and *Wallington* for the plaintiffs.

A. Powell, K.C., and *A. M. Latter* for the defendants. G

Cur. adv. vult.

Mar. 2, 1917. **AVORY, J.**, read the following judgment.—The material facts upon which the questions in this case depend are that the plaintiffs who are publishers, entrusted to the defendants, who are bookbinders, books to be bound under contract to deliver them when bound to the plaintiffs as and when required by the plaintiffs, and it was a term of the contract that all books ordered to be bound and not delivered should be charged against the plaintiffs at the expiration of one year from the first of the month following the date of the order. No time was specified for delivery, and I hold that the defendants were bound to deliver within a reasonable time after the order for delivery of bound books. On January, 1916, the plaintiffs requested the defendants to deliver to them the whole of the books then bound in stock which the defendants had charged against the plaintiffs in accordance with the above-mentioned term of the contract, and I find as a fact that between Jan. 7 and 20 the plaintiffs on two occasions telephoned to the defendants pressing for delivery. On Jan. 20 a fire occurred on the defendant's premises, which was accidental and not due to any negligence on the part of the defendants; the plaintiffs' books included in the last-mentioned order were wholly or partially destroyed or damaged in the fire; and the defendants in consequence failed to deliver them to the plaintiffs. H

I

A Counsel for the plaintiffs based their claim on a breach of the contract to deliver within a reasonable time. For this reason I do not deal with an alternative claim for detention or with the evidence as to a subsequent sale by auction of some of the plaintiffs' goods, which formed part of the salvage stock.

B For the defendants it was contended (i) that there was no breach of the contract to deliver within a reasonable time; (ii) that, even if there was a breach, the defendants were not insurers, and further were protected by the notice upon their invoices and letter paper that they would not be answerable for the loss or damage by fire; (iii) that the breach of contract was not the proximate cause of the loss, or that the damage did not naturally flow from the breach of contract; and (iv) that in any event the defendants were absolved from liability by the Fires Prevention (Metropolis) Act, 1774. A consideration of the evidence as to the time taken in delivery on previous occasions, particularly in September and December, 1915, and January, 1916, and taking into account the difficulties of transport and shortage of labour on which the defendants relied at the trial, but which had not previously been set up as an excuse, leads me to the conclusion, and I find as a fact, that a reasonable time for delivery had expired on Jan. 20, and that the defendants committed a breach of contract in not delivering before that date. Upon this finding of fact I think that the decisions in *Davis v. Garrett* (1) and *Lilley v. Doubleday* (2) approved in *Royal Exchange Shipping Co. v. Dixon* (3), and more recently in *Morrison & Co., Ltd. v. Shaw, Savill and Albion Co., Ltd.* (4), are conclusive against the second and third contentions of the defendants. To quote the words of TINDAL, C.J., in *Davis v. Garrett* (1) (6 Bing. at p. 724), "as a loss has actually happened whilst his wrongful act was in operation and force," they cannot set up as an answer to the action the bare possibility of a loss if their wrongful act had never been done. It is suggested that the principle of these decisions does not apply to an act of omission as in the present case, but I am unable to appreciate the distinction for this purpose between a breach of contract in not delivering and a breach of contract in delivering at another place.

F The point under the Fires Prevention (Metropolis) Act, 1774, s. 86, remains to be considered. Counsel for the defendants contends that this section ought to be construed literally and without limitation, and that it applies to any case in which goods which are the subject of the action in a building are destroyed in an accidental fire. It is not necessary in this case to decide what are the exact limitations of its application; it probably is intended only to exempt the occupier of a building, in the case of an accidental fire, from any liability at common law to his landlord or to his neighbour in the event of the fire spreading, but I am clearly of opinion that it has no application to the present case, where the breach of contract had been committed before the fire occurred. For these reasons I am of opinion that the plaintiffs are entitled to judgment for damages, the amount of which will be the value of the goods included in the order of

H Jan. 7 and not delivered.

Judgment for plaintiffs.

Solicitors; *G. E. Hodgkinson; Danby, Brooks & Co.*

[Reported by T. W. MORGAN, Esq., Barrister-at-Law.]

Re WIX. HARDY v. LEMON

[CHANCERY DIVISION (Younger, J.), January 20, 21, 1916]

[Reported [1916] 1 Ch. 279; 85 L.J.Ch. 192; 114 L.T. 455;
32 T.L.R. 257; 60 Sol. Jo. 291]

Settled Land—Tenant for life—Powers—Leasing—New lease granted in place of surrendered lease—New lease for longer period and at increased rent—Rent reserved by new lease not the best rent—Right of tenant for life to whole of new rent during unexpired period of surrendered lease—Settled Land Act, 1882 (45 & 46 Vict., c. 38), s. 13 (5).

Where a tenant for life accepts a surrender of an existing lease of settled land and in the proper exercise of his powers grants a new lease of the land which is for a longer period than the surrendered lease and at an increased rent, he is entitled to retain for himself, as against the remaindermen, the excess rent during the unexpired period of the surrendered lease even though the rent reserved by the new lease is less than the best rent that could have been obtained.

Cottrell v. Cottrell (1) (1885), 28 Ch.D. 628; and *Re Rodes* (2) [1909] 1 Ch. 815, considered.

Settled property comprising a freehold block of premises was subject to a lease to a bank for a term of sixty years from Mar. 25, 1873, at a rent of £1,100. On Nov. 13, 1913, viz. when nearly twenty years of the bank's lease remained unexpired, the tenants for life agreed to accept a surrender of the lease and to grant a new lease to assignees of the bank for a term of ninety-nine years from Mar. 25, 1914, at a rent of £2,500, viz. £1,400 more than the rent under the surrendered lease. The new lease, which was granted on condition that new buildings were erected on the demised premises at a cost of not less than £25,000, was sanctioned by the court as proper under the powers conferred on tenants for life by s. 13 of the Settled Land Act, 1882. The rent of £2,500 was less than the best rent obtainable, since the tenants for life, in accordance with their powers under s. 13 (5) of the Act, had taken into account the value of the surrendered lease in determining the rent to be reserved under the new lease. On an application by the trustees for the purposes of the Settled Land Acts asking whether the excess rent of £1,400 should be set aside as capital money in each year until the date when the surrendered lease would have expired on Mar. 25, 1933,

Held: bearing in mind that the court had sanctioned the new lease, and, in particular, that the consideration for it should be wholly in the form of rent, the tenants for life were entitled to keep for themselves the whole of the rent reserved under the new lease until the date mentioned, and the trustees were not required to retain or capitalise any portion of it for the benefit of the remaindermen.

Notes. Section 13 of the Settled Land Act, 1882, is replaced by s. 52 of the Settled Land Act, 1925.

As to the power of a tenant for life to accept surrenders of leases, see 34 HALSBURY'S LAWS (3rd Edn.) 571, 572. For cases on the right to income from leaseholds as between tenant for life and remainderman, see 40 DIGEST 657-659. For the Settled Land Act, 1925, s. 52, see 23 HALSBURY'S STATUTES (2nd Edn.) 128.

Cases referred to:

- (1) *Cottrell v. Cottrell* (1885), 28 Ch.D. 628; 54 L.J.Ch. 417; 52 L.T. 486; 33 W.R. 361; 40 Digest (Repl.) 712, 2070.
- (2) *Re Rodes, Sanders v. Hobson*, [1909] 1 Ch. 815; 78 L.J.Ch. 434; 100 L.T. 959; 40 Digest (Repl.) 713, 2076.

A (3) *Re Baring, Jeune v. Baring*, [1893] 1 Ch. 61; 62 L.J.Ch. 50; 67 L.T. 702; 41 W.R. 87; 9 T.L.R. 7; 3 R. 37; 40 Digest (Repl.) 703, 1988.

Adjourned Summons taken out by trustees for the purposes of the Settled Land Acts asking that directions might be given as to what part, if any, of the yearly rent of £2,500 reserved by a lease dated Dec. 31, 1914, ought to be set aside as capital money, and, in particular, whether the yearly sum of £1,400, being the excess of the said rent over the rent reserved by the previous lease of the premises surrendered to the life tenants, or any part thereof, and if so what part, ought to be set aside up to Mar. 25, 1933, the date when the precious lease would have expired if it had not been surrendered.

The material sections of the Settled Land Acts referred to were:

C "Section 6 (1). A tenant for life may lease the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same, for any purpose whatever, whether involving waste or not, for any term not exceeding (1) in case of a building lease, ninety-nine years; (2) in case of a mining lease, sixty years; (3) in case of any other lease, twenty-one years.

D "Section 7 (1). Every lease shall be by deed, and be made to take effect in possession not later than twelve months after its date. (2) Every lease shall reserve the best rent that can reasonably be obtained, regard being had to any fine taken, and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case.

E "Section 8 (1). Every building lease shall be made partly in consideration of the lessee, or some person by whose direction the lease is granted, or some other person, having erected, or agreeing to erect, buildings, new or additional, or having improved or repaired, or agreeing to improve or repair, buildings, or having executed, or agreeing to execute, on the land leased, an improvement authorised by this Act, for or in connexion with building purposes.

F "Section 13 (1). A tenant for life may accept, with or without consideration, a surrender of any lease of settled land, whether made under this Act or not, in respect of the whole land leased, or any part thereof, with or without an exception, of all or any of the mines and minerals therein, or in respect of mines and minerals, or any of them . . . (5) On a surrender, and the making of a new or other lease, whether for the same or for any extended or other term, and whether or not subject to the same or to any other covenants, provisions, or conditions, the value of the lessee's interest in the lease surrendered may be taken into account in the determination of the amount of the rent to be reserved, and of any fine to be taken, and of the nature of the covenants, provisions, and conditions to be inserted in the new or other lease."

H *Arnold Jolly* for the trustees.

H. C. Bischoff for the tenants for life.

A. F. Topham (*E. L. Riviere* with him) for the infant remaindermen.

Cur. adv. vult.

I Jan. 21, 1916. YOUNGER, J.—This summons raises a novel and, as I think, a difficult point under s. 13 (5) of the Settled Land Act, 1882.

The settled property in question is a valuable freehold block of premises in Bishopsgate, in the City of London, and was settled by the will of Fanny Wix, who died on Oct. 24, 1884. At the time of her death the testatrix was entitled in fee simple to the hereditaments in question, subject to a subsisting lease in favour of the Anglo-Foreign Banking Co. dated Aug. 21, 1874, for a term of sixty years from Mar. 25, 1873, at a rental of £1,100 per annum. By her will the testatrix demised the property to legal uses under which the three first-named defendants, Mrs. Lawson, Mrs. Forrester, and Mrs. Knowles, are now

entitled as tenants in common in equal shares for their respective lives, and the persons at present interested in remainder and for an estate in fee simple are the three infant defendants, Norah Wyatt Lemon, Richard Cameron Knowles, and Bryan Knowles. By an order of SARGANT, J., of Dec. 17, 1913, the plaintiffs were appointed trustees for the purposes of the Settled Land Act of the settlement of the Bishopsgate property created by the will of the testatrix.

On Nov. 13, 1913, while nearly twenty years of the bank's lease remained unexpired, the three tenants for life entered into a conditional agreement with the Banque Belge (in whom by assignment the leasehold had become vested), and the Bishopsgate Estates, Ltd., who had acquired an interest in the adjoining premises, under which, by arrangement with the Estates Co., the bank was to surrender its existing lease, and a new lease in substitution therefor for a term of ninety-nine years from Mar. 25, 1914, and at a rent of £2,500 per annum, was to be granted to the Estates Co. who covenanted to erect on the settled property and adjoining premises new buildings at a cost of not less than £25,000. The agreement was made conditional on the sanction of the court being obtained to it, and by an order of July 27, 1914, made on a summons intitled in the matter of the Settled Land Acts, in which the tenants for life were plaintiffs and the trustees and the infant remaindermen were defendants, SARGANT, J., directed that the conditional agreement above referred to for the grant of a lease of the above-mentioned settled premises upon the terms therein appearing as modified be carried into effect, but that this order was to be without prejudice to any question as to the destination of the excess rent payable until Mar. 25, 1933, and subject to the deposit of a sum of £2,500 pending the building of the new premises. A lease in pursuance of the agreement so sanctioned was in due course granted and is dated Dec. 31, 1914, and under it the increased rent of £2,500 is now being paid, and it is in these circumstances that the present summons was taken out.

[HIS LORDSHIP read the terms of the summons and continued:] The first question I have to determine is the effect of the saving in SARGANT, J.'s order of July 27, 1914. Does that saving clause merely reserve for future determination the legal question how, on the footing that the lease then approved was properly granted by the tenants for life, the excess rent referred to was to be dealt with, or is the effect of the saving this, that the tenants for life as a term of getting the court's sanction submitted to be bound by any order the court as a matter of fairness and equity might thereafter think fit to make with reference to the retention, or the capitalisation, or the accumulation of the excess rent, or any part of it? It would perhaps be easier to answer this question satisfactorily, if one could be quite certain under which section of the Settled Land Act the application was made to SARGANT, J., or what power the court possessed under that Act to deal with it. For it does not seem that there is any section in the Act at least directly applicable to the case, and I think that the real foundation of the order was the general jurisdiction of the court in the matter of trusts to protect trustees—in this case the tenants for life—by sanctioning in the presence of the parties interested an act of administration which they desired to carry out. So regarding the order, I think the saving must be taken to mean no more than this, that the question as to the destination of the excess rent was reserved for determination purely as one arising under the Settled Land Act, but upon the footing that the lease sanctioned was in the circumstances a proper lease to be granted under the powers conferred upon the tenants for life by s. 13 of the Act of 1882.

Section 13 so far as material, is as follows [HIS LORDSHIP read s. 13 (1), (5) and (6); and also s. 6 (1); s. 7 (1) and (2); and s. 8 (1)] and the effect of these sub-sections seems to be that while the best rent is to be reserved,

“the value of the lessee's interest in the lease surrendered may be taken into account in the determination of the amount of the rent to be reserved,

- A and of any fine to be taken, and of the nature of the covenants, provisions, and conditions to be inserted in the new or other lease "
- (s. 13 (5))—that is to say, the rent or the fine if there be one, may be reduced below the best rent or best fine by the amount of the lessee's interest in the unexpired surrender term. But, further, the lessor is not required to take a fine; the section contemplates that a fine will not always be taken; the tenant
- B for life is empowered by the section to reserve the whole of the consideration, so far as payment is concerned, in the form of rent, and I must take it to be the result of the order of July 27, 1914, that it was proper so to do in this case. The effect, however, of that is, first, that the rent of £2,500 is in every year of the whole term of ninety-nine years less than the best rent by the value of the lessee's interest in the surrendered lease spread over that period, and, secondly,
- C that the present tenants for life will, as a result of the transaction, if they are entitled to the whole of the reserved rent, receive for twenty years £1,400 in every year more than they were entitled to under the surrendered lease, and as against that those entitled to the reversion for the rest of the term will have to submit to receive in each year a rent which is less than the best rent and without compensation of any kind for the deficiency.
- D It is, of course, obvious that the result might have been avoided by a mere re-arrangement of terms. For instance, the rent reserved under the new lease for the first twenty years might have been £1,100 only, and the rent for the rest of the term fixed at what was actually the best rent. Or, again, the present value of the difference between the £1,100 rent and £2,500 rent for twenty years
- E might have been ascertained and taken in the form of a fine which under s. 4 of the Act of 1884 would become capital money and devolve accordingly, while the rent reserved for these twenty years would have been £1,100, the rent of £2,500 being reserved for the residue of the term only. By one or other of these modifications in detail the subsisting rights of the successive interests in the property as it existed immediately prior to the surrender would have been
- F preserved, and the question accordingly is whether there is any power in the court to effect the same result by requiring the excess rent, or any part of it, to be capitalised or accumulated or dealt with otherwise than by payment to the tenants for life. In other words, are the rights of the tenant for life in a case like the present to be determined solely by the form of the lease which he has granted, or is it permissible for the court to adjust the successive interests in the
- G consideration on proper principles irrespective of the form in which it is received. In support of the view that this power must be inherent in the court, counsel for the remaindermen, argued that the new lease was in effect the sale of a partial interest in the reversion, and he pointed to s. 34 of the Act, which empowers the trustees or the court where the whole reversion is sold to cause the purchase
- H money
- " to be laid out, invested, accumulated, and paid in such manner as in the judgment of the trustees or the court will give to the parties interested in the money the like benefit thereupon as they might lawfully have had from the reversion in respect whereof the money was paid,"
- I and he cited *Cottrell v. Cottrell* (1), where KAY, J., held under that section that as between the tenant for life and the remainderman, where lands subject to a beneficial lease are sold under the Settled Land Act, 1882, the tenant for life will during the unexpired period of the term be entitled to so much only of the income of the invested purchase moneys as equals the rents under the lease, and the rest of that income must be accumulated and invested for the benefit of the inheritance until the date when the lease would have expired. Reference was also made to *Re Rodes* (2), where PARKER, J., held that money paid to an equitable tenant for life by a lessee as consideration for accepting a surrender of a lease, which had been granted under the powers of the Settled Land Acts,

does not belong to him as a casual profit, but must be paid by instalments to him and other persons entitled to the rent. A

I feel the force of these considerations, and I would willingly enough give effect to them if I thought it were open to me to do so. But the words of the section are, I think, too strong for me in a case like this, where no objection can be taken to the propriety of the lease as granted. Rent under a building lease seems to me, so far as the Act is concerned, to be clearly rents and profits and receivable as such unless the settlement contains some provision to the contrary. B
There is no provision in the Act for capitalising rent, so called, except a part of the rent reserved under a mining lease by virtue of s. 11. I can find no trace anywhere that the rent reserved by a proper building lease under s. 13 (5) is to go in any direction different from that reserved by a similar lease under ss. 6 and 8. Further, KAY, J.'s, decision shows that the rule of the court in such a case as the present would be not only to capitalise but to accumulate the excess rent during the term of the surrender lease. But s. 13 (5) plainly authorises C
a fine to be taken under such circumstances as we have to deal with here. Indeed, a fine might have been taken in this case to represent the excess rent. If it had, the tenants for life would have been entitled to the interest upon it when invested under the express provisions of s. 4 of the Act of 1884. That is to say, there D
would be capitalisation, but no accumulation. So that by the express provision of the statute you find excess rent in the form of a fine dealt with on other than the equitable principles laid down by KAY, J.

Further, in a case of falling values it might well be that under s. 13 (5) a less rent would be reserved under the new lease, which would be for a longer term than was payable under the surrender lease, and there is certainly no provision E
in the Act under which that deficiency could be made good to the tenant for life. And not only does the Act contain no indication of intention to reserve to the court or the trustees any power to direct any rent reserved under a new lease from its normal destination, but the legislature may well have refrained from conferring that power upon the court by reason of the difficulty of exercising it properly. The statutory provision capitalising a fine in every case is merely F
a legislative method of cutting a knot; it does not solve a difficulty. The enactment applies to a fine on every lease, however long or short, but there can be no reason, on principle, why a fine reserved on the granting of a lease which does not endure beyond the life of the tenant for life who granted it should be capitalised. In such a case he is, on principle, as much entitled to the fine as G
he is to the rent reserved during the whole term. And there are few cases, although the present may be one, in which a mere direction to capitalise excess rent would be really just or fair; in most cases some part at least of the [rent so capitalised should in justice fall to the tenant for life on the principle applied in *Re Baring* (3), or to his successor. Indeed, the true principle would be not after the expiration of the original lease to hold the accumulated fund as capital H
moneys, but to distribute them by equal payments over the whole term of the new lease amongst the persons for the time being entitled to the rent thereby reserved, who might be a tenant for life just as likely as a remainderman. Further, if KAY, J.'s rule is always to be applied to such a case as this, and the excess rent not only to be accumulated as well as capitalised, that would in the great majority of cases deprive the tenant for life in possession of all advantage from the transaction, and would remove the real incentive to the exercise I
of a power which it might be greatly to the advantage of the settled estate should be exercised.

On the whole, there are, I think, many sound reasons for holding that in every case in which a lease such as that now under review is not open to question on the ground of impropriety or otherwise, the Act intends that it shall be operative in accordance with its tenor. Unless the lease is so improper as to amount to an improper exercise of his powers by the tenant for life, it is quite in accord with the spirit of the whole Act that the legislature intended that the tenant for life

A should keep for himself everything which under the terms of the instrument he had succeeded in retaining for himself. There must be a declaration that a portion of the rent is to be retained or capitalised.

Declaration accordingly.

Solicitors: *Brighten & Lemon; Burne & Wykes.*

B [Reported by M. H. TRUELOVE, ESQ., Barrister-at-Law.]

C

MOUSELL BROS. v. LONDON AND NORTH WESTERN RAIL. CO.

[KING'S BENCH DIVISION (Viscount Reading, C.J., Ridley and Atkin, JJ.), July 24, 1917]

D

[Reported [1917] 2 K.B. 836; 87 L.J.K.B. 82; 118 L.T. 25; 81 J.P. 305; 15 L.G.R. 706]

E

Master and Servant—Liability of master for act of servant—Criminal act—Statutory offence—Matters to be considered—False description of goods to be carried by railway with intent to avoid tolls—Liability of master to conviction—Railway Clauses Consolidation Act, 1845 (8 & 9 Vict., c. 20), ss. 98, 99—Interpretation Act, 1889 (52 & 53 Vict., c. 63), s. 2.

F

Although *prima facie* a master cannot be held criminally responsible for the acts of his servant, there are instances in which the legislature have resolved to prohibit an act or to enforce a duty in such words as to make the prohibition of the act or the enforcement of the duty absolute. In such a case the master is liable if the act is in fact done by his servant although he himself may know nothing about it. To discover whether any particular act has or has not this effect it is necessary to have regard to the object of the statute, the words used, the nature of the duty imposed, the person on whom the duty is imposed, the person by whom the duty would be performed in the ordinary course of events, and the person on whom the penalty is imposed.

G

A servant of the appellant company, who was employed, *inter alia*, to consign goods belonging to the company by the respondents' railway, in making out, or causing to be made out, the consignment notes wrongly described the goods so as to obtain their conveyance by the respondents at a cheaper rate than that which was properly chargeable. The directors of the company knew nothing of the false description and were in no way party to it. On a prosecution of the company under s. 98 and s. 99 of the Railway Clauses Consolidation Act, 1845, for giving a false account of the goods with intent to avoid the tolls payable in respect thereof,

H

I

Held: (i) in view of the language and purposes of the Act of 1845 it was the intention of the legislature to fix responsibility for this quasi-criminal act on the master if the act was done by a servant while acting within the scope of his employment, as was the case here; (ii) there was nothing in the Act showing a "contrary intention" within s. 2 (1) of the Interpretation Act, 1889, and, therefore, "person" in s. 98 and s. 99 included a body corporate; accordingly, the company could be properly convicted of the offence charged.

Notes. Applied: *Warrington v. Windhill Industrial Co-operative Society* (1918), 82 J.P. 149. Considered: *R. v. Duke of Leinster*, [1924] 1 K.B. 311;

Griffiths v. Studebakers, Ltd., [1924] 1 K.B. 102; *Allen v. Whitehead*, [1929] 1 All E.R. Rep. 13; *Gardner v. Akeroyd*, [1952] 2 All E.R. 306. Applied: *Quality Dairies (York), Ltd. v. Pedley*, [1952] 1 All E.R. 380. Referred: *Pearks' Dairies v. Tottenham Food Control Committee* (1918), 88 L.J.K.B. 623; *Gaumont British Distributors, Ltd. v. Henry*, [1939] 2 All E.R. 808; *D.P.P. v. Kent and Sussex Contractors, Ltd.*, [1944] 1 All E.R. 119; *R. v. I.C.R. Haulage, Ltd.*, [1944] 1 All E.R. 691; *Brentnall and Cleland, Ltd. v. London County Council*, [1944] 2 All E.R. 552; *James & Son, Ltd. v. Smee, Green v. Burrett*, [1954] 3 All E.R. 273; *R. v. St. Margaret's Trust, Ltd.*, [1958] 2 All E.R. 289.

As to the responsibility of a master for the criminal act of his servant and the criminal responsibility of corporations see 10 HALSBURY'S LAWS (3rd Edn.) 275-282, and for cases see 14 DIGEST (Repl.) 41-50 and 13 DIGEST (Repl.) 327-331. For Railway Clauses Consolidation Act, 1845, see 19 HALSBURY'S STATUTES (2nd Edn.) 590.

Cases referred to:

- (1) *Pearks, Gunston and Tee, Ltd. v. Ward*, [1902] 2 K.B. 1; 71 L.J.K.B. 656; 87 L.T. 51; 66 J.P. 774; 20 Cox, C.C. 279; 14 Digest (Repl.) 43, 115.
- (2) *Copper v. Moore (No. 2)*, [1898] 2 Q.B. 306; 67 L.J.Q.B. 689; 78 L.T. 520; 62 J.P. 453; 46 W.R. 620; 14 T.L.R. 414; 42 Sol. Jo. 539; 19 Cox, C.C. 45; 14 Digest (Repl.) 47, 148.
- (3) *Bond v. Evans* (1888), 21 Q.B.D. 249; 57 L.J.M.C. 105; 59 L.T. 411; 52 J.P. 613; 36 W.R. 767; 4 T.L.R. 614; 16 Cox, C.C. 461, D.C.; 14 Digest (Repl.) 50, 164.
- (4) *Chuter v. Freeth and Pocock, Ltd.*, [1911] 2 K.B. 832; 80 L.J.K.B. 1322; 105 L.T. 238; 75 J.P. 430; 27 T.L.R. 467; 22 Cox, C.C. 573; 9 L.G.R. 1055, D.C.; 13 Digest (Repl.) 265, 916.
- (5) *R. v. Tyler and International Commercial Co.*, [1891] 2 Q.B. 588; 61 L.J.M.C. 38; 65 L.T. 662; 56 J.P. 118; 7 L.T.R. 720, C.A.; 14 Digest (Repl.) 30, 23.

Cases referred to in argument:

- Cundy v. Le Cocq* (1884), 13 Q.B.D. 207; 53 L.J.M.C. 125; 51 L.T. 265; 48 J.P. 599; 32 W.R. 769, D.C.; 30 Digest (Repl.) 96, 719.
- Roberts v. Woodward* (1890), 25 Q.B.D. 412; 59 L.J.M.C. 129; 63 L.T. 200; 55 J.P. 116; 38 W.R. 770; 17 Cox, C.C. 139, D.C.; 14 Digest (Repl.) 44, 122.
- Massey v. Morris*, [1894] 2 Q.B. 412; 63 L.J.M.C. 185; 70 L.T. 873; 58 J.P. 673; 42 W.R. 638; 38 Sol. Jo. 547; 7 Asp. M.L.C. 586; 10 R. 342, D.C.; 14 Digest (Repl.) 44, 125.
- Sherras v. De Rutzen*, [1895] 1 Q.B. 918; 64 L.J.M.C. 218; 72 L.T. 834; 59 J.P. 440; 43 W.R. 526; 11 T.L.R. 369; 39 Sol. Jo. 451; 18 Cox, C.C. 157; 15 R. 388, D.C.; 14 Digest (Repl.) 39, 90.
- Citizens' Life Assurance Co. v. Brown*, [1904] A.C. 423; 73 L.J.P.C. 102; 90 L.T. 739; 53 W.R. 176; 20 T.L.R. 497, P.C.; 13 Digest (Repl.) 323, 1300.
- Hawke v. E. Hulton & Co., Ltd.*, [1909] 2 W.B. 93; 78 L.J.K.B. 633; 100 L.T. 905; 73 J.P. 295; 25 T.L.R. 474; 22 Cox, C.C. 122; 16 Mans' 164, D.C.; 13 Digest (Repl.) 266, 919.

Case Stated by the stipendiary magistrate for the city of Manchester.

On Dec. 14, 1916, two complaints were preferred by Humphrey Mansfield Dyke on behalf of the respondents, the London and North-Western Rail. Co., under the Railways Clauses Consolidation Act, 1845, against the appellants, Mousell Bros., Ltd. for that they, the appellants, on Nov. 7 and 8, 1916, being the owners or having the care of certain goods passing upon and being upon the London and North-Western Railway, did on demand unlawfully give to the collector of tolls for the respondents a false account of the same with intent to avoid the payment of the tolls payable in respect thereof. Upon the hearing of

A the complaints it was proved or admitted that the appellants were removal and storage contractors, having their principal place of business in London and having a branch at Manchester, which was managed by Percy Charles Foss. On Nov. 7 and 8, 1916, men employed by the appellants took to the respondents' depot at London Road Goods Station, Manchester, lorry loads of goods belonging to the appellants which were described as "old timber and iron rods." On Dec. 6, 1916, Percy Charles Foss told a representative of the respondents that he was responsible as manager for the consignment notes of the goods, and that the goods to which those notes referred could not properly be described as old timber or iron rods. The tolls chargeable according to the description of the goods on the consignment notes were £2 16s. 8d. for those sent on Nov. 7 and £1 17s. 1d. for those sent on Nov. 8. The tolls chargeable had the goods been correctly declared, were £4 9s. 2d. and £2 18s. 6d. respectively. The magistrate was of opinion that the goods brought by the appellants to the respondents' station on Nov. 7 and 8, 1916, were not correctly described in the consignment notes, nor were the respective numbers or quantities of the goods liable to the payment of different tolls correctly specified in the consignment notes; that the incorrect description and specification were so made on the consignment notes on the instructions of Percy Charles Foss in order to void the payment of the proper tolls chargeable thereon; that Percy Charles Foss had authority from the appellants to give the instructions; that the appellants were liable under the statute for the act of the said Percy Charles Foss; and, therefore were guilty of the offences charged in the said complaints.

By the Railways Clauses Consolidation Act, 1845:

E "Section 98. Every person being the owner or having the care of any carriage or goods passing or being upon the railway shall, on demand, give to the collector of tolls at the places where he attends for the purpose of receiving goods or of collecting tolls for the part of the railway on which such carriage or goods may have travelled or be about to travel, an exact account in writing signed by him of the number or quantity of goods conveyed by any such carriage, and of the point on the railway from which such carriage or goods have set out or are about to set out, and at what point the same are intended to be unloaded or taken off the railway; and if the goods conveyed by any such carriage, or brought for conveyance as aforesaid, be liable to the payment of different tolls, then such owner or other person shall specify the respective numbers or quantities thereof liable to each or any of such tolls. Section 99. If any such owner or other such person fail to give such account, or to produce his way-bill or bill of lading, to such collector or other officer or servant of the company demanding the same, or if he give a false account, or if he unload to take off any part of his lading or goods at any other place than shall be mentioned in such account, with intent to avoid the payment of any tolls payable in respect thereof, he shall for ever such offence forfeit . . . a sum not exceeding ten pounds for every ton of goods, or for any parcel not exceeding one hundred weight, and so in proportion for any less quantity of goods than one ton, or for any parcel exceeding one hundred weight (as the case may be), which shall be upon any such carriage; and such penalty shall be in addition to the toll to which such goods may be liable."

I By s. 2 (1) of the Interpretation Act, 1889:

"In the construction of every enactment relating to an offence punishable on indictment or on summary conviction, whether contained in an Act passed before or after the commencement of the Act, the expression "person" shall, unless the contrary intention appears, include a body corporate."

Cyril Atkinson, K.C., and McCleary for the appellants.

Disturnal, K.C., and Wingate-Saul for the respondents.

VISCOUNT READING, C.J.—The appellants, Messrs. Mousell Bros., Ltd., carry on a business as removal and storage contractors. Their principle place of business is in London, but they have a branch house in Manchester, and this branch house is under the management of Percy Charles Foss. It was a part of the duties of Foss, as manger, to fill up or to direct the filling up of the consignment notes for goods sent by the appellants, his principals, to the respondents, the railway company, for conveyance by the respondents' railway. There are certain prescribed classifications of goods, well known to the appellants, and the rates for carriage depend upon the classification to which the goods belong. In the present case it was proved that Foss, in making out the consignment notes—or in causing them to be made out—wrongly described the goods so as to obtain their conveyance at a cheaper rate than would otherwise have been chargeable.

The question which we are called upon to decide is whether, the offence of Foss having been proved, the appellants, a limited liability company, can be convicted of the offence of having given a false account of goods intended to be carried by the respondents with the intent of avoiding the payment of the tolls properly chargeable for the same. It is not suggested for one moment that the directors of the appellant company are in any way parties to the false description of the goods. That has been made quite clear all the way through. But what is suggested is that the appellants can be made criminally responsible for the act of their servant, who was intrusted with the performance of this class of acts, and was, therefore, acting within the scope of his employment. The learned stipendiary magistrate of Manchester, who heard the complaint, came to the conclusion that the appellants could be convicted under the circumstances, and the matter now comes before us upon a Case Stated as to whether that conviction was right in law. Counsel for the appellants has argued that the conviction must be quashed, because the appellants could not be made liable for the act of their servant under the present circumstances. He has contended that a principal cannot be made liable for the act of his servant or agent unless either the principal is shown to have given instructions for the wrongful act, or to have had knowledge of it and to have allowed it to continue, or unless there are in the statute creating the offence very clear words imposing such liability upon the principal. We have to determine whether that contention is correct.

The first thing to be considered is the language of the statute. Under s. 98 of the Railway Clauses Consolidation Act, 1845, there is imposed upon every "person" being the owner or having the care of any goods on the railway the obligation of giving an exact account in writing of the number or quantity of goods liable to each of the tolls. [Note: The section was amended by the Railways Act, 1921 (see Sched. 6), which prescribes the particulars of the goods to be supplied instead of merely the "number and quantity."] Then comes s. 99, under which it is made an offence for any such person as is referred to in s. 98 to give, among other things, a false account with intent to avoid the payment of any tolls payable in respect of such goods. In addition to these two sections of the Act of 1845 it is necessary to refer to s. 4 (1) of the Interpretation Act, 1889, which provides that in the construction of every enactment relating to an offence punishable on indictment or on summary conviction, whether passed before or after 1889, the word "person" shall, unless a contrary intention appears, include a body corporate.

In order to determine whether or not the contrary intention does appear, it is necessary to consider the broad question under what circumstances can a principal be made criminally responsible for the act of his servant, and then comes the question whether s. 99, which imposes the penalty on the owner, makes the principal liable for an act done by his servant within the scope of the servant's employment, but without the knowledge or instructions of the principal. In my view, the true principle of law applicable to the present case is laid down in the judgment of CHANNELL, J., in *Pearks, Gunston and Tee, Ltd. v. Ward* (1) where he says ([1902] 2 K.B. at p. 11):

"By the general principles of the criminal law, if a matter is made a criminal offence, it is essential that there should be something in the nature of *mens rea*, and, therefore, in ordinary cases a corporation cannot be guilty of a criminal offence, nor can a master be liable criminally for an offence committed by his servant. But there are exceptions to this rule in the case of quasi-criminal offences, as they may be termed—that is to say, where certain acts are forbidden by law under a penalty, possibly even under a personal penalty, such as imprisonment—at any rate, in default of payment of a fine; and the reason for this is that the legislature has thought it so important to prevent the particular act from being committed that it absolutely forbids it to be done; and if it is done the offender is liable to a penalty whether he had any *mens rea* or not, and whether or not he intended to commit a breach of the law."

It follows that where the act forbidden is one of the character described by CHANNELL, J., the principal would be liable for the doing of the forbidden act by his servant, and the whole question before us is whether these sections of the Act of 1845 deal with a forbidden thing of that class for which the principal is so made liable.

Before dealing with the exact language of the sections I should like to refer to *Coppen v. Moore* (No. 2) (2), which, although not directly applicable to the present case, contains a statement of LORD RUSSELL OF KILLOWEN, C.J., of some general principles which may well be quoted. Referring to *Bond v. Evans* (3) the Lord Chief Justice said ([1898] 2 Q.B. at pp. 312, 314):

"The decisions in these and in other like cases were based upon the construction of the statute in question. The court in fact came to the conclusion that, having regard to the language, scope, and objects of those Acts [i.e. the Licensing Acts] the legislature intended to fix criminal responsibilities upon the master for acts done by his servant in the course of his employment, although such acts were not authorised by the master, and might even have been expressly prohibited by him . . . In answer, then, to the question which alone is put to us—namely, whether upon the facts stated the decision of the magistrates convicting the appellant was in point of law correct—our answer is that in our judgment it was. When the scope and object of the Act are borne in mind, any other conclusion would to a large extent render the Act ineffective for its avowed purposes."

So that, when the language of an Act is not so clear as to leave no room whatever for doubt, the court may bear in mind the avowed purpose of the Act, and may consider whether a particular construction will or will not render the Act effective for that purpose.

Primâ facie, no responsibility rests upon a master for criminal acts done by his servant to which he is not a party. But it may be that there is an intention on the part of the legislature, in order to guard against the happening of a forbidden thing, to impose a liability upon a principal, even though the principal is entirely innocent of the act done by the servant. There are plenty of instances of this. Thus, under the licensing laws, a licensee is in some cases liable for the acts of his servant, even though these acts are done by the servant without any knowledge at all on the part of his master. The same thing is true under the provisions of the Acts dealing with the sale of foods and drugs. The master may be held responsible and made amenable to the penalty enjoined by the law although he is absolutely ignorant of the act of his servant. In those cases it is to be gathered from the language of the statute that the legislature intended that the principal should be liable, and it may said that the doing of an act has been absolutely forbidden, and the doing of it is made a criminal offence even though the *mens rea* is absent. There are other case, again, in which it is necessary that there should be something in the nature of *mens rea*. A good example of this class of case is *Chuter v. Freeth and Pocock, Ltd.* (4). In that case the offence charged being the

giving to the purchaser of food a false warranty in writing, it was held that the principal, although a limited company, could be made liable, and the court pointed out that the question really depended upon the principles laid down in *Pearks, Gunston and Tee, Ltd. v. Ward* (1).

Coming now to the present case, I have arrived at the conclusion that, even in the year 1845, the legislature must be taken to have known that there were many instances in which acts would be done by servants and yet it had been resolved that the penalty should be imposed on the principal. Here the penalty is imposed, under the Act of 1845, upon

“every person being the owner or having the care of any carriage or goods passing or being upon the railway.”

It may be that these words are wide enough to include the manager Foss, but in any event they mean, in my opinion, the bailee who is intrusted with the goods for carriage and who is not the owner. The acts which are forbidden by the relevant sections of the Act of 1845 are such as would have to be performed by a servant. The object of the statute was to forbid the giving of false descriptions of goods carried by the railway so as to get them carried at a cheaper rate than that fixed according to the tolls leviable, and the penalty section was intended for the protection of the railway company, a fine being imposed for every ton of goods carried under the false description. In view of the language and the purposes of the Act of 1845, I am of opinion that it was the intention of the legislature to fix responsibility for this quasi-criminal act upon the principal if the forbidden act was done by the servant whilst acting within the scope of his employment. If the view which I have expressed is the true one there is nothing to distinguish a limited company from any other principal, and the appellants were properly held liable for the acts of their manager, Foss. The learned magistrate was, therefore, right in the conclusion at which he arrived, and the appeal must be dismissed.

RIDLEY, J.—I am of the same opinion.

ATKIN, J.—I agree, and I have very little to add to the judgment of the Lord Chief Justice. Upon the authorities which have been cited it appears to me to be clear that, although *prima facie* a principal cannot be held criminally responsible for the acts of his servants, there may be instances in which the legislature have resolved to prohibit an act or to enforce a duty in such words as to make the prohibition of the act or the enforcement of the duty absolute. In such a case the principal is liable if the act is in fact done by his servant, although he himself may know nothing whatever about it. In order to discover whether any particular act has or has not this effect it is necessary to have regard to the object of the statute, the words used, the nature of the duty imposed, the person upon whom the duty is imposed, the person by whom the duty would be performed in the ordinary course of events, and the person upon whom the penalty is imposed. *R. v. Tyler and International Commercial Co.* (5) is ample authority for what I have just stated, and when the two sections in question of the Act of 1845 are examined in this light, I do not think that there can be any doubt that the appellants were rightly convicted in the present case.

Appeal dismissed.

Solicitors: *Grundy, Kershaw, Samson & Co.*, Manchester; *M. C. Tait*.

[Reported by J. A. SLATER, Esq., Barrister-at-Law.]

R. v. SHEFFIELD JUSTICES. Ex Parte MORRISON

[KING'S BENCH DIVISION (Lord Reading, C.J., Sankey and Low, JJ.), January 12, 13, 1916]

[Reported [1916] 1 K.B. 682; 85 L.J.K.B. 818; 114 L.T. 414;
80 J.P. 147; 32 T.L.R. 241]

Licensing—Compensation—Non-renewal of licence—Obligation of persons interested to submit agreement as to compensation to compensation authority—Right to have Commissioners of Inland Revenue notified by compensation authority—Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 20 (2)—Licensing Rules, 1910 (S.R. & O. 1910 No. 1180), r. 31.

Under the Licensing (Consolidation) Act, 1910, s. 20 (2) and the Licensing Rules, 1910, there was no obligation on persons interested in licensed premises to submit to the compensation authority any agreement they had reached as to the compensation to be paid for non-renewal of an old on-licence, and, consequently, when no such agreement had been submitted to the authority by the persons interested they were entitled under r. 31 of the Licensing Rules, 1910, to call on the compensation authority to send the prescribed notice to the Commissioners of Inland Revenue so that the commissioners might determine the amount of the compensation.

Notes. The Licensing (Consolidation) Act, 1910 was repealed and replaced with amendments by the Licensing Act, 1953. Section 17 (3) of the Act of 1953 contains, substantially, the same provisions as s. 20 (2) of the Act of 1910. The Licensing Rules, 1910, have effect under the Licensing Act, 1953, by virtue of s. 168 (2) of that Act.

As to compensation on non-renewal of a licence, see 22 HALSBURY'S LAWS (3rd Edn.) 574 et seq. For cases on payment of compensation, see 30 DIGEST (Repl.) 60 et seq. For the Licensing Act, 1953, s. 17 (3), see 33 HALSBURY'S STATUTES (2nd Edn.) 164.

Rule Nisi directed to the compensation authority for the city of Sheffield, calling upon them to show cause why a mandamus should not issue requiring them to send to the Inland Revenue Commissioners a notice pursuant to r. 31 of the Licensing Rules, 1910, in order that the commissioners might fix the amount of compensation payable in respect of the non-renewal of the licence of the Economical Hotel, Sheffield.

At the general annual meeting of the licensing justices of Sheffield, held in February, 1915, the question of the renewal of the licence of the Economical Hotel was referred to the compensation authority, and the latter body in April, 1915, decided to refuse the renewal. The refusal to renew was subject to the payment of compensation under s. 20 of the Licensing (Consolidation) Act, 1910. In order to arrive at the amount of compensation to be paid, the compensation authority required the owners and the licensee to supply them with statements as to the rent, trade, and other particulars concerning the premises. This was in accordance with the usual practice adopted by the compensation authority. The applicant, the licensee of the Economical Hotel desired to go direct to the Inland Revenue Commissioners to have the amount of the compensation fixed, and refused to supply the particulars asked for, or to submit any agreement, as to compensation to the compensation authority. The applicant further requested the compensation authority to send the notice in pursuance of r. 31 of the Licensing Rules, 1910, to the Inland Revenue Commissioners. The compensation authority took the view that there was no duty incumbent upon them to send the notice under r. 31 to the Inland Revenue Commissioners before there had been an agreement submitted to them as to the amount of compensation to be paid, and, after adjourning their meetings on several occasions in

order that the agreement might be submitted to them, declined to accede to the applicant's request. The issue raised, therefore, was whether the compensation authority were entitled to refuse to send the notice to the Inland Revenue Commissioners where no agreement as to compensation had been submitted to them.

Section 20 of the Licensing (Consolidation) Act, 1910, provided:

"(1) Where the compensation authority refuse the renewal of an old licence, a sum equal to the difference between the value of the licensed premises . . . and the value which those premises would bear if they were not licensed premises, shall be paid as compensation to the persons interested in the licensed premises. (2) The amount to be so paid shall, if an amount is agreed upon by the persons appearing to the compensation authority to be interested in the licensed premises and is approved by that authority, be that amount, and, in default of such agreement and approval, shall be determined by the Commissioners of Inland Revenue . . ."

The Licensing Rules, 1910, provided:

"Rule 27. The compensation authority shall, after the time limited by these rules for the sending in of claims has elapsed, hold a supplemental meeting for the purpose of considering whether their approval shall be given to any sum agreed upon by the person entitled to compensation and submitted to them as the money to be paid as compensation . . . and at that meeting shall give any person entitled to compensation an opportunity of being heard with respect to those matters . . . Rule 29. Where the persons entitled to compensation agree upon a sum to be submitted to the compensation authority as the amount of compensation money, a written statement to that effect containing the sum agreed upon, signed by or on behalf of all those persons, must be lodged with the compensation authority at the meeting or previously thereto. Rule 30. (1) At the meeting the compensation authority shall, if an agreement as to the sum to be paid as compensation money is submitted to them for their approval, consider whether their approval shall be given to that sum, and, if their approval is so given, shall proceed to settle the shares of the persons entitled to be compensated in that sum. Rule 31. If the amount of the compensation money remains to be determined otherwise than by means of an agreement approved by the compensation authority, the compensation authority shall send a notice of the fact to the Commissioners of Inland Revenue, Somerset House, London, W.C., accompanied by a statement of the names and addresses of the persons entitled to compensation."

E. Tindel Atkinson, K.C., and Waddy, for the compensation authority.

G. C. Whiteley, for the applicant.

LORD READING, C.J.—In this case a rule nisi has been obtained by the licensee of the Economical Hotel, Sheffield, directed to the compensation authority for the city of Sheffield, calling upon them to show cause why a mandamus should not issue requiring them to send to the Inland Revenue Commissioners a notice pursuant to r. 31 of the Licensing Rules, 1910, in order that the commissioners might fix the amount of the compensation to be paid in respect of the non-renewal of the licence of the hotel. The compensation authority have refused to send this notice, as the applicant failed to supply them with particulars for arriving at the amount of compensation money to be paid in respect of the non-renewal of the licence and to come to any agreement as to the same, and their contention is that they cannot be required to forward the notice under r. 31 until these preliminaries have taken place. The short point, therefore, for our determination is whether there is or is not in the Licensing (Consolidation) Act, 1910, and the Licensing Rules, 1910, any obligation imposed upon the claimant for compensation either to endeavour to arrive at an agreement as to the amount of

A that compensation, or, if an agreement has been arrived at, whether he is bound to submit it to the compensation authority for their approval before laying his case for compensation before the Inland Revenue Commissioners in order that the amount may be settled by them.

The applicant claims that he has a right to go direct to the Inland Revenue Commissioners, and it is contended by him that he is under no liability to submit
B any agreement to the compensation authority, or, even if an agreement has been arrived at, to present it to them for their approval. He further contends, therefore, that if he does not choose to submit any agreement to the compensation authority, this body must forward the prescribed notice to the Inland Revenue Commissioners, pursuant to r. 31, who, in the absence of an agreement approved by the compensation authority, are alone empowered to determine the amount
C of compensation to be paid. It is quite clear from the scheme of the Licensing (Consolidation) Act, 1910, that the compensation authority has no power to fix the amount of compensation. Their power is limited to fixing the proportions payable to the various persons interested when the amount has been ascertained by the agreement of the parties. Apart from the persons interested, the Inland Revenue Commissioners alone can settle the amount of the compensation, and in
D this case the applicant, as well as several other persons who are in a similar position to himself, determined to go direct to the Inland Revenue Commissioners. Consequently no agreement was ever submitted to the compensation authority. The compensation authority evidently took the view that an agreement had been arrived at, and that the applicant was bound to submit it for their approval, and they adjourned their meeting on several occasions in order that the applicant
E might submit the agreement to them. Were the compensation authority right in taking up this attitude? We have been told that, in fact, no agreement was ever arrived at. That point is quite immaterial, as the affidavits before us simply state that no agreement was ever submitted to the compensation authority, and it is quite consistent with that statement whether an agreement had or had not been come to. The point is immaterial, because the applicant contends that even
F if an agreement was made he was not bound to submit it to the compensation authority for their approval, but was entitled to have the matter dealt with directly by the Inland Revenue Commissioners.

It is not for us to say whether we think that the attitude taken up by the applicant is or is not reasonable, nor to express an opinion whether the legislature ought to have made provision that the agreement, if made, should have
G been submitted to the compensation authority. In point of fact Parliament has done no such thing. The Act of 1910, in conjunction with the rules, has provided that unless there is an agreement which is approved of, a notice must be sent to the Inland Revenue Commissioners. The duty to notify arises either when no agreement has been submitted or when an agreement has been submitted and disapproved. Here no agreement has been submitted, the amount of compensation
H remains to be determined, and the condition upon which r. 31 becomes operative has happened. Under r. 27 it is provided that the compensation authority shall hold a meeting for, the purpose of considering whether their approval shall be given to the sum agreed upon by the persons entitled to compensation and submitted to them as the money to be paid as compensation, which involves that a sum has been agreed upon and that the agreement has been
I submitted to the compensation authority. Unless these two conditions are complied with there is no right on the part of the compensation authority to determine whether they shall give their approval or not to any matter connected with the compensation.

Looking at the Act and the rules, I am of opinion that there is no legal obligation imposed upon an applicant for compensation in a case like the present to submit any agreement as to the compensation to be paid to the compensation authority for approval, and consequently, when no such agreement is submitted, the applicant is entitled under r. 31 to call upon the compensation authority to

send the prescribed notice to the Inland Revenue Commissioners in order that the claim as to compensation may be dealt with by them. For these reasons I think that this rule must be made absolute.

SANKEY, J.—I agree. The compensation authority are the persons who are in charge of the compensation fund. Whenever a question arises as to the payment of compensation, owing to the refusal to renew an old on-licence, there are various parties who are entitled to receive a share of the compensation fund, and these parties may, if they choose, agree amongst themselves as to the sum which is to be paid. Further, they may submit their agreement to the compensation authority for approval. It is then, and then only, that the compensation authority have any rights—namely, to give or to withhold their approval of the agreement. It will be seen, then, that the right of the compensation authority with regard to matters of this kind cannot arise unless two conditions precedent have been fulfilled. These conditions are set out in r. 27. The first condition is that an agreement must have been arrived at, and the second is that there must have been a submission of the agreement to the compensation authority. Nowhere in the rules is there to be found any obligation which imposes upon the parties to the agreement the duty of submitting the agreement as to compensation to the compensation authority. Now, when does the duty of sending the notice to the Inland Revenue Commissioners, as prescribed by r. 31, arise? Clearly it arises when there is no agreement at all, or when, if there is an agreement, it is not submitted to the compensation authority. As far as the present case is concerned, there is no evidence that any agreement was ever arrived at, and most certainly, if there was such an agreement, it was never submitted to the compensation authority. Since neither of the two conditions precedent has been fulfilled, the compensation authority were bound to send the notice to the Inland Revenue Commissioners. The rule nisi must be made absolute.

LOW, J.—I am of the same opinion. The legislature evidently left it to the parties interested in the compensation money to be paid upon the non-renewal of a licence to select the body which should fix the amount, and in the present case the applicant, as well as the other persons who are in a similar position, considered that the circumstances were such as to justify a reference to the Inland Revenue Commissioners rather than to the local compensation authority. I think that he was quite justified in taking this course under the Act and the rules. There are only two circumstances in which, as it appears to me, the compensation authority can stand between the applicant and the Inland Revenue Commissioners when the question of the compensation to be paid has to be considered. The first is where an agreement as to the amount of the compensation has been arrived at, and the second is where that agreement has been approved by the compensation authority. In the present case neither of these circumstances exists. There is no evidence that any agreement was ever arrived at, and even if there had been there is nothing which makes it legally necessary for the agreement to be submitted to the compensation authority. On this second point I am in entire accord with the judgments which have been delivered, and as a result I also think that this rule should be made absolute.

Rule absolute.

Solicitors: *Church, Rendell, Bird & Co.*, for *F. B. Dingle*, Sheffield; *Godden, Holme & Ward*, for *Chambers & Son*, Sheffield.

[Reported by J. A. SLATER, Esq., Barrister-at-Law.]

R. v. WHEELER

[COURT OF CRIMINAL APPEAL (Viscount Reading, C.J., Ridley and Low, J.J.),
October 23, 1916]

[Reported [1917] 1 K.B. 283; 86 L.J.K.B. 40; 116 L.T. 161; 81 J.P. 75;
33 T.L.R. 21; 61 Sol. Jo. 100; 25 Cox, C.C. 603; 12 Cr. App. Rep. 159]

*Criminal Law—Perjury—False evidence by accused person after plea of Guilty—
Perjury Act 1911 (1 & 2 Geo. 5, c. 6), s. 1 (1).*

An accused person who gives evidence on oath in mitigation of sentence after he has pleaded Guilty to a charge is a "competent witness" within s. 1 of the Criminal Evidence Act, 1898, and can be "lawfully sworn" within s. 1 (1) of the Perjury Act, 1911; evidence so given is "material in that proceeding" within that section; and, therefore, if such an accused person gives false evidence he is liable to be convicted of perjury.

Notes. As to perjury in general see 10 HALSBURY'S LAWS (3rd Edn.) 623 et seq.; and for cases see 15 DIGEST (Repl.) 813 et seq. For the Perjury Act, 1911, see 5 HALSBURY'S STATUTES (2nd Edn.) 963. For the Criminal Evidence Act, 1898, see 9 HALSBURY'S STATUTES (2nd Edn.) 613.

Cases referred to:

- (1) *R. v. Hodgkinson and Manning* (1900), 64 J.P. 808; 14 Digest (Repl.) 509, 4934.
- (2) *R. v. Bright*, ante p. 811; [1916] 2 K.B. 441; 85 L.J.K.B. 1638; 115 L.T. 488; 80 J.P. 407; 32 T.L.R. 600; 25 Cox, C.C. 540; 12 Cr. App. Rep. 69, C.C.A.; 14 Digest (Repl.) 373, 3635.
- (3) *R. v. Tate* (1871), 12 Cox, C.C. 7; 15 Digest (Repl.) 821, 7835.
- (4) *R. v. Hewitt* (1913), 9 Cr. App. Rep. 192; 15 Digest (Repl.) 822, 7846.

Also referred to in argument:

- R. v. Clegg* (1868), 19 L.T. 47; 15 Digest (Repl.) 813, 7766.
R. v. Gibbon (1862), Le. & Ca. 109; 31 L.J.M.C. 98; 5 L.T. 805; 26 J.P. 149; 8 Jur. N.S. 159; 10 W.R. 350; 9 Cox, C.C. 105, C.C.R.; 15 Digest (Repl.) 820, 7829.
R. v. Baker, [1895] 1 Q.B. 797; 64 L.J.M.C. 177; 72 L.T. 631; 43 W.R. 654; 11 T.L.R. 342; 39 Sol. Jo. 416; 15 R. 346, C.C.R.; 15 Digest (Repl.) 820, 7828.

Appeal against a conviction for perjury.

The appellant pleaded Guilty before a bench of magistrates to having sold milk which was deficient in fat, contrary to the sale of Food and Drugs Act, 1875. In the course of his statement to the court, the prosecuting inspector suggested that the deficiency of fat was due to the mixing of separated and new milk. The appellant's solicitor, when addressing the court, repudiated this suggestion, and said that the appellant had not bought any separated milk for a year. This statement was challenged, and the appellant went into the witness box and gave evidence on oath that he had not purchased any separated milk for twelve months. That statement was untrue, and the appellant was subsequently convicted at the Central Criminal Court of perjury, sentence being postponed pending the hearing of an appeal.

By the Perjury Act, 1911, s. 1 (1):

"If any person lawfully sworn as a witness . . . wilfully makes a statement material in that proceeding, which he knows to be false or does not believe to be true, he shall be guilty of perjury . . ."

Vachell, K.C., Curtis Bennett, and Keeves for the appellant.

Travers Humphreys, and Cecil Whiteley for the Crown.

The judgment of the court was delivered by

VISCOUNT READING, C.J.—This case raises the question whether a false statement made by the appellant was made upon an oath lawfully sworn in the course of judicial proceedings. Counsel for the appellant has taken two points. The first is that the appellant was called after the issue in the case had been determined by the plea of Guilty, and that any statement made by the appellant afterwards was not a statement which he was competent to make. Put shortly, it is contended that the appellant was not a competent witness when called. The second point put forward is that the statement made by the appellant was not a statement material to the issue or to the proceedings.

With regard to the first point, it is argued that under the provisions of the Criminal Evidence Act, 1898, a prisoner can only be called upon to give evidence at a certain time and in a certain way. The words in s. 1 of that Act, "at every stage of the proceedings," are very wide words. It is contended that they are limited to the proceedings in the different courts, but this court cannot see any reason for adopting this limitation. The words are used so as to enable an accused person to give evidence "at every stage of the proceeding" where his evidence can properly be given; for instance, such evidence could not be given in proceedings before a grand jury in which no part is taken by the defence. Whenever the defence can be heard the prisoner can give evidence on his own behalf. It has been argued that under s. 2 of the Criminal Evidence Act, 1898, the appellant could only be called at the close of the case for the prosecution, and that, as he was called after that time, he was not a "competent witness" within s. 1, and, therefore, could not be "lawfully sworn" within s. 1 (1) of the Perjury Act, 1911. But when the true meaning is given to s. 2 of the Criminal Evidence Act, 1898, the argument is without force. The argument assumes that s. 2 is exhaustive as to the time when a prisoner can be called as a witness. The object of the section is to provide that, if the prisoner is the only witness called for the defence, any statement on oath which he makes must be made before his advocate makes his speech, but nowhere outside that section, having regard to the scope of the Act and to the wide language of s. 1 can any provision be found to the effect that the prisoner can only be called at that time if the intention is to call other witnesses for the defence. It is difficult to say that in an enabling statute of this kind, the legislature wished to prevent the prisoner from giving evidence except at that particular time in all cases, or that after a prisoner has pleaded Guilty he cannot go into the witness box. It would be a hardship on the prisoner. Only one question remains—namely, whether evidence given in mitigation of punishment is evidence given in a "stage of the proceeding." Undoubtedly it is. The proceedings certainly continue until the passing of the sentence. The court also thinks that the statement made by the appellant was "material in that proceeding" because it was made with the object of influencing the minds of the justices and persuading them to inflict a lighter sentence than they might have done if the statement had not been made. The court thinks that an offence under s. 1 (1) of the Perjury Act, 1911, is established and that the appeal must be dismissed.

A number of authorities were quoted to us during the hearing of the case. It is true that in *R. v. Hodgkinson and Manning* (1) DARLING, J., took the view that a prisoner could not give evidence on oath in mitigation of sentence after pleading Guilty, because the period between the plea of Guilty and sentence was not a "stage of the proceedings" under the Criminal Evidence Act, 1898. But on looking at that case it shows that the judge came to that conclusion on the statement of counsel appearing for the Crown, which apparently was accepted without argument. The decision was discussed in *R. v. Bright* (2), where DARLING, J., presiding in this court, doubted whether the former decision was sound in law. Reliance was also placed by counsel for the appellant on *R. v. Tate* (3). That case has already been considered by this court in *R. v. Hewitt* (4) where the court doubted whether the decision was right, though not expressly dissenting from it. In none of the cases cited to us to-day do we find anything which would induce

this court to say that the evidence given by the appellant in this case was not "material in that proceeding" within s. 1 (1) of the Perjury Act, 1911, or that the appellant was not "lawfully sworn" as not being a "competent witness" to whom the oath had been properly administered. The case will be remitted for sentence.

Appeal dismissed.

Solicitors: *W. T. Ricketts & Sons; Director of Public Prosecutions.*

[*Reported by R. F. BLAKISTON, ESQ., Barrister-at-Law.*]

COHEN v. POPULAR RESTAURANTS, LTD.

[KING'S BENCH DIVISION (Rowlatt, J.) December 7, 1916]

[Reported [1917] 1 K.B. 480; 86 L.J.K.B. 617; 116 L.T. 477;
33 T.L.R. 107]

Landlord and Tenant—Lease—Assignment—Covenant not to assign demised premises without licence—Lease assigned to company—Voluntary liquidation of company—Assignment of lease by liquidator without licence—Breach of covenant—Damages.

A lease contained a covenant by the lessee not to assign the demised premises without the consent in writing of the lessor, such consent not to be unreasonably withheld in the case of a responsible person being offered as tenant. The lease was assigned to a limited company which subsequently went into voluntary liquidation. The liquidator, without obtaining the consent of the lessor, assigned the lease to a person presumably of straw.

Held: (i) the assignment by the liquidator was not an assignment by operation of law, but was a breach by the lessee of the covenant not to assign; (ii) the lessor could assess once for all and prove immediately in the liquidation for the amount lost by having as tenant instead of the company a tenant who was not a responsible person, and he need not wait and prove for the rent as it accrued due.

Notes. Referred: *Re Farrow's Bank, Ltd.*, [1921] All E.R. Rep. 511.

As to covenants against assignment or underletting, see 23 HALSBURY'S LAWS (3rd Edn.) 629-637, and for cases see 31 DIGEST (Repl.) 410-423.

Cases referred to:

- (1) *Doe d. Goodbehere v. Bevan* (1815), 3 M. & S. 353; 105 E.R. 644; 31 Digest (Repl.) 435, 5617.
- (2) *Re Birkbeck Permanent Benefit Building Society, Official Receiver v. Licences Insurance Corpn.*, [1913] 2 Ch. 34; 6 B.W.C.C.N. 150; sub nom. *Birkbeck Permanent Benefit Building Society v. Licensees' Insurance Corpn. and Guarantee Fund, Ltd.*, 82 L.J.Ch. 386; sub nom. *Re Birkbeck Permanent Benefit Building Society, Ex parte Official Receiver*, 57 Sol. Jo. 559; 31 Digest (Repl.) 434, 5608.
- (3) *Re Riggs, Ex parte Lovell*, [1901] 2 K.B. 16; 84 L.T. 428; sub nom. *Re Riggs, Ex parte Trustees*, 70 L.J.K.B. 541; 49 W.R. 624; 45 Sol. Jo. 408; 8 Mans. 233; 31 Digest (Repl.) 434, 5613.
- (4) *Re Moon, Ex parte Daves* (1886), 17 Q.B.D. 275; 55 L.T. 114; 34 W.R. 753; 2 T.L.R. 506, C.A.; 5 Digest (Repl.) 716, 6227.
- (5) *Williams v. Earle* (1868), L.R. 3 Q.B. 739; 9 B. & S. 740; 37 L.J.Q.B. 231; 19 L.T. 238; 33 J.P. 86; 16 W.R. 1041; 31 Digest (Repl.) 410, 5399.

- (6) *Re Panther Lead Co.*, [1896] 1 Ch. 978; 65 L.J.Ch. 499; 44 W.R. 573; 12 T.L.R. 327; 40 Sol. Jo. 437; 3 Mans. 165; 31 Digest (Repl.) 570, 6910.

Also referred to in argument:

Re Hayter Granite Co. (1865), 1 Ch. App. 77; 30 J.P. 100; 12 Jur. N.S. 1; 14 W.R. 186; sub nom. *Re Haytor Granite Co., Ex parte Bell*, 35 L.J.Ch. 154; sub nom. *Re Haytor Granite Co., Ex parte Scobell*, 13 L.T. 515, L.J.J.; 10 Digest (Repl.) 984, 6774.

Re London and Colonial Co., Horsey's Claim (1868), L.R. 5 Eq. 562, n; 37 L.J.Ch. 393; 16 W.R. 535; 9 Digest (Repl.) 713, 4728.

Re New Oriental Bank Corpn. (No. 2), [1895] 1 Ch. 753; 57 L.J.Ch. 439; 43 W.R. 523; 11 T.L.R. 291; 39 Sol. Jo. 347; sub nom. *Re New Oriental Bank Corpn., Ltd., Ex parte Hong Kong Land Investment and Agency Co., Ltd.*, 72 L.T. 419; 2 Mans. 301; 13 R. 459; 10 Digest (Repl.) 984, 6777.

Action for breach of a tenants' covenant in a lease.

On Oct. 1, 1897, a lease of the premises No. 37, High Street, Southwark, was granted for a term of twenty-one years. The lease contained a covenant by the lessees that they would not assign the premises without the lessor's previous licence and consent in writing, but that such consent was not to be unreasonably withheld in case of a respectable and responsible person being offered as tenant. On Dec. 6, 1899, the lease was assigned by the lessees to certain mesne assignees, such assignment being duly authorised by the lessor. On Feb. 1, 1912, the assignees assigned the lease to the defendant company, the lessor having previously given his consent to such assignment. On April 10, 1916, the reversion expectant on the termination of the lease became vested in the plaintiffs. A resolution was passed for the voluntary winding-up of the company, and on June 22, 1916, the liquidator of the company assigned the lease of the premises without the consent or licence of the plaintiffs to a person who was not able to pay the rent or to perform the covenants in the lease. The plaintiffs thereupon brought this action against the defendant company for breach of the covenant not to assign the lease without the previous licence or consent in writing of the lessor, claiming damages or, in the alternative, a declaration that the defendants were liable until the expiration of the lease to pay the rent reserved by the lease and to perform the covenants therein contained.

Powell, K.C., Stuart Bevan, and H. Geen for the plaintiffs.

Cunliffe, K.C., and Frampton, for the defendants.

ROWLATT, J.—This action is brought against a company which is in voluntary liquidation for a breach of a covenant in a lease not to assign the premises demised. The defendants are themselves the assignees of the lease, but it has been held that the burden of the covenant not to assign runs with the land. The company went into voluntary liquidation, and the liquidator, after the July rent became due, made an assignment of the lease to a married woman, who lives in a house rented at 8s. 6d. a week, and is, I draw the conclusion, a woman of straw. The liability of the defendants is thereby terminated for all future time.

The first point taken is that no breach of the covenant not to assign has been committed, because the assignment was by the liquidator. A covenant not to assign *primâ facie* does not extend to prohibit an assignment by a person who takes the lease by operation of law, together with a duty to dispose of it—*Doe d. Goodbehere v. Bevan* (1) which is referred to by NEVILLE, J., in *Re Birkbeck Permanent Benefit Building Society Official Receiver v. Licenses Insurance Corpn.* (2). The question raised in the latter case was whether a policy of insurance had been forfeited upon assignment by the assured, a company. Assignment by operation of law was expressly excepted from the causes of forfeiture. The company was ordered to be wound-up by the court. NEVILLE, J., at the end of his judgment said ([1913] 2 Ch. at p. 38):

A "Doe d. Goodbehere v. Bevan (1) clearly shows that primâ facie a contractual restriction of assignment does not apply to the assignment by a person on whom the property has devolved by operation of law, and who is under an obligation to assign. Of course, you may have so contracted as to include such a case, but the mere condition against assignment does not primâ facie include it. And that this condition was not intended to include it is, I think, to be found not only from the general construction which ought to be placed upon such a condition, but also from the fact that we have in the conditions a direct elimination of the case of the passing of a policy by operation of law. I do not think, therefore, it was ever intended to apply to an assignment by a person in whom the policy became vested, not by a voluntary act of the insured but by the operation of law, and who then was under an obligation to assign to somebody else."

C As the company in that case had been ordered to be wound-up by the court, and the assignment was by an officer of the court, it was held that the assignment was not the voluntary act of the assured. In the present case the facts are otherwise. The assignment was the act of a liquidator who was brought into being by the voluntary act of the company—the passing of a special resolution to wind-up the company voluntarily.

D Counsel for the defendants contended that the assignment was not the voluntary act of the defendant company, because the powers of a liquidator are conferred upon him by s. 186 of the Companies (Consolidation) Act, 1908 [corresponding to Companies Act, 1948, s. 285], and the fact that the resolution by which the liquidator was brought into being was a voluntary resolution is irrelevant, and in support of that contention he referred to *Re Riggs, Ex parte Lovell* (3). E In that case a lease of certain premises contained a covenant not to assign without licence, and a proviso for re-entry on the bankruptcy of the lessee or breach of any covenant. The lessee having been adjudicated bankrupt on his own petition, the lessor purported to determine the lease under the proviso of re-entry, and obtained peaceable possession from the lessee without giving any notice under s. 14 of the Conveyancing Act, 1881 [now Law of Property Act, 1925, s. 146]. F WRIGHT, J., held that the lessor's re-entry was void as against the lessee's trustee in bankruptcy, and that, the lessee being adjudicated bankrupt on his own petition, there was no breach of his covenant not to assign. He said ([1901] 2 K.B. at p. 21):

G "On the construction of this lease, and apart from authority, I should be of opinion that in this covenant the words 'assign or underlet' are used in their ordinary or popular sense, and refer only to such assignments as are directly made by the lessee as distinguished from such assignments by law as result by the statute from a petition in bankruptcy followed by adjudication. This conclusion seems much strengthened by the fact that the proviso, which immediately follows the covenant, expressly provides for the case of bankruptcy or of the filing of a petition by the debtor. And it would be strange if, notwithstanding the express mention of bankruptcy as a ground for re-entry, and the express obligation to give notice before re-entry on that ground, the obligation can be evaded on the ground that the bankruptcy operates in law as an assignment."

I He expressed that opinion upon the construction of the words "assign or underlet" in the passage in which they occurred in that particular lease. At the end of his judgment he also pointed out that if the debtor's own petition operated as an assignment, then a forfeiture would accrue without it being necessary to serve a notice under the Conveyancing Acts before putting it into effect; but that the presentation of a petition by a debtor is not an assignment, as there is no assignment until adjudication, and it does not necessarily follow that a petition will ever result in an adjudication. Therefore an adjudication amounts to an

assignment, whereas a petition does not. WRIGHT, J., referring to *Ex parte Dawes* (4) said:

"The case seems to be an authority that the mere filing of a petition by a debtor, is not of itself an assignment. And if so, then there is in any view no assignment until adjudication, and at that stage the matter has become actual bankruptcy, and therefore s. 2 of the [Conveyancing] Act of 1892 applies . . ."

In *Re Riggs, Ex parte Lovell* (3), the bankruptcy had taken place, and the lessee had been adjudicated a bankrupt.

I think the position which I have to consider in the present case is wholly different. In a voluntary liquidation there is nothing equivalent to an adjudication. A company may go into voluntary liquidation when perfectly solvent merely for the purpose of reconstruction. A company in such a case could not be heard to say, when its liquidator had assigned an onerous lease to a man of straw, that the assignment had taken place by operation of law and not by its own voluntary act. There is no material difference between the assignment in such a case and the assignment in the present case. If the former assignment is tinged with a taint of voluntariness, so also is the latter. There is a great difference, I think, between an adjudication in bankruptcy and a voluntary winding-up, and therefore I think that the first point taken fails.

The second point taken for the defendants was that the damages that could be recovered must be limited to those accrued due up to the present time. The measure of damages, according to *Williams v. Earle* (5) is the loss which the plaintiffs have sustained by the substitution of the assignee for the assignors as tenant. Counsel contended that I cannot take into account rent accruing due or covenants falling to be performed in the future, but must only regard the rent which had already accrued and damages that had been sustained by reason of the defendants' breaches of covenant. In support of that contention he cited several cases in Chancery in which it was held that where a lessor applied in the winding-up of a company, which were his lessees under a subsisting lease, he could only prove for the rent as it became due, and could not impound the assets of the company to answer future claims. In *Re Panther Lead Co.* (6) it was pointed out that at the present time, when liabilities in a winding-up are proved for once for all, the earlier cases as to proof would require to be reconsidered. But, however that may be, in order to apply the contention of the defendants, it is necessary to treat the lease as being still subsisting. The claim, however, is made on the basis that the defendants' liability on the lease has ceased and determined, the action being brought for damages for breaches of a covenant in a lease which has come to an end. It is, therefore, necessary for the plaintiffs to assess their damages once for all in a lump sum, which will put them in the same position as if the defendants were still the persons liable to them instead of another person of inferior pecuniary ability. On this point also I am in favour of the plaintiffs. It is quite clear that the measure of damages so stated involves a consideration of the relative financial position of the defendants and their assignee. Assuming the assignee to be insolvent, the damages which the plaintiffs have sustained will vary according to the means of the defendants, the assignors; if the defendants are quite insolvent, the plaintiffs will not have suffered any damage. It will therefore be necessary for the liquidator to attend and inform me as to the position of the company.

[The liquidator agreed to accept a proof for £200, and a declaration was made that the plaintiffs were at liberty to put in a proof for that amount.]

Judgment for plaintiffs.

Solicitors: *Harris, Chetham & Cohen; Penman & Brown.*

[Reported by W. V. BALL, Esq., Barrister-at-Law.]

ARMSTRONG v. JACKSON

[KING'S BENCH DIVISION (McCardie, J.), June 13, 14, 1917]

[Reported [1917] 2 K.B. 822; 86 L.J.K.B. 1375; 117 L.T. 479;
33 T.L.R. 444; 61 Sol. Jo. 631]*Agent—Broker and client—Broker selling own shares to client—Rescission—Restitutio in integrum—Fall in value of shares.*

The plaintiff, a man devoid of business experience, instructed the defendant, a stockbroker who had previously carried through several transactions on his behalf, to buy six hundred shares in a company for him. The defendant sent him a contract note purporting to show that the shares had been purchased. The total amount debited to the plaintiff included a charge for the defendant's services as broker. The plaintiff did not immediately take up the shares, and the defendant purported to carry them over from account to account, charging a contango rate which was stated to include the defendant's remuneration for his services as broker in effecting the continuation. The shares gradually went down in price and the plaintiff paid the differences. Ultimately, on the defendant's advice, the plaintiff took a transfer of the shares, paid the price to the defendant, and held the shares as the only registered proprietor. Some years later, the plaintiff's suspicions were aroused as a result of rumours he had heard, and his solicitors wrote to the defendant asking for the name of the jobber from whom the shares had been bought. Failing to get a satisfactory answer, the plaintiff claimed to set aside the whole transaction. It was proved that the defendant had never purchased the shares for the plaintiff, but that they were part of an allotment made to the defendant as promoter of the company, the contract note was fictitious, the shares had not been continued for the plaintiff, and the defendant had never disclosed the true position to the plaintiff.

Held: a broker who was employed to buy shares could not sell his own shares unless he made a full and accurate disclosure of the facts to his principal and the principal, with full knowledge of the facts, gave his assent to the broker being in that position; accordingly, the plaintiff was entitled to have the whole transaction set aside notwithstanding that the value of the shares had decreased between the date of the supposed sale and the date of rescission.

Dictum of LORD CRANWORTH in *Western Bank of Scotland v. Addie* (1) (1867), L.R. 1 Sc. & Div. at p. 166, applied.

Notes. Referred to: *Collins v. Hopkins*, [1923] All E.R. Rep. 225.

As to the relationship between broker and client, see 31 HALSBURY'S LAWS (2nd Edn.) 583 et seq., and for cases see 42 DIGEST 793 et seq.

Cases referred to:

- (1) *Western Bank of Scotland v. Addie*, *Addie v. Western Bank of Scotland* (1867), L.R. 1 Sc. & Div. 145, H.L.; 9 Digest (Repl.) 119, 617.
- (2) *Parker v. McKenna* (1874), 10 Ch. App. 96; 44 L.J.Ch. 425; 31 LT. 739; 23 W.R. 271, L.C. & L.J.J.; 9 Digest (Repl.) 518, 3414.
- (3) *Bentley v. Craven* (1853), 17 Beav. 204; 21 L.T.O.S. 215; 1 W.R. 401; 51 E.R. 1011; 42 Digest 505, 711.
- (4) *Gillett v. Peppercorne* (1840), 3 Beav. 78; 49 E.R. 31; 42 Digest 810, 190.
- (5) *Rothschild v. Brookman* (1831), 2 Dow. & Cl. 188; 5 Bli. N.S. 165; 6 E.R. 697, H.L.; 42 Digest 810, 189.
- (6) *Redgrave v. Hurd* (1881), 20 Ch.D. 1; 51 L.J.Ch. 113; 45 L.T. 485; 30 W.R. 251, C.A.; 40 Digest (Repl.) 396, 3173.

- (7) *Derry v. Peek* (1889), 14 App. Cas. 337; 58 L.J.Ch. 864; 61 L.T. 265; 54 J.P. 148; 38 W.R. 33; 5 T.L.R. 625; 1 Meg. 292, H.L.; 9 Digest (Repl.) 127, 685.
- (8) *Wilde v. Gibson* (1848), 1 H.L. Cas. 605; 12 Jur. 527; 9 E.R. 897, H.L.; 40 Digest (Repl.) 387, 3103.
- (9) *Seddon v. North Eastern Salt Co., Ltd.*, [1905] 1 Ch. 326; 74 L.J.Ch. 199; 91 L.T. 793; 53 W.R. 232; 21 T.L.R. 118; 49 Sol. Jo. 119; 9 Digest (Repl.) 366, 2342.
- (10) *Angel v. Jay*, [1911] 1 K.B. 666; 80 L.J.K.B. 458; 103 L.T. 809; 55 Sol. Jo. 140, D.C.; 30 Digest (Repl.) 504, 1451.
- (11) *Aberdeen Rail Co. v. Blaikie Bros.* (1854), 2 Eq. Rep. 1281; 23 L.T.O.S. 315; 1 Macq. 461, H.L.; 10 Digest (Repl.) 1267, 8948.
- (12) *Oliver v. Court* (1820), 8 Price, 127; Dan. 301; 146 E.R. 1152, Ex.Ch.; 43 Digest 855, 3028.
- (13) *York Buildings Co. v. Mackenzie* (1795), 8 Bro. Parl. Cas. 42; 3 E.R. 432, H.L.; 42 Digest 80, 721.
- (14) *Re Moline, Ex parte Dyster* (1816), 1 Mer. 155; 2 Rose, 349; 35 E.R. 632; 1 Digest (Repl.) 324, 111.
- (15) *Polhill v. Walter* (1832), 3 B. & Ad. 114; 1 L.J.K.B. 92; 110 E.R. 43; 35 Digest 40, 338.
- (16) *Foster v. Charles* (1830), 7 Bing. 105; 4 Moo. & P. 741; 9 L.J.O.S.C.P. 32; 131 E.R. 40; 35 Digest 36, 290.
- (17) *Lloyd v. Grace, Smith & Co.*, [1912] A.C. 716; 81 L.J.K.B. 1140; 107 L.T. 531; 28 T.L.R. 547; 56 Sol. Jo. 723, H.L.; 1 Digest (Repl.) 682, 2426.
- (18) *Refuge Assurance Co., Ltd. v. Kettlewell*, [1909] A.C. 243; 78 L.J.K.B. 519; 100 L.T. 306; 25 T.L.R. 395; sub nom. *Kettlewell v. Refuge Assurance Co., Ltd.*, 53 Sol. Jo. 339, H.L.; 35 Digest 71, 690.
- (19) *Brady v. Todd (Tod)* (1861), 9 C.B.N.S. 592; 30 L.J.C.P. 223; 4 L.T. 212; 25 J.P. 598; 7 Jur. N.S. 827; 9 W.R. 483; 142 E.R. 233; 1 Digest (Repl.) 324, 108.
- (20) *Eilanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218; 48 L.J.Ch. 73; 39 L.T. 269; 27 W.R. 65, H.L.; 35 Digest 77, 748.
- (21) *Clough v. London and North Western Rail. Co.* (1871), L.R. 7 Exch. 26; 41 L.J.Ex. 17; 25 L.T. 708; 20 W.R. 189, Ex.Ch.; 35 Digest 69, 669.
- (22) *Oelkers v. Ellis*, [1914] 2 K.B. 139; 83 L.J.K.B. 658; 110 L.T. 332; 32 Digest 527, 1820.
- (23) *Clarke v. Dickson* (1858), E.B. & E. 148; 27 L.J.Q.B. 223; 31 L.T.O.S. 97; 4 Jur. N.S. 832; 120 E.R. 463; 35 Digest 76, 742.
- (24) *Conkey v. Bond* (1861), 34 Barbour, 276.
- (25) *Blake v. Mowatt* (1856), 21 Beav. 603; reversed sub nom. *Mowatt v. Blake* (1858), 31 L.T.O.S. 387, H.L.; 35 Digest 67, 639.
- (26) *Rolfe v. Gregory* (1865), 4 De. G.J. & Sm. 576; 5 New Rep. 257; 34 L.J.Ch. 274; 12 L.T. 162; 11 Jur. N.S. 98; 13 W.R. 355; 46 E.R. 1042, L.C.; 32 Digest 521, 1776.
- (27) *Adam v. Newbigging* (1888), 13 App. Cas. 308; 57 L.J.Ch. 1066; 59 L.T. 267, H.L.; 31 Digest (Repl.) 193, 3232.

Action tried by McCARDIE, J., without a jury.

The facts are set out in the judgment.

Schiller, K.C., and *H. G. Robertson* for the plaintiff.

Disturnal, K.C., and *Frampton* for the defendant.

Cur. adv. vult.

June 14, 1917. **MCCARDIE, J.**, read the following judgment. The plaintiff is a medical man. He is wholly devoid of business experience. The defendant is a stockbroker and a member of the London Stock Exchange. Prior to April, 1910, the defendant had acted as stockbroker to the plaintiff, carrying through several transactions on his behalf. On April 12, 1910, the plaintiff, by telegram,

A instructed the defendant to buy for him six hundred shares in a company known as the Champion Gold Reefs of West Africa, Ltd. The capital of that company was £50,000 in two hundred thousand shares of 5s. each. On the evening of April 12 the defendant wrote to the plaintiff informing him that his order had been executed. In that letter, the defendant enclosed a contract note in the ordinary form. This contract note purported to show that the six hundred shares had been purchased at the price of 58s. 1½d. per share, and the total amount charged against the plaintiff was the sum of £1,758 15s. This amount included an item of £15 charged for the services of the defendant as broker. The plaintiff did not immediately take up the shares, and the defendant purported to carry them over from account to account on the plaintiff's behalf. The defendant charged a contango rate varying from seven per cent. to eight per cent., and the continuation notes stated that such rate included the defendant's remuneration for his services as broker in effecting the continuations. The shares gradually went down in price and the plaintiff had to pay the resulting differences. Consequently he became anxious, and asked the defendant for his views. The defendant advised him to take up the shares. The plaintiff, acting in pursuance of such advice, took a transfer of the shares in December, 1910, and paid the price to the defendant. The plaintiff continued to hold the shares as the only registered proprietor thereof. The years passed by, and, in the summer of 1915, the plaintiff heard rumours and his suspicions were awakened. His solicitors wrote to the defendant, asking him for the name of the jobber from whom the defendant had bought the six hundred shares on the plaintiff's behalf. No satisfactory answer was given and thereupon this action was commenced.

E Discovery of documents was obtained and interrogatories were administered, and, as a result of such proceedings, it has been established that the defendant had never purchased any of the shares for the plaintiff. The contract note of April, 1910, was wholly fictitious. It was a mere sham. Nor had the defendant continued any of the shares on behalf of the plaintiff. And the contango notes were fictitious. It is equally clear that the shares which were transferred to the plaintiff in December, 1910, were not the shares of a third party, but were the defendant's own shares. The defendant had been a promoter of the Champion Gold Reefs of West Africa, Ltd., and had received by allotment a large block of shares on the formation of the company. The shares transferred to the plaintiff in December, 1910, were a portion of such allotment shares. From first to last, the defendant made no disclosure whatever to the plaintiff as to the true facts.

G He purported to act as a broker, whereas in fact he was secretly acting as principal. The plaintiff was deceived throughout. Hence the plaintiff claims (i) that the whole transaction be set aside, or (ii), alternatively, that the defendant be ordered to pay compensation for breach of duty.

First, as to the claim to avoid the transaction. It is obvious that the defendant gravely failed in his duty to the plaintiff. He was instructed to buy shares, but he never carried out his mandate. A broker who is employed to buy shares cannot sell his own shares unless he makes a full and accurate disclosure of the fact to his principal, and the principal, with a full knowledge of such facts, gives his assent to the changed position of the broker. The rule is one not merely of law, but of obvious morality. As was said by LORD CAIRNS, L.C., in *Parker v. McKenna* (2) (10 Ch. App. at p. 118):

I "No man can in this court, acting as an agent, be allowed to put himself into a position in which his interest and his duty will be in conflict."

A broker who secretly sells his own shares is in a wholly false position. As vendor it is to his interest to sell shares, and, moreover, to sell at the highest price. As broker it is his clear duty to the principal to buy at the lowest price, and to give unbiased and independent advice (if such be asked) as to the time when, and the price at which, shares shall be bought, or whether they shall be bought at all. The law has ever required a high measure of good faith from

an agent. He departs from good faith when he secretly sells his own property to his principal. The rule has long been the same both at law and in equity; see *STORY ON AGENCY*, s. 210. It matters not that the broker sells at the market price, or that he acts without intent to defraud; see *Bentley v. Craven* (3). The prohibition of the law is absolute. It will not allow an agent to place himself in a situation which, in ordinary circumstances, would tempt a man to do that which is not the best for his principal; see per SIR JOHN ROMILLY, M.R., in *Bentley v. Craven* (3). The court will not enter into discussion as to the propriety of the price charged by the broker, nor is it material to inquire whether the principal has or has not suffered a loss. If the breach of duty by the broker be shown, the court will set aside the transaction: see *Gillett v. Peppercorne* (4). The rule was strikingly illustrated in *Rothschild v. Brookman* (5). The facts of that case were not dissimilar to the facts of the present action. The House of Lords (affirming the court below) set aside transactions in which the agent had secretly acted as principal. In giving his opinion, LORD WYNFORD (formerly BEST, C.J.) used these words (5 Bli. N.S. at p. 197):

“If any man who is to be trusted places himself in a condition in which he has an opportunity of taking advantage of his employer, by placing himself in such a situation, whether acting fairly or not, he must suffer the consequences of his situation. Such is the jealousy which the law of England entertains against any such transaction.”

It follows that, in the present case, the plaintiff is *prima facie* entitled to a decree setting aside the transaction in question. But counsel for the defendant vigorously contended that no such decree can be made here. In the first place, it was argued that, inasmuch as the contract between the parties was executed no rescission can be granted unless fraud can be proved against the defendant. Now, it is undoubted law that, when a vendor has procured the sale of his property by misrepresentation, the purchaser can set aside the contract of purchase, prior to completion, even though the misrepresentation be innocent: see per JESSEL, M.R., in *Redgrave v. Hurd* (6) (20 Ch.D. at p. 12); per LORD BRAMWELL in *Derry v. Peek* (7) (14 App. Cas. at p. 347); and per LORD HERSCHELL (*ibid.* at p. 359). But if the contract has been executed by the completion of a conveyance or lease or the formal assignment of a chattel, then rescission cannot be granted; see per LORD CAMPBELL in *Wilde v. Gibson* (8) (1 H.L. Cas. at p. 632); *Seddon v. North Eastern Salt Co., Ltd.* (9) ([1905] 1 Ch. at p. 333); and *Angel v. Jay* (10) ([1911] 1 K.B. at p. 666). Such is the settled rule, and it is too late to regret the limitation which has been placed on the equitable doctrine of rescission on the ground of misrepresentation. It is curious that the doctrine should cease to apply when the formal instrument of transfer has been executed or the formal delivery of a chattel has taken place. In many cases, the misrepresentation cannot, or may not, be discovered until the purchaser has secured his legal title and has, therefore, entered into possession of his newly acquired property. In my opinion, however, the rule formulated in *Seddon v. North Eastern Salt Co., Ltd.* (9) has no application to such a case as the present. It is to be observed that, in *Seddon's Case* (9), the dispute was between vendor and vendee. In *Angel v. Jay* (10) the dispute was between lessor and lessee. In *Wilde v. Gibson* (8) LORD CAMPBELL was referring, in his opinion, to a dispute between seller and purchaser. In none of these cases did the question of fiduciary relationship arise. Where such relationship exists, the rule is infinitely stricter and more severe. The position of principal and agent gives rise to particular and onerous duties on the part of the agent, and the high standard of conduct required from him springs from the fiduciary relationship between his employers and himself. His position is confidential, and readily lends itself to abuse. Hence, a strict and salutary rule is required to meet the specific situation. The rules of English law, as they now exist, spring from the original strictness of the

requirements of equity when the fiduciary relationship exists. These requirements are superadded to the common law obligations of diligence and skill; see per LORD CRANWORTH in *Aberdeen Rail. Co. v. Blaikie Bros.* (11) (1 Macq. at p. 472 et seq.); and per curiam in *Oliver v. Court* (12) (8 Price, at p. 161).

It is, I think, immaterial that the plaintiff in the present case took a transfer of the shares and became the registered holder thereof. Such facts do not impair his right to rescission. So to hold would impair, gravely and injuriously, the powers of the court. In *Gillett v. Peppercorne* (4), the plaintiff had taken a transfer of shares in circumstances similar to those now before me. Yet LORD LANGDALE at once set aside the transaction and directed the defendant to repay the purchase money with interest. The contract in that case was as fully executed as in the present case. In *Rothschild v. Brookman* (5) the contracts were also, I think, as much executed as in the present case. Yet the House of Lords, without hesitation, set aside the transactions. I also refer to *York Buildings Co. v. Mackenzie* (13), decided by the House of Lords in 1795 and referred to by LORD CRANWORTH in *Aberdeen Rail. Co. v. Blaikie Bros.* (11) (1 Macq. at p. 474), and to *Oliver v. Court* (12). These decisions are clearly opposed to the contentions of counsel for the defendant. I may add that the various authorities to which I have referred are quite independent of the proof of actual fraud, as defined by *Derry v. Peek* (7). The ratio of such decisions is wholly different from the ratio of *Derry v. Peek* (7), for they rest on the fundamental basis of fiduciary relationship, and are wholly unaffected by the opinion of the House of Lords in *Derry v. Peek* (7). But, none the less, it is clear that the agent who secretly sells his own property to a principal is guilty of dishonesty, and it was said by LORD ELDON in *Ex parte Dyster* (14) (1 Mer. at p. 175) that, if a broker mixes in a transaction in which he is ostensibly the broker, but really a buyer or seller, this is a gross fraud. I decide against the first contention of counsel for the defendant.

If, however, a finding against the defendant of personal deceit be essential to the plaintiff's claim for rescission, then I regret to say that I feel no doubt that such a case has been established. A misrepresentation will be fraudulent if made with a knowledge of its falsity, even though the defendant may not actually intend to injure the plaintiff; see *Polhill v. Walter* (15); *Foster v. Charles* (16); *Derry v. Peek* (7). Here the contract note of April, 1910, and the whole of the subsequent continuation notes and other documents were false. They were intended to deceive the plaintiff, and they did deceive the plaintiff. I am satisfied that the defendant was aware throughout of what was taking place, and when the plaintiff paid his purchase money in December, 1910, the amount thereof went at once into the defendant's pocket. It is impossible for me to accept the defendant's statement that he was ignorant of what was taking place. He was the sole proprietor of the business. He did not allege that his clerk or manager acted without his authority. He attended regularly at his office. He supervised the correspondence and personally signed many of the letters which were given in evidence before me. He had acted towards other persons in the manner complained of in this case. Prior to April, 1910, he had encouraged the plaintiff to buy Champion Gold Reef shares. On Dec. 30, 1909, he wrote to the plaintiff that he anticipated a "big rise in prices." He sent a prospectus of a glowing nature. He knew that the plaintiff was wholly inexperienced. He wrote a letter on Feb. 18, 1910, to the plaintiff to state that the shares looked an extremely good market. His letter of Feb. 21, 1910, is to the same effect. He did not actually advise the purchase of the six hundred shares now in question, but I have no doubt that his previous statements largely influenced the plaintiff to send the telegram of April 12, 1910. In any event, I may add that the defendant would be responsible in this case for the fraud of his agents in view of the decision of the House of Lords in *Lloyd v. Grace, Smith & Co.* (17). See also *Kettlewell v. Refuge Assurance Co.* (18), and *Brady v. Todd* (19).

I now turn to the second contention put forward by counsel for the defendant with respect to the claim for rescission. He argued that no decree should be granted inasmuch as the circumstances had changed through the lapse of time, and that the plaintiff could not restore in 1917 that which he had received from the defendant in 1910. The shares in 1910 stood at nearly £3 for each 5s. share. They are now worth 5s. only or slightly less, and at such price they have been standing at and since the issue of the writ. In my view, this second contention fails also, although, of course, it is clear law that *restitutio in integrum* is essential to a claim for rescission. The plaintiff still holds the shares he bought in 1910. He can hand them back to the defendant. The company is the same today as in 1910. Its name only has been changed. The objects of the company have not changed, though its assets may have varied. The market valuation of the shares has dropped greatly, but the shares are the same shares. In my view, the words of LORD BLACKBURN in *Etlanger v. New Sombrero Phosphate Co.* (20) (3 App. Cas. at p. 1278) have no application to the present case. Quoting from *Clough v. London & North Western Rail. Co.* (21) (L.R. 7 Exch. at p. 35), he says:

“We think that so long as he has made no election he retains the right to determine it either way; subject to this, that if, in the interval whilst he is deliberating, an innocent third party has acquired an interest in the property, or if, in consequence of his delay, the position even of the wrongdoer is affected, it will preclude him from exercising his right to rescind.”

LORD BLACKBURN continues:

“It is, I think, clear on principles of general justice that as a condition to a rescission there must be a *restitutio in integrum*. The parties must be put in *statu quo* . . . It is a doctrine which has often been acted upon both at law and in equity.”

I think that such words refer to a delay which occurs after a plaintiff has ascertained his right to rescind whereby the position of a defendant is substantially altered and prejudiced. No such delay has here occurred, inasmuch as the plaintiff acted with promptitude in issuing his writ when he became suspicious of the defendant's conduct. The phrase *restitutio in integrum* is somewhat vague. It must be applied with care. It must be considered with respect to the facts of each case. Deterioration of the subject-matter does not, I think, destroy the right to rescind nor prevent a *restitutio in integrum*. Indeed, it is only in cases where the plaintiff has sustained loss by the inferiority of the subject-matter or a substantial fall in its value that he will desire to exert his power of rescission. Such was the state of things in *Rothschild v. Brookman* (5). Such, I infer, was the state of things in *Gillett v. Peppercorne* (4), where the plaintiff alleged that he had paid extravagant prices for the shares. Such, too, I infer, was the state of things in *Oelkers v. Ellis* (22). If mere deterioration of the subject-matter negated the right to rescind, the doctrine of rescission would become a vain thing. Rescission was refused in *Clarke v. Dickson* (23) because the plaintiff had there changed the shares in a company on the cost-book principle into shares in a joint stock corporation. On such grounds the decision in *Clarke v. Dickson* (23) is correct. The dicta in all these cases, so far as they go beyond such grounds, are not, I think, consistent with the various decisions already cited in this judgment. Rescission was impossible in *Western Bank of Scotland v. Addie* (1) inasmuch as the shares purchased by the plaintiff—namely, shares in an unincorporated company—had been changed into shares of a company registered under the then existing Company Acts. LORD CRANWORTH, in his opinion, used the following words (L.R. 1 Sc. & Div. at p. 166):

“I agree with the learned judges below, that the circumstance that the shares, from mismanagement or otherwise, had become depreciated in value subsequently to the purchase by the pursuer, would of itself have been

A of no importance. He might still have been able to restore that which he was fraudulently induced to purchase."

These words are directly applicable to the present case. See also the American decision of *Conkey v. Bond* (24), cited in STORY ON AGENCY, notes to s. 211.

B The fall of the shares here is serious. Had, indeed, the plaintiff discovered the fraud at an earlier date, he could have repudiated the transaction whilst the price was still high, and the loss to the defendant would then not have been so great in view of his power to dispose of them on the market. But the plaintiff here is in no way to blame, and the considerations of hardship urged before me by counsel for the defendant were similarly urged in 1856 before SIR JOHN ROMILLY in a somewhat analogous case. Yet the plea of hardship must fail here as it failed sixty years ago. For in rejecting the plea of hardship in *Blake v. Mowatt* (25), SIR JOHN ROMILLY, M.R., said (21 Beav. at p. 613):

D "It is the leading principle of the equity administration in this court, that truth shall govern all transactions, and that one who deludes another in a contract, or permits him to be deluded, and takes advantage of that delusion, cannot afterwards complain, that, if the contract be set aside, he will be in a worse situation than if the contract had never been entered into."

E The extent to which the requirement of restitutio in integrum may be limited in its application is strikingly illustrated by the decision in *Adam v. Newbigging* (27). I may point out that mere lapse of time is no answer to a claim for rescission. Here, some six years elapsed before the plaintiff claimed to rescind. But in *Rothschild v. Brookman* (5), and in *Oelkers v. Ellis* (22) six years had also elapsed; in *York Buildings Co. v. Mackenzie* (13) eleven years had elapsed; in *Gillett v. Peppercorne* (4) fourteen years had elapsed; and in *Oliver v. Court* (12) fifteen years had elapsed before the plaintiffs in those cases commenced their proceedings to set aside the transactions complained of. In cases like the present, the right of the party defrauded is not affected by the mere lapse of time, so long as he remains in ignorance of the fraud; see per LORD WESTBURY in *Rolfe v. Gregory* (26) (4 De G.J. & Sm. at p. 579). If, however, he delays his claim to rescission until after the lapse of six years from his discovery of the fraud, then the court will (apart from any other point) act by analogy to the Statute of Limitations and refuse to grant relief; see *Oelkers v. Ellis* (22). I, therefore, decide against counsel for the defendant's second contention on the question of rescission.

G The conclusion at which I have arrived with regard to rescission renders it unnecessary to deliver the further observations I had prepared on several of the points arising on the alternative claim. Such points are important and difficult, but I think it better that they should be determined in a case where they call for direct decision. It follows that the plaintiff is entitled to a decree setting aside the whole of the transactions with respect to the six hundred shares. The defendant must repay, with five per cent. interest, all sums received by him from the plaintiff, less a credit of £45 for the amount of the dividend received. The plaintiff must transfer the six hundred shares to the defendant on payment of the sum so due from the defendant to the plaintiff. There will be liberty to apply. The defendant must pay the costs of the action.

Judgment for plaintiff.

Solicitors: *Lovell & White; Hays, Roughton & Dunn.*

[Reported by T. W. MORGAN, ESQ., Barrister-at-Law.]

DICK v. NORTON

[CHANCERY DIVISION (Eve, J.), February 11, 1916]

[Reported 85 L.J.Ch. 623; 114 L.T. 548; 32 T.L.R. 306;
60 Sol. Jo. 321]*Game—Shooting rights—Lease—Covenant for quiet enjoyment—Landlord's right to cut down woods—Due management of estate—Implied covenant—Injunction.*

By deed dated June 16, 1914, N. granted to D. the exclusive right to shooting over his farms. D. covenanted to permit N. to enter the coverts at any reasonable time consistent with non-disturbance of game for the purpose of thinning the plantations, felling trees, or any necessary forester's work, and N. covenanted for quiet enjoyment. The felling of the trees would have seriously interfered with if not ruined the shooting on a part of the estate. D. moved for an injunction to restrain N. from felling the trees otherwise than was consistent with the non-disturbance of game and in a due course of estate management.

Held: the demise of the shooting rights, even though there was a covenant for quiet enjoyment, did not prevent the landlord from turning his property to the best use for which it was suited; there was no implied covenant in the deed by N. not to disturb game, and, accordingly, an interlocutory injunction would not be granted.

Jeffryes v. Evans (1) (1865), 19 C.B.N.S. 246 and *Gearns v. Baker* (2) (1875), 10 Ch. App. 355, followed.

Notes: Considered: *Peech v. Best*, [1930] All E.R. Rep. 268.

As to rights over game, see 18 HALSBURY'S LAWS (3rd Edn.) 130 et seq.; and for cases see 25 DIGEST 352 et seq.

Cases referred to:

- (1) *Jeffryes v. Evans* (1865), 19 C.B.N.S. 246; 34 L.J.C.P. 261; 13 L.T. 72; 11 Jur. N.S. 584; 13 W.R. 864; 144 E.R. 781; 25 Digest 354, 53.
- (2) *Gearns v. Baker* (1875), 10 Ch. App. 355; 44 L.J.Ch. 334; 33 L.T. 86; 39 J.P. 564; 23 W.R. 543, L.J.J.; 25 Digest 358, 90.

Also referred to in argument:

Pattisson v. Gilford (1874), L.R. 18 Eq. 259; 43 L.J.Ch. 524; 22 W.R. 673; 25 Digest 358, 92.

Motion.

By a deed dated June 16, 1914, and made between the defendant, Clement William Norton (therein called the owner) of the one part and the plaintiff, Captain Quentin Dick (therein called the tenant) of the other part, the defendant demised to the plaintiff

"the full, free, and exclusive right and liberty at all times of shooting, sporting, killing, and carrying away for his own use, all manner of game wildfowl and other birds, and of exercising the owner's concurrent right to take ground game and of trapping vermin"

in, over, and on the said farms and lands specified in the schedule (subject to the rights of occupiers under the Ground Game Act, 1880) for a term of five years from April 1, 1914, at a rent of £25 a year. The tenant covenanted by cl. 6, to exercise the rights and privileges thereby granted in a proper and sportsmanlike manner, not to overstock the land with game, and

"to permit the owner to enter into the coverts at any reasonable time consistent with the non-disturbance of game for the purpose of thinning the plantations, felling trees, or any necessary forester's work, the owner

A to make good any hedges or fences which may be damaged by the owner in consequence thereof."

The owner covenanted to give notice to the tenant when the fact should come to his knowledge of any trespass on the land in pursuit or search of game, and to use his best endeavours to preserve the game for the benefit of the tenant, and

B "to permit the tenant, if he shall pay the rents and perform the covenants on his part herein contained, quietly to enjoy the rights hereby granted without interruption from the owner or any person rightfully claiming under or in trust for him."

C The schedule specified two adjoining farms, Coedtrefe and Caecappin, and also an enclosed wood called Rolwyn. The property over which shooting rights were demised comprised, besides Rolwyn Wood, three woods known as Cabin Wood, Coedtrefe Wood, and Foel Wood. The acreage of the four woods together was about fifty acres. A question was raised whether Cabin Wood, Coedtrefe Wood, and Foel Wood were actually included in the words of demise, but it was admitted that they were intended to be demised, and no exception on this ground was actually taken on the motion. The four woods were situate near Gregynog Hall, and they were admitted to be good shooting coverts and to have been planted for that purpose. They had been planted from periods varying from thirty to forty years. They consisted mainly of larch and fir trees, with a number of oaks, ash, and alders. The property had been purchased by Mr. Norton shortly before the demise, and it was admitted that the woods had been much neglected in the past and that some of the larch trees were diseased, though the witnesses differed as to the extent of such disease. All the woods had suffered in a severe storm in January, 1916, when a large number of trees were blown down, and others were leaning. The plaintiff had spent a large amount of money in laying down pheasants in the woods, which were on the border of open flat country. In November, 1915, the defendant wrote to the plaintiff's agent, that he had received a tempting offer for the timber in the Pound Wood, another small wood on the property, and that he proposed to sell it, but would not cut until the end of 1915, and though the plaintiff's agent protested against the cutting, no serious objection was taken, as the wood was small and unimportant. On Dec. 28, 1915, the defendant wrote to the plaintiff that he had sold the timber in Cabin Wood, Coedtrefe Wood, Foel Wood, and Rolwyn Wood, but that the purchasers would not be allowed to come on the ground until Feb. 2 next, in order not to interfere with the then season's shooting. He stated that he had been induced to sell for the following reasons: (a) Patriotism, as the timber was wanted for Government contracts; (b) because he was offered a far larger sum than the timber would realise ten years thence; and (c) because he had had the timber examined by an expert forester, who had advised that it was getting of less value each year through bad planting and disease. The plaintiff objected strongly to the woods being cut down, which would, he said, ruin his shooting. It appeared that the timber in the woods had been sold for £2,500, and that part of it was to be used for pit props in a colliery in Shropshire, but that the greater part was to be used in Government munition works in South Wales. On Jan. 18, 1916, the plaintiff commenced an action against the defendant for an injunction to restrain him from felling or cutting down, otherwise than was consistent with the non-disturbance of game, and was in a due course of estate management, the timber and other trees in the said four woods and from otherwise interfering with the plaintiff in his quiet enjoyment of the right of sporting granted to him by the deed of June 16, 1914, and moved for an injunction.

Clayton, K.C., and J. H. Redman for the plaintiff.

C. J. Farwell for the defendant.

EVE, J.—In this case the plaintiff, the shooting tenant over a farm belonging to the defendant, seeks an injunction in terms to restrain the defendant from felling certain timber, included in some fifty acres, divided into four woods on the farm, because he says the destruction and felling of those woods will seriously interfere with, if not ruin, the shooting over the farm. This, I think, is established by the evidence—that the removal of these woods is likely to interfere with the shooting amenities of the property. I think that this further fact is probably true, that originally these woods were planted with a view to the preservation of game. The evidence seems to be all on one side as to that, and that they are so situated as to be peculiarly favourable for the nesting of game.

Apart from one clause in this agreement which is before me, I think the case is governed entirely by the two decisions on which counsel for the defendant has relied—*Gearns v. Baker* (2) and *Jeffryes v. Evans* (1). The demise of the right of shooting does not, in my opinion—even if it incorporates an express covenant for quiet enjoyment and a covenant by the lessor to use his best endeavours to preserve the game for the benefit of the tenant—prevent the lessor from turning his property to the best advantage for which it is suited. If, in the course of husbandry, it became necessary or advisable to substitute one crop for another, or to plough up grass land, or to cut down timber, it seems to me that the lessor is not prevented from so doing by the mere fact that he has leased to someone else the right to pass over these lands and to destroy such game as may be found thereon. That result, in my opinion, follows from the emphatic judgment of the Court of Appeal in *Gearns v. Baker* (2).

The question which really exercises my mind is this: Whether, by reason of the insertion of cl. 6 in this agreement, there has arisen an implied covenant by the lessor not to enter into these coverts, except at times when such entry would be consistent with the preservation of game. The clause which is incorporated in the covenant by the lessee is to this effect: [His LORDSHIP read the clause down to the words “or any necessary forester’s work.”] Counsel for the defendant has urged, and, I think, has convinced me, that it would not be right that I should so interpret that covenant on the part of the lessee—*primâ facie* certainly for the benefit of the lessor—so as to extract from it a negative covenant by the lessor not to enter on his own woods for the purpose of tree felling, except at those times at which he could do so consistently with the non-disturbance of the game. Here again I am helped in a large measure by the judgment of JAMES, L.J., in *Gearns v. Baker* (2). If it is intended that the lessee should acquire the right of excluding the lessor from his own coverts at any particular time such right ought to be expressed in the plainest possible terms. I think, therefore, that, on the case as it stands, I should not be justified in granting an injunction. But, even had I put a different construction on the agreement in question, I do not think that this is a case in which I could have interfered by way of interlocutory injunction. The position is this: There have arisen circumstances in which the defendant has been able to sell these fifty acres of timber for an extraordinarily good price. On the evidence the sale was negotiated, and the agreement come to, many months ago. The purchaser, relying on his agreement, has entered into contracts to resell the timber to works engaged in the production of munitions, and in part, apparently, for some of the collieries for use as pit props, and it is impossible for me to foresee or to estimate at this moment the amount of damage which might accrue to the defendant, if I were to grant an injunction which would thereby restrain him from carrying out the contract which he has entered into with the timber merchant, and would, in terms, prevent the timber merchant from carrying out the other contracts he has entered into with his sub-purchasers. As I say, I have no means by which I could measure those damages. They might be extremely large. On the other hand, there is this: The plaintiff is a gentleman with whom I heartily sympathise in this matter, a gentleman who has taken the shooting, hoping to enjoy it for another three years at a rent of £25, which does

A not by any means represent its value to him, because it is an important part in a large shooting estate. These coverts are obviously from the evidence a very important part of the shooting amenities of the property of which he is tenant. Although it will be disappointing, and no doubt he will suffer a great deal of inconvenience and some loss, I think that, if it comes to a case of estimating the amount of loss he is likely to suffer, the loss will be far more easily estimated and ascertained than would be the ascertainment of the amount of damage that might follow from granting an injunction. On the whole, if I came to a different conclusion on the construction of the contractual relations of the parties than what I have done, I should not feel disposed to grant an interlocutory injunction. There will be no other order on the motion, except the costs will be costs in the action.

C Solicitors: *Gibson & Weldon*, for *Martin Woosnam*, Newtown, Montgomeryshire; *Thorne, Priest & Co.*, for *G. H. Morgan*, Shrewsbury.

[Reported by E. K. CORRIE, ESQ., Barrister-at-Law.]

D

MEGGESON v. GROVES

E [CHANCERY DIVISION (Peterson, J.), October 24, 25, 26, 31, 1916]

[Reported [1917] 1 Ch. 158; 86 L.J.Ch. 145; 115 L.T. 683;
61 Sol. Jo. 115]

Time—Computation—Period of years from given date—Moment of commencement.

F *Landlord and Tenant—Tenancy—Commencement—Term of years “from Mar. 25”—Moment when “tenancy” began.*

A landlord, by a written agreement, granted a tenancy for a term of ten years from Mar. 25, 1906.

Held: the tenancy commenced at midnight on Mar. 25.

G *Agriculture—Agricultural holding—Tenancy agreement—Covenant by tenant not to sell produce—Operation only during “year before expiration of the contract”—Commencement of that year—Produce of previous year—Application of covenant to—Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 26 (1).*

The tenancy agreement of an agricultural holding, for ten years from Mar. 25, 1906, contained a covenant by the tenant “not to sell or dispose of any hay . . . without the consent in writing of the landlord.” By the Agricultural Holdings Act, 1908, s. 26 (1) (b) [corresponding to the Agricultural Holdings Act, 1948, s. 11 (4) (b)] this covenant was effective only “as respects the year before the expiration of the contract of tenancy.”

H **Held:** the covenant applied from midnight on Mar. 25, 1915, after which it applied to any hay still on the holding, irrespective of whether it was produced before or after that date.

I *Contract—Offer and acceptance—Offer by post accepted by post—Time at which contract made.*

On Mar. 24, 1915 the tenant offered in writing to sell a stack of hay for £125, and W. F. on the same day posted a letter to the tenant accepting this offer. The next day W. F. posted a cheque to the tenant, which the tenant received on Mar. 26.

Held: the contract of sale was complete as soon as W.F., had posted his letter of acceptance on Mar. 24 on that day there was made a

contract of sale of the hay and under it the property in the hay passed to W.F. immediately, accordingly, the hay was sold on Mar. 24, 1915, before the last year of the tenancy commenced, and so the landlord's written consent to the sale was not required.

Notes. The Agricultural Holdings Act, 1908, has been repealed. Provisions similar to those of s. 26 (1) of that Act are now made by the Agricultural Holdings Act, 1948, s. 11.

Referred to: *Raikes v. Ogle*, [1920] All E.R. Rep. 424; *Brakspear v. Barton*, [1924] 2 K.B. 88.

As to the commencement and duration of a term of years, see 23 HALSBURY'S LAWS (3rd Edn.) 531-534, and for cases see 30 DIGEST (Repl.) 48. As to covenants to consume or not to remove produce of an agricultural holding, see 1 HALSBURY'S LAWS (3rd Edn.) 265-267, for cases see 2 DIGEST (Repl.) 63 et seq., and for the Agricultural Holdings Act, 1948, see 28 HALSBURY'S STATUTES (2nd Edn.) 25.

As to when acceptance by post of a contractual offer is complete, see 8 HALSBURY'S LAWS (3rd Edn.) 79, para. 135, and for cases see 12 DIGEST (Repl.) 87.

As to computation of a period fixed for duration of an interest, see 32 HALSBURY'S LAWS (2nd Edn.) 139 para. 201, and for cases, see 30 DIGEST (Repl.) 462.

Cases referred to:

- (1) *Ackland v. Lutley* (1839), 9 Ad. & El. 879; 1 Per. & Dav. 636; 8 L.J.Q.B. 164; 112 E.R. 1446; 30 Digest (Repl.) 486, 1296.
- (2) *Sidebotham v. Holland*, [1895] 1 Q.B. 378; 64 L.J.Q.B. 200; 72 L.T. 62; 43 W.R. 228; 11 T.L.R. 154; 39 Sol. Jo. 165; 14 R. 135, C.A.; 30 Digest (Repl.) 385, 297.

Also referred to in argument:

- Gale v. Bates* (1864), 3 H. & C. 84; 4 New Rep. 66; 33 L.J.Ex. 235; 10 L.T. 304; 10 Jur. N.S. 734; 12 W.R. 715; 159 E.R. 457; 2 Digest (Repl.) 66, 372.

Witness Action.

By an agreement dated Dec. 12, 1905 the plaintiff agreed to let to the defendant an agricultural holding known as Southlands Farm from Mar. 25, 1906 for a term of ten years, determinable on either side by twelve calendar months' notice. By this agreement the defendant contracted to

"Stack upon the premises all the hay and corn that shall grow thereon, and not to sell or dispose of any hay, straw, or roots without the consent in writing of the landlord, and not to mow any part of the grass lands two years in succession without well manuring the same at the proper season. To leave on the premises all the manure arising from the produce of the last year's tenancy."

On Mar. 19, 1915 the plaintiff gave the defendant notice to quit on Mar. 25, 1916. On Mar. 24, 1916 the defendant in writing offered to sell, and a Mr. Forrester in writing agreed to buy, a stack of hay for £125. The defendant received Mr. Forrester's cheque for £125 on Mar. 26. On Aug. 30, 1915 the defendant sold sixteen trusses of hay to two officers, who required them for military purposes. The officers did not comply with the conditions required before a requisition can be made, nor did they purport to exercise any compulsory powers. This hay was the produce of the previous year.

Section 26 (1) of the Agricultural Holdings Act, 1908 [repeated, in slightly different language, by s. 11 (1), (4) (b), of the Act of 1948] provided that

"Notwithstanding any custom of the country, or the provisions of any contract of tenancy or agreement respecting the method of cropping of arable lands, or the disposal of crops, a tenant of a holding shall have full right to practise any system of cropping of the arable land on the holding and to dispose of the produce of the holding without incurring any penalty, forfeiture, or

- A liability: Provided that he shall previously have made, or, as soon as may be, shall make, suitable and adequate provision to protect the holding from injury or deterioration, which provision shall in the case of disposal of the produce of the holding consist in the return to the holding of the full equivalent manorial value to the holding of all crops sold off or removed from the holding in contravention of the custom, contract, or agreement: This subsection shall not apply . . . (b) in any other case, as respects the year before the expiration of the contract of tenancy."
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In this action the plaintiff asked for an injunction to restrain the defendant from committing any further breaches of the agreement, and for damages for the breaches already committed. The tenancy having determined, an injunction could not be granted, and as, since the institution of the action, the claims of the plaintiff and the defendant had been settled and disposed of under an arbitration held under the provisions of the Agricultural Holdings Act, 1908, there was no longer a claim for damages. The only question left was as to the costs of this action.

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- Tomlin, K.C.*, and *W. A. Peck* (for *A. P. Vanneck*, serving with His Majesty's forces) for the plaintiff.
- D *Hughes, K.C.*, and *R. Ribton* for the defendant.

Cur. adv. vult.

Oct. 31, 1916. **PETERSON, J.**, read the following judgment. This action is based on an alleged breach of a tenancy agreement by the defendant. The plaintiff asks for an injunction to restrain the defendant from committing further breaches, and for damages for past breaches. The tenancy has now determined, and, therefore, an injunction cannot be granted, nor is there now any claim for damages, as under an arbitration held under the provisions of the Agricultural Holdings Act, 1908, after the institution of this action, the claims of the landlord and tenant were settled and disposed of. The only question which is left is to pay the costs of this action, but that question involves the consideration of several legal problems in addition to the determination of disputed question of fact.

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The defendant became tenant of Southlands Farm, Essex, under an agreement of Dec. 12, 1905, made between the plaintiff, who was the landlord, and the defendant, for the term of ten years from Mar. 25, 1906, determinable on either side by twelve calendar months' notice given on or before Mar. 25, 1915. Notice was duly given by the plaintiff and the term came to an end in March, 1916. Under the agreement the defendant contracted to [His LORDSHIP read the two clauses of the agreement above mentioned, and continued:] The effect of these provisions is to prohibit the defendant from selling or disposing of any hay, straw, or roots at any time during the term without the plaintiff's consent. Three sales of hay by the defendant have been established, two of which took place on Aug. 30, 1915, while the date of the third sale is in dispute. The defendant alleges that it took place on Mar. 24 or 25, 1915, while the plaintiff's case is that the sale was on a later date. In the case of all three sales it is necessary to consider the effect of s. 26 of the Agricultural Holdings Act, 1908 on the tenancy agreement. [His LORDSHIP read s. 26, and continued:] The defendant contends that, by virtue of that section, he was enabled, during the period before the commencement of the last year of the tenancy, to sell the hay produced by the holding, subject to the obligation to return to the holding the full equivalent manorial value of the hay which he sold, and that, during the last year of the tenancy, he is, by the joint operation of the section and the agreement, only prohibited from selling or removing the hay which was produced by the holding during the last year of the tenancy, and that the sale of the stack of hay on Mar. 24 or 25, 1915 took place before the commencement of the last year of the tenancy, while sixteen trusses of hay which were sold on Aug. 30, 1915 consisted

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of hay produced by the holding in a previous year. In my opinion, the section clearly enables a tenant to sell the produce of the holding before the commencement of the last year of the tenancy, subject to the obligation to return as soon as may be its full equivalent manurial value, but I am unable to accept the contention that the defendant is only prevented, during the last year of the tenancy, from selling or removing the produce of that year. The argument is based on cl. (b) of sub-s. (1) of the section [now s. 11 (4) (b) of the Act of 1948], which, it was contended, refers to the produce of the year before the expiration of the tenancy. That, however, is not what the clause says. Subsection (1) gives to the tenant full right (i) to practise any system of cropping of the arable land and (ii) to dispose of the produce, and then provides that the section which gives these powers shall not apply as respects the year before the expiration of the tenancy. This provision relates to a period, and not to the produce of a period, and therefore excludes for the last twelve months of the tenancy the power conferred on the tenant by the section to sell the produce of the holding. The defendant's rights during the last year of the tenancy are consequently governed by the provisions of his tenancy agreement, which prohibit him from selling or disposing of any hay without the plaintiff's written consent.

The facts relating to the sale of the stack of hay are as follows: The purchaser, W. Forrester, was in March, 1915 informed by a Mr. Farrell that the defendant had a stack of hay for sale. He had an interview with the defendant, and offered £120 for the stack. On Mar. 24 the defendant sent Farrell, who acted as a go-between, to Mr. Forrester with a letter, in which he offered to sell the stack for £125. On the same day Mr. Forrester sent to the defendant a letter, which has been lost, accepting the offer to sell for £125. Mrs. Groves made a note of the sale in the milk book, which was subsequently lost or destroyed, under the date of Mar. 24. On Mar. 25 Mr. Forrester posted his cheque for £125, which reached the defendant on Mar. 26, and on Mar. 25 he also gave directions for the insurance of the stack. Mr. Forrester removed the stack at the end of April or the beginning of May. There is one other fact to which I ought to refer. The defendant verbally agreed that he would, if Mr. Forrester purchased, procure the consent of Mr. Horner, whose farm adjoined Southlands Farm, to the removal of the stack by Mr. Forrester across part of Mr. Horner's holding to the road. The defendant forgot to obtain this consent, but it was ultimately given by Mr. Horner.

On these facts there was a contract for sale of the stack on Mar. 24, and under ss. 17 and 18 of the Sale of Goods Act, 1893 the property in the stack passed to the defendant on Mar. 24. The plaintiff, however, contended that there was no sale of the stack until at least the cheque for £125 was cashed on Mar. 26 or 27, and relied for this contention on s. 4 of the Sale of Goods Act, 1893. It may be that he is right in contending that the letter of Mar. 24, written by Mr. Forrester to the defendant, did not constitute a note or commission in writing of the contract, as it did not include the provision that the defendant should procure Mr. Horner's consent to the removal of the stack over his land, and that Mr. Forrester's cheque could not be considered as a gift of "something in earnest to bind the contract or in part payment" until it was received by the defendant or cashed. But these considerations, relevant as they might be if the defendant had been trying to enforce the contract against Mr. Forrester, have no relevancy to a case in which the contract has been completed. Section 4 assumes the existence of a contract, and provides that it shall only be enforceable by action as between the parties to the contract in certain events. The section makes it necessary to produce certain evidence in support of the contract. It matters not when the memorandum is signed, or when the payment is made. The date of the contract remains the same, and as soon as the evidence required by the statute is forthcoming one party can enforce the contract against the other. The question between the plaintiff and the defendant is when the contract was made, not when it became enforceable. In my view, therefore, the property passed to Mr. Forrester on Mar. 24.

- A Having regard to this conclusion it is unnecessary to consider when the last year of the tenancy commenced. But, as this question was argued, I may add that, in my view, the decision in *Ackland v. Lutley* (1) establishes that it began at midnight on Mar. 25, and that, as counsel for the plaintiff pointed out, the headnote in *Sidebotham v. Holland* (2) [1895] 1 Q.B. 378, goes beyond the judgments, which clearly do not disagree with the decision in *Ackland v. Lutley* (1).
- B But the plaintiff says that in any case the defendant did not return to the holding the full manorial equivalent of this stack of hay. Under s. 26 of the Agricultural Holdings Act, 1908 the return of the manorial equivalent may be either before or after the hay is disposed of, and the plaintiff is very far from having satisfied me that the manorial equivalent was not made good to the holding. It was suggested that the defendant had the burden of proving that it
- C had been returned to the farm. In my opinion that is not so. In the reply the plaintiff alleges that the full manorial equivalent had not been returned to the holding, and it is for him to establish the truth of the allegation. In my judgment, then, the plaintiff has not shown any ground on which he can complain of the sale of the stack of hay in March, 1915.

- The sales on Aug. 20 stand on a different basis. They were sales to which s. 26
- D of the Agricultural Holdings Act, 1908 did not apply, and, consequently, as the plaintiff's consent to them was not obtained, they were *primâ facie* breaches of the tenancy agreement. The defendant, however, in his defence alleged that the sixteen trusses of hay which formed the subject-matter of the two sales were, in fact, requisitioned by the military authorities. This allegation was not supported by the evidence. An officer came to the defendant's farm and inquired whether
- E he had any hay. The defendant showed him what he had and, as the result, eight trusses were taken. On the same day another officer came and obtained another eight trusses. The defendant was paid 32s. for the sixteen trusses. It was not contended that the military authorities had complied with the conditions which are required before a requisition can be made, nor did the officers purport to exercise any compulsory powers. It was an ordinary sale in each
- F case. The defendant, therefore, in these two cases committed a breach of the provisions of the tenancy agreement. The value of these trusses of hay was small, and their manorial value was only 6s. 8d., and if that had been all that took place I should have hesitated before I allowed any costs to the plaintiff. But the matter does not rest there. The plaintiff had pressed the defendant for particulars of the sale of the stack of hay which he believed to have been improperly disposed
- G of, and had received no answer to his demand. On Nov. 5, having ascertained that sixteen trusses of hay had been sold on Aug. 30 to the military authorities, and being suspicious that other hay had been sold, the plaintiff wrote to the defendant. To this letter the defendant did not vouchsafe any reply. The reason is, I think, fairly clear. According to the defendant's evidence he had been
- H advised by Mr. Rumsey, an agricultural valuer, that he must not sell the crop of the last year of the tenancy, and he thought that he could during the last year of the tenancy sell any of the produce of the previous year. The writ which was issued on Nov. 23 asked for an injunction restraining the defendant from selling or disposing of any hay or straw, and from removing any manure arising from the produce of the last year. On Nov. 27 Messrs. Coffin and Rumsey, on
- I behalf of the defendant, wrote that the defendant had no intention of removing any hay, straw, or manure arising from the produce of the last year of the tenancy, and in the defence it is alleged that those sixteen trusses were part of the produce of the year 1912. To my mind it is also clear that the defendant was under the impression that he could, during the last year of the tenancy, sell any hay which was part of the crop of the previous year. The defendant says that after the sales of Aug. 30, he had only a very insignificant amount of hay of previous years left on his hands. I am not convinced that this was so, but if it was the plaintiff did not know it. The fact remains that the sales on Aug. 30

were breaches of the agreement, and that the defendant would not give the plaintiff any information as to the sales which he had made. A

In my opinion, therefore, the defendant must pay the costs of the action, except so far as they have been increased by the issue of the sale of the stack of hay in March and the issue whether he has retained a full manorial equivalent for the hay which he has sold, and the plaintiff must pay the defendant's costs so far as they have been increased by these issues, and the costs will be set off in the usual way. B

Solicitors: *Greenwell, Higham & Co.*, for *J. C. Pawson*, Chelmsford; *A. S. Maskell*.

[Reported by J. L. DENISON, Esq., Barrister-at-Law.] C

THE SARPEN D

[COURT OF APPEAL (Swinfen Eady, Pickford and Bankes, L.JJ.), March 22, 23, May 27, June 5, 1916]

[Reported [1916] P. 306; 85 L.J.P. 209; 114 L.T. 1011; 32 T.L.R. 575; 60 Sol. Jo. 538; 13 Asp. M.L.C. 370]

Shipping—Salvage—Ship “belonging to His Majesty”—Consent of Admiralty to claim—Tug requisitioned in time of war—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 557 (1). E

The plaintiffs were the owners, master and crew of a tug, which, while requisitioned by the Admiralty under proclamation rendered valuable salvage services to a ship belonging to the defendants. At that time, no agreement had been come to between the plaintiffs and the Admiralty settling the terms and conditions of the engagement of the tug, but terms were subsequently agreed whereby the plaintiffs were to pay the wages of the crew to provide all stores and necessary equipment of the vessel and to take marine risks, while the Admiralty were to accept war risks on the vessel and crew and to provide coal. F

Held: neither the effect of the requisitioning of the tug nor the subsequent agreement made it a ship “belonging to His Majesty” within s. 557 (1) of the Merchant Shipping Act, 1894, and, therefore, the plaintiffs were entitled to prosecute a claim for and to recover salvage without the consent of the Admiralty having been obtained. G

Notes. The relevant portions of s. 557 of the Merchant Shipping Act, 1894, were repealed by the Merchant Shipping (Salvage) Act, 1940, which in turn has been repealed and replaced by the Crown Proceedings Act, 1947, s. 8 (2), but this case is still of value as an example of what is and what is not one of H.M. ships. H

Considered: *The Carrie*, [1917] P. 224. Referred: *The Matti*, [1918] P. 314; *Admiralty Comrs. v. Page*, [1919] 1 K.B. 299; *Admiralty Comrs. v. Valverda Owners*, [1938] 1 All E.R. 162; *The Stealla Romana, The Oltenia*, [1944] P. 43. I

As to salvage, see 1 HALSBURY'S LAWS (3rd Edn.) 65 et seq.; and for cases, see 41 DIGEST 823 et seq. For the Merchant Shipping Act, 1894, s. 557, see 23 HALSBURY'S STATUTES (2nd Edn.) 682.

Cases referred to:

(1) *The Nile* (1875), L.R. 4 A. & E. 449; 44 L.J. Adm. 38; 33 L.T. 66; 3 Asp. M.L.C. 11.

- A** (2) *The Bertie* (1886), 55 L.T. 520; 2 T.L.R. 690; 6 Asp. M.L.C. 26.
 (3) *The Lemington* (1874), 32 L.T. 69; 23 W.R. 421; 2 Asp. M.L.C. 475.
 (4) *The Ripon City*, [1897] P. 226; 66 L.J.P. 110; 77 L.T. 98; 13 T.L.R. 378; 8 Asp. M.L.C. 304.
 (5) *Master of the Trinity House v. Clark* (1815), 4 M. & S. 288.
- B** (6) *Weir & Co. v. Union Steamship Co., Ltd.*, [1900] A.C. 525; 69 L.J.Q.B. 809; 83 L.T. 91; 9 Asp. M.L.C. 111; 5 Com. Cas. 363.
 (7) *The Broadmayne*, [1916] P. 64; 85 L.J.P. 153; 114 L.T. 891; 32 T.L.R. 304; 60 Sol. Jo. 367; 13 Asp. M.L.C. 356.
 (8) *The Iodine* (1844), 3 Notes of Cases, 140; 8 L.T. 30.
 (9) *Cargo ex Woosung* (1876), 1 P.D. 260; 35 L.T. 8; 25 W.R. 1; 3 Asp. M.L.C. 239.
- C** (10) *The Dalhousie* (1875), 1 P.D. 271, n.; sub nom. *The Azalea*, 35 L.T. 9, n.; 3 Asp. M.L.C. 240, n.

Cases referred to in argument:

- The Scout* (1872), L.R. 3 A. & E. 512; 41 L.J. (Adm.) 42; 26 L.T. 371; 20 W.R. 617; 1 Asp. M.L.C. 258.
- D** *The Cybele* (1878), 3 P.D. 8; 47 L.J. (P.) 86; 37 L.T. 773; 26 W.R. 345; 3 Asp. M.L.C. 532, C.A.
Baumvoll Manufactur von Scheibler v. Gilchrest & Co., [1892] 1 Q.B. 253; affirmed [1893] A.C. 8; 62 L.J. (Q.B.) 201; 68 L.T. 1; 9 T.L.R. 71; 7 Asp. M.L.C. 263, H.L.
- E** *Sir John Jackson, Ltd. v. Blanche (Owners)*, [1908] A.C. 126; 98 L.T. 464; 24 T.L.R. 384; 52 Sol. Jo. 334; 11 Asp. M.L.C. 37.
Young v. S.S. Scotia, [1903] A.C. 501; 72 L.J. (P.C.) 115; 89 L.T. 374; 9 Asp. M.L.C. 485.

Appeal by the plaintiffs from a decision of BARGRAVE DEANE, J.

F The plaintiffs, the owners, master, and crew of the steam tug *Simla*, brought an action for salvage services rendered to the Norwegian steamship *Sarpen* when she was ashore on Papa Stronsa, in the Orkneys, in April, 1915. The *Simla* had been requisitioned by the Admiralty under the Royal Proclamation of Aug. 3, 1914 (Transports and Auxiliaries), authorising

G "the Lords Commissioners of the Admiralty . . . to requisition and take up . . . any British ship or British vessel as defined in the Merchant Shipping Act, 1894, within the British Isles or the waters adjacent thereto, for such period of time as may be necessary, on condition that the owners of all ships and vessels so requisitioned shall receive payment for their use and for services rendered during their employment in the Government service . . . according to terms to be arranged as soon as possible after the said ship has been taken up, either by mutual agreement between the Lords Commissioners of the Admiralty and the owners, or, failing such agreement, by the award of a board of arbitration."

H No agreement had been come to between the Admiralty and the tug owners settling the terms of the engagement of the *Simla* until after the trial of the action before BARGRAVE DEANE, J., who held that, the *Simla* being in the same position as a King's ship, no claim for salvage services could be allowed by s. 557 of the Merchant Shipping Act, 1894, which provides that no claim for salvage services by the commander or crew of any of Her Majesty's ships shall be adjudicated on without the consent of the Admiralty. In case there should be an appeal, he fixed the amount to be awarded for the salvage services rendered at £800. The plaintiffs appealed.

I *Dawson Miller, K.C.*, and *Raeburn* for the plaintiffs.
Stephens and *J. B. Aspinall* for the defendants.

June 5. The following judgments were read.

SWINFEN EADY, L.J.—The tug *Simla* rendered valuable salvage services to the Norwegian steamship *Sarpen*, a vessel laden with dry wood pulp, when the latter was on the rocks at Papa Stronsa, one of the Orkney Islands, in April, 1915. This action was brought by the owners, master, and crew of the tug against the *Sarpen*, her cargo and freight, to recover salvage. The judge decided that the *Simla* was a vessel in the service of the Crown, and in the position of a King's ship, and precluded by s. 557 of the Merchant Shipping Act, 1894, from making any claim for salvage; and that the master and crew of the vessel were not entitled to have their claim for salvage services finally adjudicated on, unless the consent of the Admiralty to the prosecution of that claim was proved, which had not been done. He, therefore, held that the claim failed. In case there should be an appeal, the judge proceeded to consider what would be a proper amount to award for the salvage services rendered, if a claim could be maintained, and he fixed the amount at £800. The owners, master and crew of the tug appeal, and ask to have it determined that the ship was not, and ought not to be regarded as, a King's ship at the time when the services were rendered, and, accordingly, that the claim can be maintained, and that the consent of the Admiralty is not required for the due prosecution of the claim by the master and crew. The plaintiffs also contend that, if they are entitled to recover salvage, the sum of £800 determined by BARGRAVE DEANE, J., is inadequate compensation for services rendered.

In order to determine whether the tug is to be regarded as a King's ship, it is necessary to consider her position and the terms on which she had been acquired and was held by the British Admiralty when the salvage services were rendered. She was sent to Sheerness dock by her owners in response to a telegram from the dockyard authority of July 30, 1914, requesting that certain named tugs (not including the *Simla*) be dispatched to Sheerness forthwith, but, if not available, that tugs of similar description be dispatched; the plaintiffs in their reply admitted that the tug *Simla* was under requisition by the Admiralty, and, accordingly, the learned judge said that he accepted

“the position which both parties seem to agree to, that the requisition was duly effected, and when so requisitioned the *Simla* went to Sheerness, and then to Kirkwall Bay, and lay in the harbour there under the direction of the naval harbour master.”

I treat the matter on the same footing as by agreement it was treated in the court below, and regard the tug *Simla* as requisitioned and taken up on the terms of the proclamation of Aug. 3, 1914. The proclamation, however, contains a recital that, owing to the urgency of the need, it is impossible to delay the employment of the vessels taken until the terms of engagement have been mutually agreed on, and it provides for terms being arranged as soon as possible after a ship has been taken up, either by mutual agreement between the Admiralty and the shipowner, or, failing such agreement, by the award of a board of arbitration. Since the trial of the action before BARGRAVE DEANE, J., an agreement has been come to between the Admiralty and the tug owners, settling the terms of the engagement of the tug *Simla*. By this agreement, the Admiralty are to pay an agreed sum per day for the hire of the tug; the rate is framed on the following conditions:—Owners are to pay wages and health insurance of the crew, to provide and pay for all stores and the necessary equipment for the proper and efficient working of the vessel, and to take marine risks on the vessel and crew. Admiralty to accept war risks on the vessel and crew and to provide coal. In the event of loss of time or prevention of a vessel working owing to deficiency of men or stores, defect, or damage, not due to a contingency coming under the category of war risks, payment of hire shall cease until she be again in an efficient state to resume her service, and the costs of repair of such defects or

A damage shall be an owner's charge. A charterparty to be issued later. These terms are retrospective and date back to July 30, 1914.

This court, having now before it the terms so settled, is in a much better position than *BARGRAVE DEANE, J.*, was to determine whether the ship is to be deemed to be a ship belonging to His Majesty, within the meaning of s. 557 (1) of the Merchant Shipping Act, 1894. By the terms of that sub-section,

B "Where salvage services are rendered by any ship belonging to Her Majesty or by the commander or crew thereof, no claim shall be allowed for any loss, damage, or risk caused to the ship or her stores, tackle, or furniture, or for the use of any stores or other articles belonging to Her Majesty, supplied in order to effect those services, or for any other expense or loss sustained by Her Majesty by reason of that service . . ."

C This provision is a re-enactment of s. 484 of the Merchant Shipping Act, 1854. Where salvage services are rendered by a King's ship, no claim to salvage can be made in respect of the ship, but the commander and crew may prosecute a claim with the consent of the Admiralty (s. 557 (1) of the Act of 1894). Previous to this provision and the corresponding enactment in the Act of 1854, there was in force an order of the Board of Admiralty of Jan. 30, 1852, directing the officers of Her Majesty's ships not to claim reward for salvage services rendered to vessels in distress unless the service was one of real importance, or was accompanied with hazard: *KENNEDY ON CIVIL SALVAGE* (2nd Edn.), p. 113. The question is whether the *Simla* is to be considered a King's ship for the purpose of determining whether a claim for salvage can be made on behalf of the ship and her owners.

E In *The Nile* (1) salvage services were rendered by the *Finisterre* and the officers of H.M.S. *Simoom* and the *Nile* admitted liability for salvage and paid £1,000, which was accepted, and the only question actually raised was as to the apportionment of the amount, and whether Captain Peile was entitled to a share as well as the naval officers who actually assisted at the operations. In that case, the *Finisterre* had been chartered by the Government by a charter not demising the ship; all sea damage was at the risk of the owners of the ship, and the salvage services were outside the scope of the vessel's employment as a transport. *SIR ROBERT PHILLIMORE* pointed out that the ship was never demised; and that there was no temporary transfer of her ownership to Her Majesty, and that her owners were, therefore, entitled to the ship's share of salvage remuneration. The inference from this is that, if there had been an actual demise of the *Finisterre* to the Admiralty, and if sea damage had been at the risk of the Admiralty, the ship would have been for the time being "a ship belonging to Her Majesty" within the meaning of s. 484 of the Merchant Shipping Act, 1854—now s. 557 of the Act of 1894. This is in accordance with the decision of the King's Bench in 1815 in *Master, &c., of the Trinity House v. Clark* (5), where *LORD ELLENBOROUGH* delivered the judgment of the court, which determined that, where the ship *Britannia* was under a time charter to the Crown which amounted to a demise of the ship, a temporary ownership in the vessel passed to the Crown. In *Weir & Co. v. Union Steamship Co.* (6) *LORD DAVEY*, referring to this case, said that it was decided on very special circumstances and could hardly be a precedent for any other. But the passage which follows indicates that, in his opinion, if the contract is one in which the ship is completely handed over to the charterers, to be navigated by them at their own risk and responsibility, there would be a transfer of temporary ownership. Certainly a ship may belong to a person as "owner" although such ownership may be only temporary: see *The Lemington* (3) (2 Asp. M.L.C. at p. 478); *The Ripon City* (4) ([1897] 2 P. at pp. 242, 244). In the case before us, however, it now appears that the tug *Simla* was taken by the Admiralty on the terms of the owners paying wages and health insurance of crew, providing and paying for all stores and the necessary equipment for the proper and efficient working

of the vessel, and taking the marine risk on the vessel and crew. When, therefore, the *Simla* was rendering (with the permission of the naval authorities) the services for which salvage reward was claimed, it was the owners of the *Simla* and not the Admiralty who were incurring risks of sea damage and injury to the vessel and her crew, and the Admiralty were not at risk in the matter.

Now that the facts have been more fully ascertained, I am of opinion that the *Simla* cannot be regarded as a King's ship when rendering the salvage services, and that the ship is not prevented from claiming ordinary salvage remuneration by the fact of the vessel's hiring to the Admiralty, nor do the commander and crew require the consent of the Admiralty to the prosecution of their claim. I observe that BARGRAVE DEANE, J., after holding that the vessel was in the service of the Crown, added that without the sanction of the Admiralty she could not claim any salvage reward for salvage services. But if the ship were a King's ship, no claim to salvage can be made on behalf of the ship, whether with or without the consent of the Admiralty; the claim must be limited to a claim by the commander and crew; it is this claim which requires the consent of the Admiralty for its prosecution in the case of a vessel belonging to His Majesty.

It may be urged that the settlement of the terms of hire between the Admiralty and the tug owners, come to since the trial of the action before BARGRAVE DEANE, J., although operating retrospectively, ought not to prejudice the defence of the *Sarpen* to the demand for salvage. But the terms on which the vessel was acquired by the Admiralty had been left open; *prima facie* a ship rendering services such as the *Simla* rendered to the *Sarpen* would be entitled to a salvage award; the burden of showing that the *Simla* was not so entitled was on the *Sarpen*; and if, at the trial, the terms of hire had not been sufficiently settled to determine the character and position of the *Simla*, the owners of the *Sarpen* might have applied for an adjournment of the hearing until either agreement or arbitration had determined whether the *Simla* was in the position of a King's ship. No adjournment, however, was asked for; the evidence before BARGRAVE DEANE, J., was quite insufficient to establish that the *Simla* was in the position of a vessel belonging to His Majesty; and the subsequent agreement shows that the *Simla* has not at any time since it was taken up acquired that character. It was also contended on behalf of the *Sarpen* that there could be no salvage award, as the services rendered were not voluntary on the part of the tug, since she had been directed by the naval officer in command at Kirkwall to proceed to the assistance of the *Sarpen*. But the services were rendered voluntarily as between the salvors and the salvaged, which is all that is material; the *Simla* owed no duty towards the *Sarpen*. In all cases of salvage by a King's ship, where the commander and crew are entitled to obtain a salvage award, they are acting under orders, given either in general instructions or by a superior officer in the particular instance.

With regard to the amount to be awarded, which BARGRAVE DEANE, J., assessed at £800, if this court should be of opinion that salvage could be recovered, I see no ground for differing from the learned judge on the question of amount. There does not appear to have been any misapprehension on his part as to the facts of the case, or any error in point of principle. In my judgment the appeal should be allowed, and £800 awarded to the salvors.

PICKFORD, L.J.—This is an action of salvage brought by the owners, master and crew of the steam tug *Simla* against the owners of the steamship *Sarpen*, a Norwegian vessel, her cargo and freight, for services rendered while the "*Sarpen* was ashore on Papa Stronsa, in the Orkneys." The services are not denied, but the defendants allege that the plaintiffs are not entitled to claim salvage because they are prohibited from doing so by s. 557 of the Merchant Shipping Act, 1894. This is not the form of the pleading, but it is the substantial question. It is also alleged that the services were not voluntary because they

- A were rendered by the orders of the naval authorities. It may be as well to dispose of this point at once. It rests, in my opinion, on no sound basis. The test of voluntariness is only applicable as between the salvor and salvaged, and if the services be voluntary in relation to the salvaged—i.e., not rendered by reason of any obligation towards him—it is quite immaterial that the salvor has been ordered by someone who has control of his movements to render them.
- B To decide the main question, it is necessary to see in what way the *Simla* was employed at the time of the services. She was owned by Mr. Watkins and was placed at the disposal of the Government in consequence of two telegrams received on July 30, which requested certain named tugs or others of a similar description to be sent to Sheerness. The proclamation under which vessels were requisitioned was issued two or three days later, and it is admitted by the reply
- C that, at the time of the services, the *Simla* was under requisition, but it is denied that such requisition amounted to a demise of the tug or a transfer of ownership to His Majesty. So far as the facts were known at the trial and on the argument before us, they were that the owners were to be paid a monthly hire, the amount of which was not ascertained; that they provided and paid the master and crew and provided the stores and provisions, bunker coal being supplied by the
- D Admiralty. I think that the learned judge described the position correctly when he said that the tug was in sole employment of the Crown, which had actual discretion as to her use, and it was necessary to obtain the permission of the Admiralty authorities before she could go out and render salvage services. I cannot, however, agree with him when he says that under those circumstances, she could not claim any salvage reward for salvage services without the sanction
- E of the Admiralty. The sanction of the Admiralty has nothing to do with the claim of the owners of the tug; if they come within the provisions of s. 557 of the Merchant Shipping Act, 1894, no claim can be made by them at all either with or without such sanction; if they do not come within the provisions, no such sanction is necessary. In order to defeat their claim, it must be shown that the *Simla* was a ship belonging to His Majesty within the meaning of that section.
- F The section is as follows: [HIS LORDSHIP read the section, and continued:] Probably the reason of the provision is that it is not considered right that risk or loss of property provided by the public should be paid for by a member of that public. It is true that this reason does not apply to risk and loss occasioned by services to foreigners, and it was contended before us that the section must be limited to services rendered to British ships or cargo, but I see no such
- G limitation in the section, and it was probably extended to foreign ships by the comity of nations. But to bring the salving vessel within the section she must belong to the Crown. It is not enough that she is chartered by the Crown, which has the sole directing power over her, and that she cannot render salvage services without the Crown's consent. She does not necessarily belong to the Crown in that case any more than a vessel under charter not by way of demise
- H to anyone else belongs to the charterer: see *The Nile* (1) and *The Bertie* (2), with which I agree. Those cases are not authorities which govern this case; the salving vessels were under charter as transports only and not hired for any purpose which the Crown required, and they were not, so far as I can tell, under requisition; but I think they are authorities, with which I agree, that the owner of a vessel is not excluded from the right to salvage because she is in the service
- I of the Crown and cannot render such services without its consent, and the services are rendered under the instructions of the naval authorities.

It is necessary to see if the fact of being under requisition makes any difference. In my opinion, it does not necessarily do so. I do not deny that there may be a requisition under such terms as to give the Crown the dominion as well as the control of the ship, and it may be that, in such a case, she may be said to belong to the Crown, although not in the ordinary sense belonging to it. But I am of the same opinion that I expressed in *The Broadmayne* (7) that the word "requisition" does not necessarily connote such a state of things; it means

that the Crown has the right to require the services of the ship without the consent of the owner, but it does not define the terms on which the Crown may see fit to take those services. It is well known that some vessels are employed under requisition on terms of charterparties and some are not, that the terms of the charterparties are not always the same, and a case was mentioned at the Bar in which express terms were made entitling the tug so requisitioned to the benefit of salvage. The proclamation under which the ship is to be taken to be requisitioned seems to me to contemplate that all vessels will not be requisitioned on the same terms. It is as follows: [His LORDSHIP read the proclamation.] It may very well be that the words "according to terms to be arranged" strictly and grammatically refer only to payment for services and compensation, but it is obvious that, in arranging such payment and compensation, it is necessary to look at the other terms of the hiring, e.g., whether the owner or the Crown pays the crew, on whom war and marine risks fall, and such matters, and, as I have pointed out, it is well known that the Crown does under requisition hire the services of ships on different terms as to such matters. The Crown cannot be forced by arbitration to accept any particular conditions, but it can and does agree to such conditions, and then the only question for arbitration is, given those conditions, what is the proper amount to be paid.

In my opinion, when there is a hiring under requisition as in this case, on terms to be settled after the hiring, the question of whether the requisitioned ship is a ship belonging to His Majesty cannot be ascertained until those terms are settled. I do not think in this case there was a taking over of the absolute dominion of the vessel, subject to being afterwards altered at the will of the Crown, but a taking over on terms which the Crown had not then settled, and which, when settled, might or might not confer such dominion. In this case there were not, in my opinion, materials before the court on which it could come to the conclusion that the *Simla* was a ship belonging to His Majesty, and I think, therefore, that the plaintiffs are entitled to an award. On Mr. Watkins' evidence the tug belonged to him and was entitled to salvage reward, and to show that the Crown was employing her under terms which were not ascertained was not sufficient to displace that *prima facie* case. It is to be noticed that the Admiralty have in no way interfered; in fact, so far as any intelligible meaning can be given to the communications from the Transport Department, they seem to be willing that the plaintiffs should recover salvage so long as it is not against Crown property, and the defendants have not taken the trouble to obtain any evidence from the Admiralty as to anything. I think, therefore, that on the evidence before the learned judge the plaintiffs were entitled to succeed. The defendants would, I think, have been entitled to object to judgment being given against them while the terms were unsettled and to ask for an adjournment until it was decided what they were, but they did not do so. We have, however, since the case was argued, had sent to us in substance the terms agreed between the plaintiffs and the Government. They are finally to be embodied in a charterparty, and that has not yet been done, but they have been accepted by the parties as substantially correct, and we have heard argument on them on that basis. Those terms have been read. They are, in effect, a hiring by the Government, which is not a demise of the vessel, and leave the marine risk to fall on the owners, and they take effect from July, 1914.

The result is that, when the salvage services were rendered, the tug was employed under terms which did not constitute her a ship belonging to His Majesty, and, therefore, her owners, master, and crew were entitled to recover a salvage reward. There remains to be considered the amount of the award. The learned judge assessed it at £800 in case the plaintiffs were entitled to recover, and they have appealed on the ground that the amount was insufficient. This court is always loth to interfere with the amount of salvage awarded, even where it might possibly not take exactly the same view as the court below, and I do

A not see in this case sufficient grounds for interfering with the discretion of
BARGRAVE DEANE, J.

BANKES, L.J.—This is an appeal from a decision of BARGRAVE DEANE, J., who decided against the claim of the owners, master and crew of the steam tug *Simla* for salvage services rendered to the Norwegian steamship *Sarpen*. The decision proceeded entirely on the ground that the *Simla* was a “ship belonging to His Majesty”, and that the claim of the owners must, therefore, be disallowed, and that, so far as the claim of the master and crew was concerned, the consent of the Admiralty not having been obtained for the prosecution of the claim, that claim must be disallowed also.

C The rule restricting any claim for salvage by a vessel belonging to His Majesty appears to be of very old standing. It was referred to in *The Iodine* (8) by MR. LUSHINGTON ((1844), 3 Notes of Cases, at p. 141), in the following terms:

“Observations have been made in the argument respecting one of Her Majesty’s vessels preferring a claim of this nature. I thought that the question had long ago been settled; for from the very earliest date of my experience as an advocate, as far back as 1808, I thought the opinion expressed by LORD STOWELL had decided this question. I apprehend that where assistance is rendered by any vessel belonging to Her Majesty, the following principles are to be applied: that where a service is done, and there is personal risk and labour, Her Majesty’s officers and seamen are entitled to be rewarded precisely in a similar manner, on the same principles, and in the same degree, as where any other persons render that service. But, with regard to the use of the vessel, a different consideration would apply, and a less remuneration would always be made, on account of the vessel being the property of the country, and the property of the owners under these circumstances never being risked.”

F Ten years later the rule as extended was incorporated in the Merchant Shipping Act, 1854 (s. 484 and s. 485), and is now to be found in s. 557 of the Merchant Shipping Act, 1894. It has never been expressly decided what constitutes a vessel belonging to His Majesty so as to render the owners incapable of claiming for salvage services. The question can, of course, only arise in relation to vessels engaged in Government service and privately owned, or owned by the Government of some colony or dependency. The question was discussed in *Cargo ex Woosung* (9) and *The Dalhousie* (10) with reference to vessels belonging to G Bombay Government. The most instructive case on the point to which we have been referred is, I think, that of *The Nile* (1). That case raised the question whether the owners of the steamship *Finisterre* were entitled to salvage. The vessel was at the time engaged under charter in Her Majesty’s transport service. In dealing with the question SIR R. PHILLIMORE says this (L.R. 4 A. & E. at p. 455):

H “Having reference to these documents, I am of opinion that the *Finisterre* was never demised—indeed, it was not so contended—to Her Majesty; that there was no temporary transfer of her ownership to Her Majesty; and that her owners are entitled (a point faintly, if at all, contested) to her share of salvage remuneration. I think, however, that she was so far under the control of the senior naval officer, Captain Peile, that on the one hand she could not have acted as salvor without his permission, though, on the other hand, she could not have been ordered by him to perform this service I —which was not, in my judgment, within the terms of the charter.”

In this passage SIR ROBERT PHILLIMORE clearly indicates that, in his opinion, if there had been a temporary transfer of ownership the *Finisterre* would have become for the time being, and for the purposes of the Merchant Shipping Act and the earning of salvage, a vessel belonging to Her Majesty. In this view I agree; and it is, therefore, unnecessary to consider the cases, to several of which we have been referred, in which it has been held that, for certain purposes, a

vessel may be considered as having a dual ownership—the ownership of what I may call the actual owner, and the ownership of the temporary owner. A

In the present case, there is no question that the actual owners of the *Simla* are the plaintiffs in the action. The only question is whether the requisitioning of the *Simla* by the Government placed her for the time being in the temporary ownership of the Government so as to constitute her a vessel belonging to His Majesty, and as such disentitled to earn salvage. I should entertain no doubt at all on this subject had the requisition been a formal unqualified exercise of the Royal Prerogative. Such an exercise of the prerogative must, I think, be interpreted as a taking over of a vessel in the fullest possible sense, which would include the claim to exercise and the exercising of the rights of the owner to the full extent. The difficulty in the present case arises from the circumstances under which the *Simla* was taken for Government service, and the terms of the proclamation of Aug. 3, 1914. The only documents which passed between the Government and the owners before and in reference to the taking of the *Simla* were two telegrams, both dated July 30, in which the Admiralty requested the owners to send certain named tugs or tugs of similar description to Sheerness. B
In pursuance of this request, the *Simla* was sent with others, and she has since been continuously retained in Government employ. For the purposes of this C
action, the parties are agreed that the *Simla* must be treated as having been requisitioned under the proclamation, although no warrant was ever issued for that purpose. It becomes, therefore, very material to consider the terms of the D
proclamation. The proclamation confers on the Lords Commissioners of the Admiralty the power to requisition and take up for the service of His Majesty any ship as defined by the proclamation for such period of time as may be E
necessary, but only on condition that the owner shall receive payment for the use, and for services rendered, during the employment in Government service, and compensation for loss and damage thereby occasioned according to terms to be arranged as soon as possible after the ship has been taken up, either by mutual agreement or by arbitration. This language appears to me to give the F
Admiralty a wide discretion in arranging terms with the owner of a requisitioned vessel. The payment to be made is to depend on the use to which the vessel is put, or the services which she is required to render, and the terms of employment may, therefore, extend from the full requisitioning of the vessel on terms at G
least as extensive as a demise of the vessel to the mere occasional employment of the vessel to render some specified and intermittent service. The language of the proclamation appears to me to indicate that it was intended to provide for the possibility of there being cases in which the continuous use of the vessel might not be required, but that she might be required to render certain services H
only at stated periods, leaving her free for her owner's purposes at other times, and that other terms might be agreed on which might affect the amount of compensation which an owner could properly claim. As an instance, I cannot think of a better illustration than the present, where conceivably it may be in the interest of everyone that the *Simla* should be at liberty to undertake services for reward if and when the Admiralty authorities thought it right to give her permission to undertake them. If this was permitted, the rate of payment to the owners would presumably be less than if it was not permitted, while the I
Admiralty would be free to give or refuse permission as it suited their purpose. This question of the right to charge for salvage services must necessarily, as it seems to me, come up for settlement if and whenever the terms of payment are discussed between the Admiralty and the owners of the requisitioned tug. In the present case, when the matter was before the Admiralty Court the question of the tug's position and the terms of payment had not come up for discussion. I certainly am not prepared to assume and I do not think that the learned judge was right in assuming either that the effect of a requisition under the proclamation was ipso facto to put the *Simla* into the class of a ship "belonging to His Majesty," or that the terms which would be eventually mutually agreed

A or settled by arbitration must necessarily involve a transfer of the temporary ownership to the Crown. During the argument before this court, counsel for the plaintiffs mentioned the fact that, since the case was before the Admiralty Court, terms had been agreed between the owners and the Admiralty. We were not told the terms at the time, but the court has been furnished at its own request with a copy of the correspondence which has passed and counsel have been
B further heard on it. It now appears that one of the terms which have been agreed is that marine risks are for the owner and war risks only for the Crown.

In my opinion, this agreement concludes the question as to the real position of the *Simla* with regard to salvage while she remains under requisition, and that it is no longer possible to contend that she was at the time the salvage services were rendered a ship belonging to His Majesty. Apart from the question of the
C agreement, however, the evidence before the learned judge was not, in my opinion, such as to justify a finding that the *Simla* was at the time the salvage services were rendered in the position of "a ship belonging to His Majesty." I regard her at that time as only conditionally requisitioned—that is to say that she was requisitioned on terms which might or might not place her in the position of "a ship belonging to His Majesty"; but, as the terms had not at
D that time even come under discussion, she had not become fixed with the disabilities, so far as salvage services are concerned, of one of His Majesty's ships. Under these circumstances, I consider that the appeal on the question of liability should succeed. The amount fixed by the learned judge is, I consider, low, but not so low as to justify any interference by this court.

Appeal allowed.

Solicitors: *Clarkson & Co.; Thomas Cooper & Co.*

[*Reported by L. F. C. DARBY, ESQ., Barrister-at-Law.*]



